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DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 274a

[CIS No. 2441–08; Docket No. USCIS–2008–0001]

RIN 1615–AB69

Documents Acceptable for Employment Eligibility Verification; Correction

AGENCY: U.S. Citizenship and Immigration Services (USCIS), DHS.

ACTION: Final rule; correction.

SUMMARY: The Department of Homeland Security corrects an inadvertent error contained under **FOR FURTHER INFORMATION CONTACT** of the final rule titled Documents Acceptable for Employment Eligibility Verification published in the **Federal Register** on April 15, 2011. The e-mail address referenced in the final rule should read "*E-verify@dhs.gov*".

DATES: This final rule is effective May 16, 2011.

FOR FURTHER INFORMATION CONTACT: Letitia Coffin, Verification Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 131 M Street, NE., Suite 200, Washington, DC 20002, telephone (888) 464–4218 or e-mail at *E-verify@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Need for Correction

On April 15, 2011, the Department of Home land Security published a final rule in the **Federal Register** at 76 FR 21225 establishing Documents Acceptable for Employment Eligibility Verification. There was an inadvertent error in the document. The email referenced should be changed read "*E-Verify@dhs.gov*" instead of "*Everify@dhs.gov*".

Christina E. McDonald,

Acting Associate General Counsel for Regulatory Affairs, Department of Homeland Security.

[FR Doc. 2011–10344 Filed 4–28–11; 8:45 am]

BILLING CODE 9111–97–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 704

RIN 3133–AD74

Corporate Credit Unions

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: NCUA is issuing final amendments to its rule governing corporate credit unions (corporates). The amendments include internal control and reporting requirements for corporates similar to those required for banks under the Federal Deposit Insurance Act and the Sarbanes-Oxley Act. The amendments require each corporate to establish an enterprise-wide risk management committee staffed with at least one risk management expert. The amendments require corporates conduct all board of director votes as recorded votes and include the votes of individual directors in the meeting minutes. The amendments permit corporates to charge their members reasonable one-time or periodic membership fees as necessary to facilitate retained earnings growth. For senior corporate executives who are dual employees of corporate credit union service organizations (CUSOs), the amendments also require disclosure of certain compensation received from the corporate CUSO.

DATES: This rule is effective May 31, 2011, except that the amendments to §§ 704.2 and 704.15 are effective January 1, 2012, and the addition of § 704.21 is effective April 29, 2013.

FOR FURTHER INFORMATION CONTACT: Jacqueline Lussier, Staff Attorney, Office of General Counsel; Elizabeth Wirick, Staff Attorney, Office of General Counsel; and Lisa Henderson, Staff Attorney, Office of General Counsel, all at telephone (703) 518–6540), National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314; or David Shetler, Deputy Director, Office of Corporate Credit Unions, at the address above or telephone (703) 518–6640.

SUPPLEMENTARY INFORMATION:

I. Background

In September 2010, the NCUA Board made substantial revisions to part 704 (with conforming amendments to parts 702, 703, 709, and 747). 75 FR 64786 (Oct. 20, 2010) (September Rulemaking). These amendments established a new capital scheme, including risk-based capital requirements; imposed new prompt corrective action requirements; placed various new limits on corporate investments; imposed new asset-liability management controls; amended some corporate governance provisions; and limited a corporate CUSO to categories of activities preapproved by NCUA.

The preamble to the September Rulemaking also stated that shortly after its promulgation the Board intended to issue another proposal that would further amend part 704 and related provisions. *Id.* at 64824. In November 2010, the Board issued the promised follow-on proposal with further revisions to the corporate rule. 75 FR 73000 (Nov. 29, 2010). The seven amendments proposed in November would have:

- Provided for the sharing of Temporary Corporate Credit Union Stabilization Fund (TCCUSF) expenses among all members of corporate credit unions, including both credit union and noncredit union members;
- Limited natural person credit unions (NPCUs) to membership in one corporate of the NPCU's choice at any one time;
- Required corporates conduct all board of director votes as recorded votes and include the votes of individual directors in the meeting minutes;
- Incorporated certain audit, reporting, and audit committee practices from the Federal Deposit Insurance Act (FDI Act), Part 363 of the Federal Deposit Insurance Corporation (FDIC) Regulations, and the Sarbanes-Oxley Act of 2002;
- Required corporates to establish enterprise-wide risk management committees staffed with at least one independent risk management expert;
- Allowed corporates to charge their members reasonable one-time or periodic membership fees; and

• Required the disclosure of compensation received from a corporate CUSO by certain highly compensated corporate credit union executives.

The initial public comment period on the November proposals was 30 days, but the Board extended the comment period to 60 days. 75 FR 75648 (Dec. 6, 2010). During the comment period, which closed on January 28, 2011, NCUA received 227 comments from a wide variety of sources.

II. Overview of the Final Amendments

After considering the comments received on the November proposal, the Board determined not to proceed with the first two proposals listed above relating to the sharing of TCCUSF expenses and the limitation on corporate credit union membership. This final rule does include the other five November proposals. As discussed in detail below, the Board adopted the membership fee and CUSO compensation disclosure amendments exactly as proposed. In response to the comments, however, the Board adopted the final three proposals (*i.e.,* relating to internal controls, enterprise risk management, and recording director votes) with some changes from the proposed versions. Additionally, some of the provisions relating to internal controls and enterprise risk management have delayed effective dates.

III. Section-by-Section Analysis of the Final Amendments

Section 704.2 Definitions

The proposal included a number of new definitions in § 704.2, generally relating to terms used in the proposed internal control and reporting amendments to § 704.15. The newly defined terms included: *Critical accounting policies, Enterprise risk management, Examination of internal control, Family, Financial statements, Financial statement audit, Generally accepted auditing standards, Independent public accountant, Internal control, Internal control framework, Internal control over financial reporting,* and *Supervisory committee.*

Although the proposed rule contained a definition for *Family,* that definition has been dropped from this final rule as the Board has determined that the existing part 704 definition of *Immediate family member* is sufficient. This final rule also modifies the proposed definition of *Independent public accountant* (IPA) slightly to ensure that if a state permits accountants licensed out-of-state to practice accounting in-state, those accountants will be considered to fall within the IPA definition.

The effective date of these new definitions is delayed to January 1, 2012, to correspond to the earliest effective date of the internal control and reporting amendments in § 704.15.

Except as described above, the proposed § 704.2 definitions are adopted as proposed.

Section 704.11 Corporate Credit Union Service Organizations; and § 704.19 Disclosure of Executive and Director Compensation

The proposal included amendments to §§ 704.11 and 704.19 to ensure that the required disclosures of compensation paid to certain corporate employees under § 704.19 also capture compensation paid to these employees by any corporate CUSO in which the corporate credit union has invested or made a loan. The proposed revisions to § 704.19(a) clarified that a corporate credit union's annual disclosures of compensation paid to its most highly compensated employees must include any compensation from a CUSO in which the corporate has invested. To facilitate an accurate disclosure, the proposal also required the CUSO agree to provide this information about dual employee compensation to the corporate. This agreement would be embedded in the general agreement between the corporate and the CUSO discussed in § 704.11(g).

A slight majority of commenters opposed this proposed CUSO compensation disclosure requirement, and the most frequent reason given was a concern that this disclosure could lead to "piercing the corporate veil" between the corporate and the CUSO. The NCUA Board disagrees that disclosure of the compensation of dually-compensated employees, by itself or in connection with other factors, is likely to shift a CUSO's legal liability to a corporate.

Some commenters also worried NCUA might eventually impose these disclosure requirements on natural person credit unions and their CUSOs as well. At this time, the Board has no such intent. The Board does believe, however, that the members of corporate credit unions need this transparency with regard to corporate executive pay.

Other commenters opined that NCUA has no authority to regulate CUSOs. The Board agrees that it cannot regulate CUSOs directly, but it can, for safety and soundness reasons, regulate the types of investments that credit unions make and whether credit unions should invest in CUSOs. If a corporate wishes to invest in, or loan to, an entity, that entity will likely meet the definition of a corporate CUSO, and the CUSO must conform to NCUA's requirements if it wishes to retain that corporate investment. Another objector termed the proposal unnecessary because the information is required on, and can be obtained from, IRS Form 990. This objector is incorrect. For example, federally chartered credit unions do not file Form 990s, and, typically, the information contained on a completed Form 990 is not coextensive with the information required to be disclosed to members under this rule.

One commenter who generally supported the proposal requested that disclosure be limited to the member/owners of the corporate and that the disclosure not be made to the general public. The Board notes that § 704.19 does not require public disclosure, but only disclosure to members. 12 CFR 704.19(b). The corporate can make this member disclosure in a nonpublic manner if it desires.

Accordingly, the Board adopts the proposed revisions to §§ 704.11 and 704.19 without change.

Section 704.13 Board Responsibilities

The proposal would have amended § 704.13 to require corporates to conduct all board of director votes as recorded votes and to include the votes of individual directors in the meeting minutes, with the goal of increasing the transparency of the corporate credit union decision-making process. In the final rule, the Board has modified this proposal to require recording only "no" votes and abstentions on a particular item where the affirmative votes can otherwise be determined as the remaining directors in attendance.

Many commenters who opposed the proposal were concerned that requiring recorded votes would create divisiveness within the board or could lead to individuals being singled out for litigation or enforcement action. Some commenters also stated that the proposal would discourage individuals from serving on corporate boards. A few commenters also expressed concerns that NCUA would also eventually impose the same requirement on NPCUs. Other commenters opined that the proposal exceeded NCUA's authority generally, arguing that only states could impose such requirements on state-chartered corporates. Another commenter stated this requirement was a matter for the bylaws, not a regulation.

The Board disagrees with these commenters. Recent events in the corporate system illustrate the dangers resulting from the insular and non-transparent decision-making that occurred at some corporate credit

unions. As corporates continue their efforts to reorganize and recover from the crisis, it is essential that the members of corporate credit unions are able to see how their directors vote on matters that affect the members. While the Board acknowledges the possibility that this transparency requirement could create dissension among board members, the Board believes that the benefits of openness and transparency far outweigh any discomfort individual board members may face from recorded votes. Further, as discussed in the preamble to the proposed rule, NCUA has broad authority to require federally-insured credit unions, including corporate credit unions, to prepare and submit financial information and other information as the Board requires. 12 U.S.C. 1761, 1766, 1781, 1782(a)(2), and 1789. Because of the importance of transparency in corporate credit union board decisions, and the effect those decisions can have on the safety and soundness of the entire credit union system, the Board believes this provision is appropriately placed in a regulation rather than relying on each corporate to adopt a conforming bylaw.

A few commenters also asserted that the proposed recorded vote requirement would conflict with provisions of Roberts' Rules of Order that provide for the chair to vote only in case of a tie, or with provisions of state law and the Revised Model Business Corporation Act that presume all directors assent to an action unless dissent is documented. Several commenters suggested recording "no" votes and abstentions would suffice, especially if the meeting minutes list the directors present. After considering these comments, the Board has modified the proposal to require recording only "no" votes and abstentions on all board votes, as long as the names of directors attending the meeting are recorded elsewhere in the minutes.

Except as noted above, the Board adopts the revisions to § 704.13 as proposed.

Section 704.15 Audit and Reporting Requirements

NCUA currently requires that a corporate credit union's board of directors ensure the preparation of timely and accurate balance sheets, income statements, and internal risk assessments and that systems are audited periodically in accordance with industry standards. 12 CFR 704.4(c). In addition, a corporate credit union's supervisory committee must ensure that: (1) An external audit is performed annually in accordance with generally accepted auditing standards; and (2) the audit report is submitted to the board of directors, to NCUA, and in a summary version, to the members. 12 CFR 704.15(a).

To facilitate early identification of problems in financial management at corporate credit unions, the NCUA Board proposed to amend § 704.15 to add certain additional auditing, reporting, and supervisory committee requirements. These proposals were very similar to those required of banks by the FDIC. 12 CFR part 363. The most significant proposed revisions would have required a corporate to:

- Ensure that its financial reports reflect all material correcting adjustments necessary to conform with generally accepted accounting principles (GAAP) as identified by the corporate's IPA.
- Prepare an annual management report, signed by the chief executive officer and the chief accounting officer or chief financial officer, that contains: (1) A statement of management's responsibility for preparing financial statements, for establishing and maintaining an adequate internal control structure, and for complying with safety and soundness laws and regulations; (2) an assessment of the corporate's compliance with such laws and regulations; and (3) for a corporate with assets of at least $1 billion, an assessment of the effectiveness of the internal control structure.
- Ensure that its IPA: (1) Reports to the supervisory committee all critical accounting policies; (2) retains the working papers related to an audit for seven years; (3) complies with the independence standards and interpretations of the American Institute of Certified Public Accountants (AICPA); (4) has an acceptable peer review; (5) notifies NCUA if the IPA ceases being a corporate's independent accountant; and (6) for a corporate with assets of at least $1 billion, reports separately to the supervisory committee on management's assertions concerning the effectiveness of the corporate's internal control structure.
- Ensure that it: (1) Files a copy of its annual report to NCUA within 180 days after the end of the calendar year, which NCUA will make available for public inspection; (2) provides NCUA with a copy of any letter or report issued by its IPA; (3) informs NCUA when it engages an IPA or loses an IPA through dismissal or resignation; (4) provides a notice to NCUA of late filing of the annual report; and (5) submits a summary of its annual report to the membership.
- Ensure that its supervisory committee (1) consists of members who are independent of the corporate (defined as having no family relationships or material business or professional relationships with the corporate); (2) supervises the IPA; and (3) ensures that audit engagement letters do not contain unsafe and unsound limitation of liability provisions.

The public commenters that addressed the proposed revisions to § 704.15 generally did so without discussing the specific revisions. That is, those in favor of the proposal simply stated that it was a good idea. Likewise, those opposed maintained generally that the proposed revisions to § 704.15 were too burdensome. A few commenters said that if any of the provisions were adopted, they should apply to all corporates regardless of size.

The NCUA Board believes that the proposed amendments are important to ensure the accurate and reliable measurement of a corporate credit union's assets and earnings, which has a direct bearing on the determination of regulatory capital. The Board believes that the amendments will help identify weaknesses in internal control over financial reporting and risk management at corporate credit unions and reinforce corrective measures, thus complementing supervisory efforts in contributing to the safety and soundness of corporate credit unions. Accordingly, the Board is adopting the provisions as proposed, except as discussed below. The Board is mindful, however, that corporates are still adjusting to the major part 704 revisions in the September Rulemaking, and that imposing these new auditing and reporting requirements on corporate credit unions immediately could be confusing and overly burdensome. Accordingly, the Board is delaying the effective date of all the § 704.15 revisions until at least January 1, 2012, and as discussed below, delaying some of the revisions into 2013 and 2014.

Proposed paragraph 704.15(a)(2) required corporate credit union management to prepare an annual report containing certain enumerated elements. Several elements—including a statement of management's responsibility for establishing and maintaining an adequate internal control structure and procedures for financial reporting—applied to all corporates. However, proposed paragraph 704.15(a)(2)(iii), which required that management assess the effectiveness of the internal control structure and procedures for financial reporting, would have applied only to corporate credit unions with at least $1 billion in assets. Similarly, proposed paragraph 704.15(b)(2), which required

that corporates have the IPA attest to management's assertions concerning the effectiveness of the corporate's internal control structure and procedures for financial reporting, also applied only to corporates with at least $1 billion in assets.

Some commenters stated that all the internal control requirements in § 704.15 should apply to all corporates. After careful consideration, the Board agrees and has determined to remove the $1 billion asset threshold for these two provisions. All corporates present systemic risk and therefore should be subject to strong internal control reviews and attestations. To mitigate the compliance burden of these requirements, however, the Board has determined to delay the effective date of these provisions past 2012. The management assessment requirement in paragraph (a)(2)(iii) will take effect on January 1, 2013, so that only management reports prepared in 2013 (for the calendar year 2012) and for later calendar years must contain management's assessment of the effectiveness of the internal control structure and procedures. In addition, the IPA assessment requirement in paragraph (b)(2) will take effect on January 1, 2014 for management reports prepared for the calendar year 2013 and thereafter.

Proposed paragraph 704.15(d)(1) addressed the composition of a corporate credit union's supervisory committee, stating that its members may not be employees of the corporate credit union and must be independent of the corporate credit union. A few commenters found this provision confusing, and the Board has clarified it. The final paragraph (d)(1) states that supervisory committee members must be independent of the operational side of the corporate, that is, the part of the credit union that is supervised, directly or indirectly, by the corporate's Chief Executive Officer.

Except as discussed above, the Board adopts § 704.15 as proposed.

Section 704.21 Enterprise Risk Management

The proposal included a new section on *Enterprise Risk Management* (ERM) requiring all corporate credit unions to develop and follow an ERM policy. The proposal required the board of directors establish an ERM committee responsible for overseeing the corporate's risk management practices and for reporting at least annually to the board of directors. The committee would include at least one independent risk management expert with sufficient experience in identifying, assessing, and managing risk exposures.

The proposal defined *independent* to mean that the expert does not, going back three years, have any family relationships or any material business or professional relationships with the corporate that would affect his or her independence as a committee member. The risk management expert must have a post-graduate education; an actuarial, accounting, economics, financial, or legal background; and at least five years experience in identifying, assessing, and managing risk exposures. The expert's experience must also be commensurate with the size of the corporate and the complexity of its operations. The board must hire this individual from outside the corporate.

Most of the commenters who commented generally on enterprise risk assessments thought they were valuable and could be effective tools for management. Many of these commenters agreed with the proposed rule but thought it should be refined.

Several other commenters specifically opposed any regulatory ERM requirement. Many of these commenters thought the ERM proposals were redundant with other committees (ALCO, supervisory, and audit) and unnecessary in light of these committees, regular NCUA and state examinations, and the new NCUA corporate regulations. Some of these commenters thought that the ERM functions were not sufficiently distinguished from the functions of the board, ALCO, supervisory committee, or audit committee, and that the ERM committee might impinge on the turf of these committees and the board, all without providing material new information or new benefit. These commenters, however, did not say specifically how the ERM might cause this confusion. A few commenters thought that NCUA should consider addressing ERM as guidance or best practices. A few commenters grouped the proposed rule's ERM and audit reporting requirements together and generally opposed both as expensive and unnecessary.

The Board disagrees with these comments. As general matter, organizations may be practicing good risk management on an exposure-by-exposure basis, but they may not be paying close enough attention to the aggregation of exposures across the entire organization. An organization must measure and understand all the individual risks associated with its various business components, and also understand how they interact dynamically. A successful ERM process can help to meet many of those challenges. As one commenter stated, "[i]ncreasingly, [ERM] is being utilized by credit unions, particularly larger ones, as an important mechanism to ensure the organization has the proper, overall [perspective] on all of its risks and its capacity to manage those risks. * * * [E]nterprise risk assessments * * * can be very effective tools [for] making sure the corporate has the ability to identify, manage, and correct material risks."

There is a misapprehension among some commenters that the ERM committee would be redundant of other committees, such as the supervisory (or audit) and ALCO or credit committees. The FCU Act, NCUA's regulations, and the standard federal corporate credit union bylaws provide for those committees and prescribe targeted areas of responsibility for each. The ERM committee's unique mission would be to review and report on management's identification and management of all of the corporate's significant and emerging enterprise risk. The ERM committee would act in an advisory capacity to the board of directors to ensure that the board obtains focused, comprehensive information on enterprise risk, and not just on the individual, specific risks addressed by the ALCO, credit, and supervisory committees. The ERM committee would address all of an enterprise's risks—including financial, operational, strategic, compliance, and reputational risks—under one umbrella. The ERM committee would also conduct its analysis and present its views independent of the earnings pressure faced by the operational side of the corporate. The pressure to achieve certain earnings goals can, in some instances, cause the operators to overlook or downplay the risks associated with their endeavors.

The ERM committee has no power to require action by the corporate or any part of the corporate, and thus does not overlap with management's turf or the turf of any other committee. To clarify that the committee is only advisory, and has no prescriptive powers or authorities, the final rule replaces the word "oversight" with the word "review" as it applies to the ERM committee's activities.

One commenter stated that, if the rule was adopted, it ought to specify a charter for the ERM committee and the scope of its duties and delegated responsibilities. The Board believes that the board of directors of the corporate has the responsibility to specify the duties of the ERM committee consistent with the requirements of this rule. Accordingly, a specific charter is not

necessary. Another commenter stated that annual ERM reporting is insufficient, and that it should be done at least quarterly. The Board agrees and has modified the regulation accordingly.

Some commenters addressed the ERM expert. One commenter thought that a single expert was insufficient, and that multiple experts with different expertise were necessary. Another commenter thought a "part-time" consultant was not a good idea, and that the rule should encourage the use of "in-house full-time risk management experts." A few commenters asked for clarification of the independence concept, and two commenters did not see how the ERM expert could remain independent from the corporate once the expert was compensated by the corporate.

In response to these comments, the NCUA Board notes that the proposal required that the ERM committee include "at least" one independent risk management expert. Each corporate has the authority to determine whether additional experts are necessary or desirable. The Board also believes that each corporate should be permitted to decide whether to employ the expert on a full- or part-time basis as part of the ERM committee or to engage the expert as a consultant, either part- or full-time, and has clarified this in the rule text.

As for the independence requirement, the Board's intent was to ensure the ERM expert is not influenced by the operational side of the corporate credit union. For clarity, the final rule provides that an ERM expert is independent if neither the expert, nor any immediate family member of the expert, is supervised by, or has any other material business or professional relationship with, the chief executive officer or anyone supervised, directly or indirectly, by the CEO. This is similar to the independence standard applicable to the members of the supervisory committee as provided under § 704.15(d). Also, the Board notes that the fact that the expert is compensated by the corporate does not undermine the independence of the expert any more than compensating the independent public accountant undermines the IPA's independence.

The Board is delaying the effective date of this ERM section for 24 months to give corporates time to put together an ERM policy, assemble an ERM committee, and locate and hire a qualified ERM expert. The final rule also renumbers this ERM section as § 704.21, instead of § 704.22 as proposed.

Except as discussed above, the Board adopts the final ERM section as proposed.

Section 704.22 Membership Fees

The proposal included a new section on membership fees permitting a corporate the option to charge its members a one-time or periodic membership fee as a mandatory requirement of membership. The purpose of the proposal was to give corporates another tool to build retained earnings.

The proposal required the fee be uniform and proportional to the member's asset size. The corporate could reduce the fee for members that have contributed capital to the corporate, but any reduction would have to be proportional to the amount of the member's non-depleted contributed capital. The corporate would have to give members at least six months advance notice of any initial or new fees, or any material change to a recurring fee. A corporate could terminate the membership of any credit union that fails to pay the fee fully within 60 days of invoicing.

Of the commenters who commented on this provision, slightly over half supported it, with the rest opposed to it. Several corporate credit unions commented on the proposal with most supporting it. Many commenters that supported the proposal recommended some changes to it, as discussed below.

Some supportive commenters stated corporates should be allowed to determine the amount of the fee without the limits imposed in the proposed rule and in accordance with a formulation set by the corporate. Some of these commenters felt that adequate disclosure to the members should be the only requirement. The Board does not agree with these comments. The rule provides corporates the option of charging reasonable membership fees as a way to build retained earnings. The requirement that fees be calculated uniformly for all members and as a percentage of each member's assets is a safeguard against the imposition of arbitrary and unreasonable fees and ensures fair treatment of all members, including smaller natural person credit unions. Furthermore, this fee provision does give corporates the flexibility to reduce fees for those members that are contributing more capital to the corporate. One commenter also recommended that the rule require any membership fees be approved by at least a majority vote of the corporate's members. Again, the Board disagrees. Allowing members to vote on whether the corporate may charge such fees would undermine the corporate's flexibility in employing fees as a tool to attain required retained earnings targets. Also, the rule provides for adequate notice to members about upcoming fees so that the members can oppose the fee or obtain their services elsewhere.

Some commenters stated that the required six-month notice provision for any new fees is too long, and should be shortened to something like 45 or 60 days. These commenters believe that this would permit corporates to more accurately estimate the need for and results from assessing the fee. Another commenter opined that six months notice is adequate for routine fees, but that for more significant fee charges the proposal does not allow time for forward planning by credit union members.

The Board disagrees with these commenters. The Board believes that the required minimum six-month advance notice is reasonable for planning by both corporates and members. A notice period shorter than six months would not give members adequate time to look for alternative service providers should they find the fees too onerous. The commenter who said that six months notice is adequate for routine fees, but wanted a longer advance notice period for more significant charges did not define "routine fees" or "more significant charges." The proposed rule sets only a minimum notice period; it does not keep a corporate from providing additional advance notice for particular fees.

Those commenters who opposed permitting membership fees provided various reasons for their opposition. Some of these commenters felt such fees would put additional, unwarranted financial strain on NPCUs already required to contribute capital to corporates and make payments to the Temporary Corporate Credit Union Stabilization Fund. Many of these commenters thought the fee option would give corporates too much power over their NPCU members. The Board believes that the fee rule provides an acceptable balance between the corporates' need for retained earnings and capital and the members' need for services.

Some commenters expressed concern about allowing a corporate to "expel" a member for not paying membership fees. One commenter felt the proposal appears to circumvent the expulsion process established in the FCU Act and that the process of expulsion should be defined with regard to capital and contract requirements. Several commenters stated that the proposal does not address whether an NPCU whose membership is terminated for

failure to pay the fee will get its perpetual contributed capital back.

The Board believes that some of these commenters are mischaracterizing the membership termination provision as an "expulsion" from membership. A corporate has the right to terminate membership of any member that does not comply with the minimum conditions of membership, such as maintaining the minimum share balance required under the bylaws. Such termination is not an expulsion. Likewise, failure to pay a legally imposed membership fee in a timely fashion under this new section subjects the member to potential membership termination. In addition, provisions for the return of membership capital are addressed elsewhere in part 704.

The Board notes that the membership fees section numbering in the proposed (i.e., § 704.23) is changed to § 704.22 in the final rule. Also, paragraph (d) of the proposed § 704.23 stated that the corporate credit union may terminate the membership of any *credit union* that fails to pay the fee in full on a timely basis. The reference to *credit union* should have been to *member* since corporates may have certain entities in their fields of membership that are not credit unions, and the final rule corrects this reference.

Except as discussed above, the Board adopts this membership fee provision as proposed.

IV. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact any regulation may have on a substantial number of small entities (those under $10 million in assets). This final regulation applies only to corporate credit unions, all of which have assets well in excess of $10 million. Accordingly, the NCUA Board certifies that this final rule will not have a significant economic impact on a substantial number of small credit unions and, therefore, a regulatory flexibility analysis is not required.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden. 44 U.S.C. 3507(d). For purposes of the PRA, a paperwork burden may take the form of a reporting, recordkeeping, or disclosure requirement, each referred to as an information collection. NCUA identified and described several information collection requirements in the proposed rule. As required by the PRA, NCUA submitted a copy of the proposed rule to the Office of Management and Budget (OMB) for its review and approval. Persons interested in submitting comments with respect to the information collection aspects of the proposed rule were invited to submit them to OMB (with a copy to NCUA) at the addresses noted in the preamble to the proposed rule.

For several reasons, NCUA has modified the final estimated burden associated with the final rule. At the time the proposed rule was issued, there were 27 corporate credit unions, and there are now only 26 corporates. This reduction affects the burden estimates for some aspects of the information collection requirements, as discussed below. In addition, and as discussed more fully in the preamble to this final rule, the Board has determined to make several changes in the final rule, and some of those changes affect the burden estimates for some aspects of the information collection requirements. These changes are also discussed below. Finally, NCUA received one comment specifically addressed to the agency's estimates of paperwork burden as set out in the preamble to the proposed rule concerning proposed § 704.15, Audit and reporting requirements. This comment is discussed below in the section addressing the burden represented by § 704.15(a)(2).

The specific provisions of the final rule with hour-burden estimates different from the proposal follow.

Section 704.13(c)(8)—Recorded Director Votes

As proposed, this section required all 27 corporates to conduct all board of director votes by recorded vote and to record those votes in the minutes of the directors' meetings. In the proposed rule, NCUA estimated that compliance with the requirement should take approximately 1 hour and that each corporate would hold 12 meetings per year. 27 corporates × 12 meetings = 324 meetings per year. 324 meetings × 1 hours = 324 hours.

There are now 26 corporates, so the estimated burden is reduced. 26 corporates × 12 meetings = 312 meetings per year. 312 meetings × 1 hour = 312 hours. Accordingly, this change has the effect of decreasing the estimated burden by 12 hours.

Section 704.21—Equitable Distribution of Corporate Credit Union Stabilization Fund Expenses

The Board has determined not to adopt this proposal in the final rule. This eliminates the associated information collection requirements, which consisted of (i) an aggregate estimated 540 hours for the preparation of a list of non-FICU members of each corporate and providing the list to NCUA and (ii) an aggregate estimated 675 hours for conducting a special meeting of a corporate's members to expel a member and notifying NCUA of the result of the vote. Accordingly, the elimination of this section has the effect of decreasing the estimated aggregate burden by 1,215 hours.

Section 704.15(a)(2)—Management Report

NCUA received one comment letter opposed to nearly every aspect of the audit and reporting requirements under proposed § 704.15. One of the comments concerned NCUA's paperwork burden estimates. The commenter stated that the management report requirements in proposed § 704.15(a)(2) will substantially increase the cost of compliance, "far beyond what the NCUA reports in the Summary of Collection Burden of the regulation." The commenter, however, failed to provide any specific information on what the increased burden hours or costs would be.

There are two information collections in proposed § 704.15(a)(2), as described below:

(1) As proposed, paragraphs (a)(2)(i) and (ii) of § 704.15 require all corporates to prepare an annual management report that contains a statement of management's responsibilities for performing certain duties in the corporate. The report must also contain an assessment of the corporate's compliance with certain laws and regulations. NCUA estimated that it should take a corporate approximately 4 hours to prepare its management report. 27 corporates × 4 hours = 108 hours.

(2) As proposed, paragraph (a)(2)(iii) of § 704.15 required each corporate credit union with assets of $1 billion or more to include in its management report an assessment by management of the effectiveness of the corporate credit union's internal control structure and procedures for financial reporting. There were 16 corporates with at least $1 billion in assets at the time the proposed rule was issued. NCUA estimated that it should take a corporate approximately 8 hours to prepare its assessment. 16 corporates × 8 hours = 128 hours.

After considering the comment and based on additional information, the following factors affect the estimated burden hours associated with § 704.15(a)(2):

• The number of corporates has dropped from 27 to 26;

• The final rule applies the assessment requirements of § 704.15(a)(2)(iii) to all corporates, regardless of asset size; and

• NCUA estimates that the burden hours per corporate will be 25% greater than the burden estimated in the proposal.

Accordingly, NCUA estimates that it should take a corporate about 5 hours to prepare its management report under paragraphs (a)(2)(i) and (ii) of § 704.15. 26 corporates × 5 hours = 130 hours.

NCUA estimates that it should take a corporate about 10 hours to prepare its assessment under paragraph (a)(2)(iii) of § 704.15. 26 corporates × 10 hours = 260 hours.

With the revisions described above, NCUA now estimates the total information collection burden represented by the final rule, calculated on an annual basis, as follows:

• Recorded director votes: 26 corporates × 12 meetings × 1 hour = 312 hours.

• Disclosure of dual employee compensation from corporate CUSOs: 5 CUSOs × 1 hour = 5 hours.

• Management report: 26 corporates × 5 hours = 130 hours.

• Assessment: 26 corporates × 10 hours = 260 hours.

• Notice of engagement or change of accountants: 5 corporates × 2 hours = 10 hours.

• Notification of late filing: 5 corporates × 1 hour = 5 hours.

Total Burden Hours: 722 hours.

NCUA has submitted these burden revisions to OMB. NCUA expects that OMB will review and approve the revisions, and approve NCUA's submission, in the near future.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order.

The final rule will not have substantial direct effects on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this final rule does not constitute a policy that has federalism implications for purposes of the executive order.

The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by section 551 of the Administrative Procedure Act. 5 U.S.C. 551. The Office of Management and Budget has determined that this rule is not a major rule for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996.

List of Subjects in 12 CFR Part 704

Credit unions, Corporate credit unions, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board on April 21, 2011.

Mary F. Rupp,

Secretary of the Board.

For the reasons stated in the preamble, the National Credit Union Administration amends 12 CFR part 704 as set forth below:

PART 704—CORPORATE CREDIT UNIONS

■ 1. The authority citation for part 704 continues to read as follows:

Authority: 12 U.S.C. 1762, 1766(a), 1772a, 1781, 1789, and 1795e.

■ 2. Effective January 1, 2012, add definitions of *Critical accounting policies, Enterprise risk management, Examination of internal control, Financial statements, Financial statement audit, Generally accepted auditing standards, Independent public accountant, Internal control, Internal control framework, Internal control over financial reporting,* and *Supervisory committee* to § 704.2 as follows:

§ 704.2 Definitions.

* * * * *

Critical accounting policies means those policies that are most important to the portrayal of a corporate credit union's financial condition and results and that require management's most difficult, subjective, or complex judgments, often as a result of the need to make estimates about the effect of matters that are inherently uncertain.

* * * * *

Enterprise risk management means the process of addressing risk on an entity-wide basis. The purpose of this process is not to eliminate risk but, rather, to provide the knowledge the board of directors and management need to effectively measure, monitor, and control risk and to then plan appropriate strategies to achieve the entity's business objectives with a reasonable amount of risk taking.

* * * * *

Examination of internal control means an engagement of an independent public accountant to report directly on internal control or on management's assertions about internal control. An examination of internal control over financial reporting includes controls over the preparation of financial statements in accordance with accounting principles generally accepted in the United States of America (GAAP) and NCUA regulatory reporting requirements.

* * * * *

Financial statements means the presentation of a corporate credit union's financial data, including accompanying notes, derived from accounting records of the credit union, and intended to disclose the credit union's economic resources or obligations at a point in time, or the changes therein for a period of time, in conformity with GAAP. Each of the following is considered to be a financial statement: a balance sheet or statement of financial condition; statement of income or statement of operations; statement of undivided earnings; statement of cash flows; statement of changes in members' equity; statement of revenue and expenses; and statement of cash receipts and disbursements.

Financial statement audit means an audit of the financial statements of a corporate credit union performed in accordance with generally accepted auditing standards by an independent person who is licensed by the appropriate State or jurisdiction. The objective of a financial statement audit is to express an opinion as to whether those financial statements of the credit union present fairly, in all material respects, the financial position and the results of its operations and its cash flows in conformity with GAAP.

* * * * *

Generally accepted auditing standards (GAAS) means the standards approved and adopted by the American Institute of Certified Public Accountants

which apply when an independent, licensed certified public accountant audits private company financial statements in the United States of America. Auditing standards differ from auditing procedures in that procedures address acts to be performed, whereas standards measure the quality of the performance of those acts and the objectives to be achieved by use of the procedures undertaken. In addition, auditing standards address the auditor's professional qualifications as well as the judgment exercised in performing the audit and in preparing the report of the audit.

* * * * *

Independent public accountant (IPA) means a person who is licensed by, or otherwise authorized by, the appropriate State or jurisdiction to practice public accounting. An IPA must be able to exercise fairness toward credit union officials, members, creditors and others who may rely upon the report of a supervisory committee audit and to demonstrate the impartiality necessary to produce dependable findings. As used in this part, IPA is synonymous with the terms "auditor" and "accountant." The term IPA does not include a licensed person working in his or her capacity as an employee of an unlicensed entity and issuing an audit opinion in the unlicensed entity's name, *e.g.,* a licensed league auditor or licensed retired examiner working for a non-licensed entity.

* * * * *

Internal control means the process, established by the corporate credit union's board of directors, officers and employees, designed to provide reasonable assurance of reliable financial reporting and safeguarding of assets against unauthorized acquisition, use, or disposition. A credit union's internal control structure generally consists of five components: Control environment; risk assessment; control activities; information and communication; and monitoring. Reliable financial reporting refers to preparation of Call Reports that meet management's financial reporting objectives. Internal control over safeguarding of assets against unauthorized acquisition, use, or disposition refers to prevention or timely detection of transactions involving such unauthorized access, use, or disposition of assets which could result in a loss that is material to the financial statements.

Internal control framework means criteria such as that established in *Internal Control—Integrated Framework,* issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO), or comparable, reasonable, and U.S.-recognized criteria.

Internal control over financial reporting means a process effected by those charged with governance, management, and other personnel, designed to provide reasonable assurance regarding the preparation of reliable financial statements in accordance with accounting principles generally accepted in the United States of America. A corporate credit union's internal control over financial reporting includes those policies and procedures that:

(1) Pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the entity;

(2) Provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with accounting principles generally accepted in the United States of America, and that receipts and expenditures of the entity are being made only in accordance with authorizations of management and those charged with governance; and

(3) Provide reasonable assurance regarding prevention, or timely detection and correction, of unauthorized acquisition, use, or disposition of the entity's assets that could have a material effect on the financial statements.

* * * * *

Supervisory committee means, for federally chartered corporate credit unions, the supervisory committee as defined in Section 111(b) of the Federal Credit Union Act, 12 U.S.C. 1761(b). For state chartered corporate credit unions, the term supervisory committee refers to the audit committee, or similar committee, designated by state statute or regulation.

* * * * *

■ 3. Revise paragraphs (g)(5) and (g)(6), and add a new paragraph (g)(7), to § 704.11 to read as follows:

§ 704.11. Corporate Credit Union Service Organizations (Corporate CUSOs).

* * * * *

(g) * * *

(5) Will allow the auditor, board of directors, and NCUA complete access to the CUSO's personnel, facilities, equipment, books, records, and any other documentation that the auditor, directors, or NCUA deem pertinent;

(6) Will inform the corporate, at least quarterly, of all the compensation paid by the CUSO to its employees who are also employees of the corporate credit union; and

(7) Will comply with all the requirements of this section.

* * * * *

■ 4. Revise paragraphs (c)(6) and (c)(7), and add a new paragraph (c)(8), in § 704.13 to read as follows:

§ 704.13 Board responsibilities.

* * * * *

(c) * * *

(6) Financial performance is evaluated to ensure that the objectives of the corporate credit union and the responsibilities of management are met;

(7) Planning addresses the retention of external consultants, as appropriate, to review the adequacy of technical, human, and financial resources dedicated to support major risk areas; and

(8) For each item before the board, the meeting minutes list the names of directors and their votes, as well as the names of any directors who did not vote, except that if the minutes include a complete list of directors attending the meeting, the vote tally need only list the names of directors who voted against the item or who abstained.

■ 5. Effective January 1, 2012, revise § 704.15 to read as follows:

§ 704.15 Audit and reporting requirements.

(a) *Annual reporting requirements*—(1) *Audited financial statements.* A corporate credit union must prepare annual financial statements in accordance with generally accepted accounting principles (GAAP), which must be audited by an independent public accountant in accordance with generally accepted auditing standards. The annual financial statements and regulatory reports must reflect all material correcting adjustments necessary to conform with GAAP that were identified by the corporate credit union's independent public accountant.

(2) *Management report.* Each corporate credit union must prepare, as of the end of the previous calendar year, an annual management report that contains the following:

(i) A statement of management's responsibilities for preparing the corporate credit union's annual financial statements, for establishing and maintaining an adequate internal control structure and procedures for financial reporting, and for complying with laws and regulations relating to safety and soundness in the following areas: affiliate transactions, legal lending limits, loans to insiders, restrictions on capital and share

dividends, and regulatory reporting that meets full and fair disclosure;

(ii) An assessment by management of the corporate credit union's compliance with such laws and regulations during the past calendar year. The assessment must state management's conclusion as to whether the corporate credit union has complied with the designated safety and soundness laws and regulations during the calendar year and disclose any noncompliance with the laws and regulations; and

(iii) Beginning on and after January 1, 2013, an assessment by management of the effectiveness of the corporate credit union's internal control structure and procedures as of the end of the past calendar year that must include the following:

(A) A statement identifying the internal control framework used by management to evaluate the effectiveness of the corporate credit union's internal control over financial reporting;

(B) A statement that the assessment included controls over the preparation of regulatory financial statements in accordance with regulatory reporting instructions including identification of such regulatory reporting instructions; and

(C) A statement expressing management's conclusion as to whether the corporate credit union's internal control over financial reporting is effective as of the end of the previous calendar year. Management must disclose all material weaknesses in internal control over financial reporting, if any, that it has identified that have not been remediated prior to the calendar year-end. Management may not conclude that the corporate credit union's internal control over financial reporting is effective if there are one or more material weaknesses.

(3) *Management report signatures.* The chief executive officer and either the chief accounting officer or chief financial officer of the corporate credit union must sign the management report.

(b) *Independent public accountant*—(1) *Annual audit of financial statements.* Each corporate credit union must engage an independent public accountant to audit and report on its annual financial statements in accordance with generally accepted auditing standards. The scope of the audit engagement must be sufficient to permit such accountant to determine and report whether the financial statements are presented fairly and in accordance with GAAP. A corporate credit union must provide its independent public accountant with a copy of its most recent Call Report and NCUA examination report. It must also provide its independent public accountant with copies of any notice that its capital category is being changed or reclassified and any correspondence from NCUA regarding compliance with this section.

(2) *Internal control over financial reporting.* Beginning on and after January 1, 2014, the independent public accountant who audits the corporate credit union's financial statements must examine, attest to, and report separately on the assertion of management concerning the effectiveness of the corporate credit union's internal control structure and procedures for financial reporting. The attestation and report must be made in accordance with generally accepted standards for attestation engagements. The accountant's report must not be dated prior to the date of the management report and management's assessment of the effectiveness of internal control over financial reporting. Notwithstanding the requirements set forth in applicable professional standards, the accountant's report must include the following:

(i) A statement identifying the internal control framework used by the independent public accountant, which must be the same as the internal control framework used by management, to evaluate the effectiveness of the corporate credit union's internal control over financial reporting;

(ii) A statement that the independent public accountant's evaluation included controls over the preparation of regulatory financial statements in accordance with regulatory reporting instructions including identification of such regulatory reporting instructions; and

(iii) A statement expressing the independent public accountant's conclusion as to whether the corporate credit union's internal control over financial reporting is effective as of the end of the previous calendar year. The report must disclose all material weaknesses in internal control over financial reporting that the independent public accountant has identified that have not been remediated prior to the calendar year-end. The independent public accountant may not conclude that the corporate credit union's internal control over financial reporting is effective if there are one or more material weaknesses.

(3) *Notice by accountant of termination of services.* An independent public accountant performing an audit under this part who ceases to be the accountant for a corporate credit union must notify NCUA in writing of such termination within 15 days after the occurrence of such event and set forth in reasonable detail the reasons for such termination.

(4) *Communications with supervisory committee.* In addition to the requirements for communications with audit committees set forth in applicable professional standards, the independent public accountant must report the following on a timely basis to the supervisory committee:

(i) All critical accounting policies and practices to be used by the corporate credit union;

(ii) All alternative accounting treatments within GAAP for policies and practices related to material items that the independent public accountant has discussed with management, including the ramifications of the use of such alternative disclosures and treatments, and the treatment preferred by the independent public accountant; and

(iii) Other written communications the independent public accountant has provided to management, such as a management letter or schedule of unadjusted differences.

(5) *Retention of working papers.* The independent public accountant must retain the working papers related to the audit of the corporate credit union's financial statements and, if applicable, the evaluation of the corporate credit union's internal control over financial reporting for seven years from the report release date, unless a longer period of time is required by law.

(6) *Independence.* The independent public accountant must comply with the independence standards and interpretations of the American Institute of Certified Public Accountants (AICPA).

(7) *Peer reviews and inspection reports.* (i) Prior to commencing any services for a corporate credit union under this section, the independent public accountant must have received a peer review, or be enrolled in a peer review program, that meets acceptable guidelines. Acceptable peer reviews include peer reviews performed in accordance with the AICPA's Peer Review Standards and inspections conducted by the Public Company Accounting Oversight Board (PCAOB).

(ii) Within 15 days of receiving notification that the AICPA has accepted a peer review or the PCAOB has issued an inspection report, or before commencing any audit under this section, whichever is earlier, the independent public accountant must file a copy of the most recent peer review report and the public portion of the most recent PCAOB inspection report, if any, accompanied by any

letters of comments, response, and acceptance, with NCUA if the report has not already been filed.

(iii) Within 15 days of the PCAOB making public a previously nonpublic portion of an inspection report, the independent public accountant must file a copy of the previously nonpublic portion of the inspection report with NCUA.

(c) *Filing and notice requirements*—(1) *Annual Report.* Each corporate credit union must, no later than 180 days after the end of the calendar year, file an Annual Report with NCUA consisting of the following documents:

(i) The audited comparative annual financial statements;

(ii) The independent public accountant's report on the audited financial statements;

(iii) The management report; and

(iv) The independent public accountant's attestation report on management's assessment concerning the corporate credit union's internal control structure and procedures for financial reporting.

(2) *Public availability.* The annual report in paragraph (c)(1) of this section will be made available by NCUA for public inspection.

(3) *Independent public accountant's letters and reports.* Each corporate credit union must file with NCUA a copy of any management letter or other report issued by its independent public accountant with respect to such corporate credit union and the services provided by such accountant pursuant to this part (except for the independent public accountant's reports that are included in the Annual Report) within 15 days after receipt by the corporate credit union. Such reports include, but are not limited to:

(i) Any written communication regarding matters that are required to be communicated to the supervisory committee (for example, critical accounting policies, alternative accounting treatments discussed with management, and any schedule of unadjusted differences); and

(ii) Any written communication of significant deficiencies and material weaknesses in internal control required by the AICPA's auditing standards.

(4) *Notice of engagement or change of accountants.* Each corporate credit union that engages an independent public accountant, or that loses an independent public accountant through dismissal or resignation, must notify NCUA within 15 days after the engagement, dismissal, or resignation. The corporate credit union must include with the notice a reasonably detailed statement of the reasons for any dismissal or resignation. The corporate credit union must also provide a copy of the notice to the independent public accountant at the same time the notice is filed with NCUA.

(5) *Notification of late filing.* A corporate credit union that is unable to timely file any part of its Annual Report or any other report or notice required by this paragraph (c) must submit a written notice of late filing to NCUA. The notice must disclose the corporate credit union's inability to timely file all or specified portions of its Annual Report or other report or notice and the reasons therefore in reasonable detail. The late filing notice must also state the date by which the report or notice will be filed. The written notice must be filed with NCUA before the deadline for filing the Annual Report or any other report or notice, as appropriate. NCUA may take appropriate enforcement action for failure to timely file any report, or notice of late filing, required by this section.

(6) *Report to Members.* A corporate credit union must submit a preliminary Annual Report to the membership at the next calendar year's annual meeting.

(d) *Supervisory committee.*—(1) *Composition.* Each corporate credit union must establish a supervisory committee, all of whose members must independent. A committee member is independent if:

(i) Neither the committee member, nor any immediate family member of the committee member, is supervised by, or has any material business or professional relationship with, the chief executive officer (CEO) of the corporate credit union, or anyone directly or indirectly supervised by the CEO, and

(ii) Neither the committee member, nor any immediate family member of the committee member, has had any of the relationships described in paragraph (d)(1)(i) for at least the past three years.

(2) *Duties.* In addition to any duties specified under the corporate credit union's bylaws and these regulations, the duties of the credit union's supervisory committee include the appointment, compensation, and oversight of the independent public accountant who performs services required under this section and reviewing with management and the independent public accountant the basis for all the reports prepared and issued under this section. The supervisory committee must submit the audited comparative annual financial statements and the independent public accountant's report on those statements to the corporate credit union's board of directors.

(3) *Independent public accountant engagement letters.* (i) In performing its duties with respect to the appointment of the corporate credit union's independent public accountant, the supervisory committee must ensure that engagement letters and/or any related agreements with the independent public accountant for services to be performed under this section:

(A) Obligate the independent public accountant to comply with the requirements of paragraph (b) of this section (including, but not limited to, the notice of termination of services, communications with the supervisory committee, and notifications of peer reviews and inspection reports); and

(B) Do not contain any limitation of liability provisions that:

(*1*) Indemnify the independent public accountant against claims made by third parties;

(*2*) Hold harmless or release the independent public accountant from liability for claims or potential claims that might be asserted by the client corporate credit union, other than claims for punitive damages; or

(*3*) Limit the remedies available to the client corporate credit union.

(ii) Engagement letters may include alternative dispute resolution agreements and jury trial waiver provisions provided that the letters do not incorporate any limitation of liability provisions set forth in paragraph (d)(3)(i)(B) of this section.

(4) *Outside counsel.* The supervisory committee of any corporate credit union must, when deemed necessary by the committee, have access to its own outside counsel.

(e) *Internal audit.* A corporate credit union with average daily assets in excess of $400 million for the preceding calendar year, or as ordered by NCUA, must employ or contract, on a full- or part-time basis, the services of an internal auditor. The internal auditor's responsibilities will, at a minimum, comply with the Standards and Professional Practices of Internal Auditing, as established by the Institute of Internal Auditors. The internal auditor will report directly to the chair of the corporate credit union's supervisory committee, who may delegate supervision of the internal auditor's daily activities to the chief executive officer of the corporate credit union. The internal auditor's reports, findings, and recommendations will be in writing and presented to the supervisory committee no less than quarterly, and will be provided upon request to the IPA and NCUA.

■ 6. Revise the introductory text of paragraph (a) of § 704.19 to read as follows:

§ 704.19 Disclosure of executive and director compensation.

(a) *Annual disclosure.* A corporate credit union must annually prepare and maintain a disclosure of the dollar amount of compensation paid to its most highly compensated employees, including compensation from any corporate CUSO in which the corporate has invested or made a loan, in accordance with the following schedule:

* * * * *

■ 7. Effective April 29, 2013, add a new § 704.21 to read as follows:

§ 704.21 Enterprise risk management.

(a) A corporate credit union must develop and follow an enterprise risk management policy.

(b) The board of directors of a corporate credit union must establish an enterprise risk management committee (ERMC) responsible for reviewing the enterprise-wide risk management practices of the corporate credit union. The ERMC must report at least quarterly to the board of directors.

(c) The ERMC must include at least one independent risk management expert. The risk management expert will have post-graduate education; an actuarial, accounting, economics, financial, or legal background; and at least five years experience in identifying, assessing, and managing risk exposures. The risk management expert's experience must also be commensurate with the size of the corporate credit union and the complexity of its operations. The board of directors may hire the independent risk management expert to work full-time or part-time for the ERMC or as a consultant for the ERMC.

(d) A risk management expert qualifies as independent if:

(1) The expert reports to the ERMC and to the corporate credit union's board of directors;

(2) Neither the expert, nor any immediate family member of the expert, is supervised by, or has any material business or professional relationship with, the chief executive officer (CEO) of the corporate credit union, or anyone directly or indirectly supervised by the CEO; and

(3) Neither the expert, nor any immediate family member of the expert, has had any of the relationships described in paragraph (d)(2) of this section for at least the past three years.

(e) The risk management expert is not required to be a director of the corporate credit union.

■ 8. Add a new § 704.22 to read as follows:

§ 704.22 Membership fees.

(a) A corporate credit union may charge its members a membership fee. The fee may be one-time or periodic.

(b) The corporate credit union must calculate the fee uniformly for all members as a percentage of each member's assets, except that the corporate credit union may reduce the amount of the fee for members that have contributed capital to the corporate. Any reduction must be proportional to the amount of the member's nondepleted contributed capital.

(c) The corporate credit union must give its members at least six months advance notice of any initial or new fee, including terms and conditions, before invoicing the fee. For a recurring fee, the corporate credit union must also give six months notice of any material change to the terms and conditions of the fee.

(d) The corporate credit union may terminate the membership of any credit union that fails to pay the fee in full within 60 days of the invoice date.

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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Chapter VII

[IRPS 11–1]

Guidelines for the Supervisory Review Committee

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final Interpretative Ruling and Policy Statement 11–1, "Supervisory Review Committee" (IRPS 11–1).

SUMMARY: This policy statement combines two Interpretative Ruling and Policy Statements (IRPSs) and adds denials of technical assistance grant (TAG) reimbursements to the types of determinations that credit unions may appeal to NCUA's Supervisory Review Committee. This new IRPS will replace the earlier IRPSs addressing the Supervisory Review Committee.

DATES: This IRPS was previously issued as an interim final IRPS, which became effective on January 20, 2011.

FOR FURTHER INFORMATION CONTACT: Dave Marquis, Executive Director or Justin M. Anderson, Staff Attorney, Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428, or *telephone:* (703) 518–6320 (Dave Marquis) or (703) 518–6540 (Justin Anderson).

SUPPLEMENTARY INFORMATION:

A. Background

Pursuant to Section 309(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (Riegle Act), Public Law 103–325, § 309(a), 108 Stat. 2160 (1994), the NCUA Board (Board) adopted guidelines that established an independent appellate process to review material supervisory determinations, entitled "Supervisory Review Committee" (IRPS 95–1). 60 FR 14795 (March 20, 1995). Through IRPS 95–1, NCUA established a Supervisory Review Committee (Committee) consisting of three senior staff members to hear appeals of material supervisory determinations. IRPS 95–1 defined material supervisory determinations to include determinations on composite CAMEL ratings of 3, 4 and 5, all component ratings of those composite ratings, significant loan classifications and adequacy of loan loss reserves. The Board noted in the preamble to IRPS 95–1, however, that it would consider expanding the disputes covered by the Committee's review process at a later date. 60 FR 14795, 14796 (March 20, 1995). In 2002, the Board amended IRPS 95–1 by issuing IRPS 02–1, which added Regulatory Flexibility designation revocations to the list of material supervisory determinations credit unions may appeal to the Committee.

B. Interim Final IRPS

At its January meeting, the NCUA Board issued interim final IRPS 11–1. 76 FR 3674 (January 20, 2011). As noted in the preamble to the interim final IRPS, under Part 705 of NCUA's regulations, qualifying credit unions can apply for loans or technical assistance grants (TAGs) from the Community Development Revolving Loan Fund for Credit Unions (CDRLF). The change made in the interim final IRPS allows a credit union to appeal the denial of a TAG reimbursement to the Committee. Specifically, under the interim final IRPS, any credit union that disagrees with the Director of OSCUI's determination may, within 30 days from the date of the denial, appeal the determination to the Committee. Committee decisions on TAG appeals are final; they are not appealable to the NCUA Board. Interim final IRPS 11–1 also combined the two previous IRPSs addressing the Committee, IRPS 95–1 and 02–1, into one centralized document. The Board noted in the preamble that interim final IRPS 11–1

would supersede and replace the previous two IRPSs on the Committee. The Board also made the following minor changes in the interim final IRPS: Inclusion of current position titles; deletion of the requirement for quarterly meetings (meetings will be held on an as needed basis); and to make timing of appeal of Committee decisions to the NCUA Board consistent, inclusions of a statement that all decisions appealable to the Board are from the date of receipt of decision.[1]

C. Summary of Comments

NCUA received three comments, two from credit union trade associations and one from a state credit union association. All three commenters generally supported the rule, but did request additional changes. All three commenters requested that appeals to the Supervisory Review Committee be more transparent. Ideas suggested by the commenters included publishing on NCUA's website the names of the committee members, the agenda and dates of committee meetings, an annual report of the committee's actions, and the decisions of the committee. NCUA is considering ways to make the appeals process more transparent, including adding information about the Committee and its functions to the NCUA website. The Board, however, does not believe it is necessary to include any actions related to transparency in this IRPS. The purpose of the IRPS is to inform credit unions of their rights of appeal to the Committee.

One commenter also requested that NCUA clarify how credit unions can appeal other supervisory and examination matters that are outside the scope of the Committee's review. Section B of this IRPS lists various NCUA regulations addressing procedures for other appealable issues. In addition, Section B notes that the Board serves as the final administrative decision maker for major disputes not covered by those other regulations or this IRPS. Such matters should first be pursued through the appropriate Regional Office or the Office of Corporate Credit Unions.

Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe a significant economic impact agency rulemaking may have on a substantial number of small credit unions. For purposes of this analysis, credit unions under $1 million in assets are considered small credit unions.

This final IRPS expands the types of determinations that credit unions may appeal to the NCUA's Supervisory Review Committee and combines two previous IRPS. This final IRPS imposes no additional financial, regulatory or other burden on credit unions. NCUA has determined and certifies that this final IRPS will not have a significant impact on a substantial number of small credit unions. Accordingly, NCUA has determined that a Regulatory Flexibility Analysis is not required.

Paperwork Reduction Act

NCUA has determined that this final IRPS does not increase paperwork requirements under the Paperwork Reduction Act of 1995 and regulations of the Office of Management and Budget.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their regulatory actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. This final IRPS applies to all credit unions that appeal NCUA material supervisory determinations before the NCUA Supervisory Committee, but does not have 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. NCUA has determined that this final IRPS does not constitute a policy that has federalism implications for purposes of the executive order.

Assessment of Federal Regulations and Policies on Families

NCUA has determined that this final IRPS will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the APA. 5 U.S.C. 551. The Office of Management and Budget is currently reviewing this IRPS, but NCUA does not believe the IRPS is a major rule for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996.

Accordingly, the interim final IRPS 11–1, which was published at 76 FR 3674 on January 20, 2011, is adopted as a final IRPS without change.

By the National Credit Union Administration Board on April 21, 2011.

Mary F. Rupp,

Secretary of the Board.

[FR Doc. 2011–10103 Filed 4–28–11; 8:45 am]

BILLING CODE 7535–01–P

[1] Under IRPS 95–1, decisions were appealable 30 days from the date a Committee decision was issued and under IRPS 02–1 decisions were appealable 60 days from the appellant's receipt of a decision.

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 732, 738, 770 and 774

[Docket No. 100709293–1073–01]

RIN 0694–AE96

Editorial Corrections to the Export Administration Regulations

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: The Bureau of Industry and Security (BIS) publishes this final rule to implement editorial corrections to the Export Administration Regulations (EAR). In particular, this rule corrects the country entry for Syria on the Commerce Country Chart to ensure that the license requirements are accurately represented. In addition, this rule corrects other errors in the Commerce Control List such as inaccurate references, spelling and technical errors, and removes superfluous wording to ensure accuracy in the EAR.

DATES: Effective Date: This rule is effective: April 29, 2011.

FOR FURTHER INFORMATION CONTACT: Sharron Cook, Office of Exporter Services, Bureau of Industry and Security, by telephone at (202) 482–4890 or by e-mail at *sharron.cook@bis.doc.gov.*

SUPPLEMENTARY INFORMATION: This final rule implements editorial corrections to four parts of the Export Administration Regulations (EAR), including several Export Control Classification Number (ECCN) entries. In particular, the Bureau of Industry and Security (BIS) publishes this rule to correct the country entry for Syria on the Commerce Country Chart to more clearly identify for exporters the licensing requirements that apply to this destination. In addition, this final rule

corrects inaccurate references, spelling and technical errors, and removes superfluous wording to ensure accuracy in the Commerce Control List (CCL). The revisions made by this rule are described more fully below in Code of Federal Regulations part number order.

Part 732

On October 3, 2008 (73 FR 57495), BIS published an interim final rule entitled "Encryption Simplification," which inadvertently removed subparagraphs (1), (2), and (3) from paragraph (b) of section 732.2. These subsections discussed the scope of the EAR in relation to publicly available technology and software. This rule restores those subparagraphs to section 732.2(b).

Part 738

On May 14, 2004 (69 FR 26766), BIS added General Order No. 2 to Supplement No. 1, Part 736 pursuant to Section 5(a)(1) of the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, which requires a prohibition on the export to Syria of all items on the CCL. However, the May 14, 2004 rule inaccurately represented the license requirements for Syria on the Commerce Country Chart (Supplement No. 1 to part 738). This rule revises those controls to ensure accurate licensing information is provided to improve compliance to the EAR. This rule removes the "X's" under all the reasons for control, and adds in their place "See General Order No. 2 in Supplement No. 1 to Part 736 of the EAR to determine whether a license is required to export or reexport to this destination." Adding this notation to the Commerce Country Chart does not substantively change existing controls related to Syria; it only serves to more accurately cite the applicable regulatory controls as set forth in the EAR.

Part 770

This rule revises section 770.2 to remove inaccurate ECCN references in paragraph (a)(1), which provides: "Interpretation 1: Anti-friction bearing or bearing systems and specially designed parts." The references to the five ECCNs in section 770.2 were inadvertently retained in the regulations when BIS removed the ECCNs from the Commerce Control List (CCL) in an interim rule published on January 15, 1998 rule (63 FR 2452). This rule amends this error by removing the references to ECCNs: 2A002, 2A003, 2A004, 2A005, and 2A006. This amendment is being made to ensure consistency with the EAR.

Part 774

This rule revises a number of entries with errors on the CCL to provide a complete and more accurate description of controls in certain ECCNs. A description of the specific amendments to the CCL is provided below. As described below, the amendments apply to ECCNs 0B002, 1B233, 1C006, 1E201, 1E355, 2B005, 6A995, 6D993, 7D001, 9D001, and 9D002.

Category 0—Nuclear Materials, Facilities, and Equipment [And Miscellaneous Items]

ECCN 0B002 is amended to redesignate paragraphs that were not correctly designated in an interim rule published on January 15, 1998 (63 FR 2452, 2462–3). To revise the error, this rule redesignates paragraphs f.1, f.2, g, g.1, g.2, g.3, and g.4, as paragraphs e.1, e.2, f, f.1, f.2, f.3, and f.4, respectively.

Category 1—Systems, Equipment, and Components

ECCN 1B233 is amended to move a paragraph that was misplaced below the License Requirements section in a final rule published on August 29, 2002 (67 FR 55594, 55602). This rule moves the paragraph, "Facilities and plants described in 1B233.a are subject to the export licensing authority of the Nuclear Regulatory Commission (see 10 CFR part 110)" from directly below the License Requirement section and relocates it to paragraph 2 in Related Controls in the List of Items Controlled section. This correction will ensure accuracy and consistency within the EAR.

ECCN 1C006 is amended to remove a paragraph inadvertently left after the technical note was removed in an interim rule published on January 15, 1998 (63 FR 2452, 2471). This rule removes paragraph "e" under the Items paragraph of the Lists of Items Controlled.

ECCN 1E201 is amended to correct an inaccurate reference in the heading published in an interim rule on January 15, 1998 (63 FR 2452, 2483). This rule corrects an inaccurate reference in the heading by revising the reference "1C002.a.2.c or .d" to read "1C002.b.3 and b.4."

ECCN 1E355 is amended to remove superfluous wording published in an interim rule on May 18, 1999 (64 FR 27138, 27150). Specifically, this rule removes a redundant reference to the acronym "CWC," which stands for the Chemical Weapons Convention, at the end of paragraph "b." under the Items paragraph of the Lists of Items Controlled.

Category 2—Materials Processing

ECCN 2B005 is amended to correct a reference error made in a final rule published on April 18, 2008 (73 FR 21035, 21039). This rule corrects the misprint in "(3)" of the Related Controls paragraph of "2B104" to read "2B105" to make the reference accurate and consistent with the EAR.

Category 6—Sensors and Lasers

ECCN 6A995 is amended to correct an inadvertent error made in a final rule published on November 5, 2007 (72 FR 62524, 62547). This rule corrects the spelling of the word "or" after the word "than" and before the word "equal" in the Note directly following paragraph 6A995.e.2.b. This change will ensure consistency and accuracy in the EAR.

ECCN 6D993 is amended to correct a technical error made in an interim rule published on January 15, 1998 (63 FR 2452, 2535). This rule corrects the Unit paragraph in the Lists of Items Controlled to correctly coincide with the nature of the controlled software by removing the text "Equipment in number; parts and accessories in" so that the only remaining text is "$ value."

Category 7—Navigation and Avionics

ECCN 7D001 is amended to correct a grammatical error made in a final rule published on November 5, 2007 (72 FR 62524, 62549). This rule adds a comma between the words "systems" and "inertial" in the RS paragraph of the License Requirements section to ensure grammatical accuracy in the EAR.

Category 9—Aerospace and Propulsion

ECCN 9D001 is amended to correct a technical error made in an interim rule published on March 25, 1996 (61 FR 12713, 13032). This rule revises the description of the software to which the NS control applies in the License Requirements section by adding the phrase "and technology controlled by" to ensure accuracy in the application of these controls. This additional language ensures that 9E003 technology is not improperly referred to as equipment.

ECCN 9D002 is amended to correct a technical error made in a final rule published on March 5, 2003 (68 FR 10586, 10608). This rule revises the description of the software to which the NS control applies in the License Requirements section to ensure accuracy in the application of these controls. This additional wording ensures that 9E003 technology is not improperly referred to as equipment.

Rulemaking Requirements

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

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the requirements of Paperwork Reduction Act, unless that collection of information displays a currently valid Office of Management and Budget Control Number. This rule does not affect any paperwork collection. This rule does not contain policies with Federalism implications as that term is defined under E.O. 13132.

3. The Department finds that there is good cause under 5 U.S.C. 553(b)(B) to waive the provisions of the Administrative Procedure Act requiring prior notice and the opportunity for public comment because it is unnecessary. The revisions made by this rule are administrative in nature and do not affect the rights and obligations of the public. Because these revisions are not substantive changes to the EAR, it is unnecessary to provide notice and opportunity for public comment. In addition, the 30-day delay in effectiveness required by 5 U.S.C. 553(d) is not applicable because this rule is not a substantive rule. Notice of proposed rulemaking and opportunity for public comment are not required for this rule under the Administrative Procedure Act or by any other law, and the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable.

List of Subjects

15 CFR Part 732

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

15 CFR Part 738

Exports.

15 CFR Part 770

Exports.

15 CFR Part 774

Exports, Reporting and recordkeeping requirements.

Accordingly, Parts 732, 738, 770 and 774 of the Export Administration Regulations (15 CFR Parts 730 through 774) are amended as follows:

PART 732—[AMENDED]

■ 1. The authority citation for part 732 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 12, 2010, 75 FR 50681 (August 16, 2010).

■ 2. Section 732.2 is amended by adding paragraphs (b)(1), (2) and (3) to read as follows:

§ 732.2 Steps regarding scope of the EAR.

* * * * *

(b) * * *

(1) If your technology or software is publicly available, and therefore outside the scope of the EAR, you may proceed with the export or reexport if you are not a U.S. person subject to General Prohibition Seven. If you are a U.S. person, go to Step 15 at § 732.3(j) of this part. If you are a U.S. person and General Prohibition Seven concerning proliferation activity of U.S. persons does not apply, then you may proceed with the export or reexport of your publicly available technology or software. Note that all U.S. persons are subject to the provisions of General Prohibition Seven.

(2) If your technology or software is not publicly available and you are exporting from the United States, skip to the Step 7 in § 732.3(b) of this part concerning the general prohibitions.

(3) If you are exporting items from a foreign country, you should then proceed to Step 3 in paragraph (c) of this section and the other steps concerning the scope of the EAR.

* * * * *

PART 738—[AMENDED]

■ 3. The authority citation for part 738 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c; 22 U.S.C. 3201 *et seq.;* 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 15 U.S.C. 1824a; 50 U.S.C. app. 5; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 12, 2010, 75 FR 50681 (August 16, 2010).

■ 4. Supplement No. 1 to Part 738 is amended by revising the entry for Syria to read as follows:

SUPPLEMENT NO. 1 TO PART 738—COMMERCE COUNTRY CHART

[Reason for control]

Countries	Chemical & biological weapons			Nuclear non-proliferation		National security		Missile tech	Regional stability		Firearms convention	Crime control			Anti-terrorism	
	CB 1	CB 2	CB 3	NP 1	NP 2	NS 1	NS 2	MT 1	RS 1	RS 2	FC 1	CC 1	CC 2	CC 3	AT 1	AT 2
	*		*		*		*		*		*		*			
Syria	See General Order No. 2 in Supplement No. 1 to Part 736 of the EAR to determine whether a license is required in order to export or reexport to this destination.															
	*		*		*		*		*		*		*			

PART 770—[AMENDED]

■ 5. The authority citation for part 770 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 12, 2010, 75 FR 50681 (August 16, 2010).

■ 6. Section 770.2 is amended by revising paragraph (a)(1) to read as follows:

§ 770.2 Item interpretations.

(a) * * *

(1) Anti-friction bearings or bearing systems shipped as spares or replacements are classified under Export Control Classification Number (ECCN) 2A001 (ball, roller, or needle-roller bearings and parts). This applies to separate shipments of anti-friction bearings or bearing systems and anti-friction bearings or bearing systems shipped with machinery or equipment for which they are intended to be used as spares or replacement parts.

* * * * *

PART 774—[AMENDED]

■ 7. The authority citation for part 774 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c, 22 U.S.C. 3201 *et seq.,* 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C.

1354; 15 U.S.C. 1824a; 50 U.S.C. app. 5; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 12, 2010, 75 FR 50681 (August 16, 2010).

Supplement No. 1 to Part 774—[Amended]

■ 8. In Category 0—Nuclear Materials, Facilities, and Equipment [And Miscellaneous Items], ECCN 0B002 is amended by:

■ a. Redesignating paragraphs f.1 and f.2 as paragraphs e.1 and e.2, respectively; and

■ b. Redesignating paragraphs g, g.1, g.2, g.3, and g.4 as paragraphs f, f.1, f.2, f.3, and f.4, respectively.

■ 9. In Category 1—Systems, Equipment, and Components ECCN 1B233 is amended by:

■ a. Revising the License Requirements section; and

■ b. Revising the Related Controls paragraph of the List of Items Controlled section, to read as follows:

Supplement No. 1 to Part 774—Commerce Control List

* * * * *

1B233 Lithium isotope separation facilities or plants, and equipment therefor, as follows (see List of Items Controlled).

License Requirements

Reason for Control: NP, AT

Control(s)	*Country chart*
NP applies to 1B233.b.	NP Column 1
AT applies to 1B233.b.	AT Column 1

* * * * *

List of Items Controlled

* * * * *

Related Controls: (1) See ECCN 1E001 ("development" and "production") and ECCN 1E201 ("use") for technology for items described in this entry. (2) Facilities and plants described in 1B233.a are subject to the export licensing authority of the Nuclear Regulatory Commission (see 10 CFR part 110).

* * * * *

■ 10. In Category 1—Systems, Equipment, and Components, ECCN 1C006 is amended by removing the last paragraph designated as "e" in the Items paragraph of the Lists of Items Controlled.

■ 11. In Category 1—Systems, Equipment, and Components, ECCN 1E201 is amended by revising the heading, to read as follows:

1E201 "Technology" according to the General Technology Note for the "use" of items controlled by 1A002, 1A007, 1A202, 1A225 to 1A227, 1B201, 1B225 to 1B232, 1B233.b, 1C002.b.3 and b.4, 1C010.a, 1C010.b, 1C010.e.1, 1C202, 1C210, 1C216, 1C225 to 1C240 or 1D201.

* * * * *

■ 12. In Category 1—Systems, Equipment, and Components, ECCN 1E355 is amended by removing the acronym "CWC" from the end of paragraph b in the Items paragraph of the List of Items Controlled section.

■ 13. In Category 2—Materials Processing, ECCN 2B005, List of Items Controlled section is amended by removing "2B104" and adding in its place "2B105" in paragraph (3) of the Related Controls paragraph.

■ 14. In Category 6—Sensors and Lasers, ECCN 6A995 is amended by revising the Note: 6A995.e.2.b to read as follows:

6A995 "Lasers" (see List of Items Controlled).

* * * * *

Lists of Items Controlled

* * * * *

Items: * * *

* * * * *

e. * * *

e.2 * * *

e.2.b * * *

Note: 6A995.e.2.b does not control multiple transverse mode, industrial "lasers" with output power less than or equal to 2kW with a total mass greater than 1,200kg. For the purpose of this note, total mass includes all components required to operate the "laser," e.g., "laser," power supply, heat exchanger, but excludes external optics for beam conditioning and/or delivery.

* * * * *

■ 15. In Category 6—Sensors and Lasers, ECCN 6D993, the License requirements section is amended by removing the text "Equipment in number; parts and accessories in" from the Unit paragraph.

■ 16. In Category 7—Navigation and Avionics, ECCN 7D001 is amended by revising the RS control paragraph in the License Requirement section, to read as follows:

7D001 "Software" specially designed or modified for the "development" or "production" of equipment controlled by 7A (except 7A994) or 7B (except 7B994).

License Requirements

Reason for Control: * * *

Control(s)	*Country chart*
RS applies to "software" for inertial navigation systems, inertial equipment, and specially designed components therefor, for "civil aircraft.".	RS Column 1

* * * * *

■ 17. In Category 9—Aerospace and Propulsion, ECCN 9D001 is amended by revising the NS control paragraph in the License Requirement section, to read as follows:

9D001 "Software" specially designed or modified for the "development" of equipment or "technology," controlled by 9A (except 9A018, 9A990 or 9A991), 9B (except 9B990 or 9B991) or 9E003.

License Requirements

Reason for Control: * * *

Control(s)	*Country chart*
NS applies to "software" for equipment controlled by 9A001 to 9A003, 9A012, 9B001 to 9B010, and technology controlled by 9E003.	NS Column 1

* * * * *

■ 18. In Category 9—Aerospace and Propulsion, ECCN 9D002 is amended by revising the NS control paragraph in the License Requirement section, to read as follows:

9D002 "Software" specially designed or modified for the "production" of equipment controlled by 9A (except 9A018, 9A990, or 9A991) or 9B (except 9B990 or 9B991).

License Requirements

Reason for Control: * * *

Control(s)	*Country chart*
NS applies to "software" for equipment controlled by 9A001 to 9A003, 9A012, 9B001 to 9B010, and technology controlled by 9E003.	NS Column 1

* * * * *

Dated: April 11, 2011.

Kevin J. Wolf,

Assistant Secretary.

[FR Doc. 2011–9924 Filed 4–28–11; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket No.: PTO–P–2010–0092]

RIN 0651–AC52

Changes To Implement the Prioritized Examination Track (Track I) of the Enhanced Examination Timing Control Procedures

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Final rule; delay of effective and applicability dates.

SUMMARY: On April 4, 2011, the United States Patent and Trademark Office (Office) published a final rule that revises the rules of practice in patent cases to implement a procedure under which applicants may request prioritized examination at the time of filing of an application upon payment of appropriate fees and compliance with certain requirements (Track I final rule). The prioritized examination procedure is the first track (Track I) of a 3-Track examination process designed to provide applicants with greater control over when their nonprovisional utility and plant applications are examined and to promote greater efficiency in the patent examination process. The Track I final rule states that the effective date is May 4, 2011, and that a request for prioritized examination may be submitted with any original utility or plant application filed on or after May 4, 2011. The Office is hereby notifying the public that the Track I final rule effective date and applicability date have been delayed until further notice.

DATES: *Effective Date:* The effective date for the amendments to 37 CFR 1.17 and 1.102 published at 76 FR 18399, April 4, 2011 (the Track I final rule) is delayed until further notice. The Office will publish a document in the **Federal Register** announcing the new effective date.

Applicability date: No request for prioritized examination will be accepted until further notice.

FOR FURTHER INFORMATION CONTACT: Eugenia A. Jones, Kathleen Kahler Fonda, or Michael T. Cygan, Office of Patent Legal Administration, Office of the Associate Commissioner for Patent Examination Policy, by telephone at (571) 272–7727, (571) 272–7754 or (571) 272–7700, or by mail addressed to: Mail Stop Comments Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450, marked to the attention of Eugenia A. Jones.

SUPPLEMENTARY INFORMATION: On April 4, 2011, the Office published a final rule that revises the rules of practice in patent cases to implement a procedure under which applicants may request prioritized examination at the time of filing of an application upon payment of appropriate fees and compliance with certain requirements (Track I final rule). See *Changes to Implement the Prioritized Examination Track (Track I) of the Enhanced Examination Timing Control Procedures,* 76 FR 18399 (Apr. 4, 2011). The Office set an aggregate goal for the prioritized examination procedure of providing a final disposition within twelve months of prioritized status being granted. See *Changes to Implement the Prioritized Examination Track (Track I) of the Enhanced Examination Timing Control Procedures,* 76 FR at 18401. The Office, however, has found it necessary to revise its patent examiner hiring plan due to funding limitations. The revised hiring plan does not permit the Office to hire new examiners. With the current level of resources, the Office will not be able to meet the twelve-month pendency goal in prioritized examination applications without impacting the non-prioritized examination applications at this time. Therefore, the Office is delaying the effective date and applicability date of the Track I final rule until further notice. When the funding limitations are resolved, the Office will issue a subsequent notice identifying a revised effective date and applicability date on which the final rule shall apply.

Dated: April 25, 2011.

David J. Kappos,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2011–10376 Filed 4–28–11; 8:45 am]

BILLING CODE 3510–16–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 49

[EPA–HQ–OAR–2010–0293; FRL–9300–2]

RIN–2060–AQ56

Clarifications to Indian Tribes' Clean Air Act Regulatory Requirements; Direct Final Amendments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The EPA is taking direct final action to amend certain Clean Air Act regulations pertaining to Indian tribes. This action changes the title of the regulations titled, "Tribal Clean Air Act Authority" to the more accurate "Indian Country: Air Quality Planning and Management." The action also reorganizes existing sections for better placement within the regulations.

DATES: The direct final rule is effective on July 28, 2011 without further notice, unless EPA receives relevant adverse comments by May 31, 2011. If EPA receives relevant adverse comments, we will publish a timely withdrawal in the **Federal Register** informing the public that the amendments in this rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2010–0293, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov.*
- *Fax:* (202) 566–9744.
- *Mail:* Indian Country: Air Quality Planning and Management Docket, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies.
- *Hand Delivery:* EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20460. 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–OAR–2010–0293. The 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 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 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 *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 form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Indian Country: Air Quality Planning and Management Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Darrel Harmon, Office of Air and Radiation (OAR/IO 6101A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564–7416, facsimile number (202) 501–0394; electronic mail (e-mail) address: *harmon.darrel@epa.gov.*

SUPPLEMENTARY INFORMATION: The information presented in this preamble is organized as follows:

I. Why is EPA using a direct final rule?
II. What is the purpose of this action?
III. Why is this action needed?
IV. Where can I get a copy of this document?
V. What should I consider as I prepare my comments for EPA?
VI. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act

I. Why is EPA using a direct final rule?

The EPA is publishing this direct final rule without a prior proposed rule because we view this as a non-controversial action and anticipate no adverse comments. This action does not make changes to any requirements; the action simply renames the existing 40 CFR Part 49 to more accurately reflect its purpose and relocates existing sections for better organization within the part. Any parties interested in commenting must do so at this time. Because this is an amendment of regulatory language through rulemaking, a redline version of the regulatory language has been created and has been placed in the docket. (*http://www.regulations.gov,* see docket number EPA–HQ–OAR–2010–0293) to aid the public's ability to comment. For further information about commenting on the rule, see the **ADDRESSES** section of this document. If EPA receives adverse comments, we will publish a timely withdrawal in the **Federal Register** informing the public the amendments in this direct final rule will not take effect. We will address any comments received in a subsequent final rule based on the proposed rule.

II. What is the purpose of this action?

The purpose of this action is to (1) retitle 40 CFR Part 49 "Tribal Clean Air Act Authority" to the more accurate "Indian Country: Air Quality Planning and Management," and (2) relocate three existing sections from Subpart A, which is intended to include only general tribal authority-related provisions, to Subpart L, which includes provisions specific to implementation plans for tribes located in EPA Region IX. The three sections that will be moved from 40 CFR part 49 subpart A to Subpart L are § 49.22 Federal Implementation Plan for Tri-cities Landfill, Salt River Pima-Maricopa Indian Community (will become § 49.5511), § 49.23 Federal Implementation Plan Provisions for Four Corners Power Plant, Navajo Nation (will become § 49.5512), and § 49.24 Federal Implementation Plan Provisions for Navajo Generating Station, Navajo Nation (will become § 49.5513). Sections 49.22, 49.23, and 49.24 will be reserved in the event new general tribal authority-related provisions are promulgated in the future.

III. Why is this action needed?

This rule is needed to provide regulatory clarity to Indian tribes. The change in the title of the part from "Tribal Clean Air Act Authority" to the more accurate "Indian Country: Air Quality Planning and Management" is needed because the current title suggests the part only includes requirements applicable to the granting of authority to tribes under the Clean Air Act. While the title was appropriate when Part 49 was originally promulgated, since then other regulations not relating to tribal authority have been added to the part such that the title is no longer broad enough to encompass the entire scope of these regulations. "Indian Country: Air Quality Planning and Management" is a broader, more accurate title which identifies the Part 49 regulations as relating more generally to the planning and management of air quality in Indian country. It has been long recognized by EPA Headquarters (HQ) and Regions the title did not fully illustrate the context of the rule and could be misread. For this reason, EPA HQ and Regions have an interest in changing the title to reduce any confusion. This change will also enable tribes to more easily recognize the Clean Air Act regulation that affects them.

The rule also moves sections 49.22, 49.23 and 49.24 out of Subpart A, which is intended to include provisions relating generally to tribal authority regardless of the EPA Region in which a tribe is located, to Subpart L, Implementation Plans for Tribes in Region IX, such that all implementation plan provisions that apply specifically to Region IX tribes are located together.

IV. Where can I get a copy of this document?

In addition to being available in the docket, an electronic copy of this final

action will also be available on the Worldwide Web (WWW) through the Technology Transfer Network (TTN). Following signature, a copy of this final action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/oarpg/.* The TTN provides information and technology exchange in various areas of air pollution control.

V. What should I consider as I prepare my comments for EPA?

Do not submit information containing CBI to EPA through *http://www.regulations.gov* or e-mail. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), Office of Air Quality Planning and Standards, Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2010–0293. Clearly mark the part or all of the information 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.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a "significant regulatory action" under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and is, therefore, not subject to review under the Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose any new information collection burden. These amendments do not result in changes to the information collection requirements of the existing regulations and will have no impact on the information collection estimate of projected cost and hour burden made and approved by the Office of Management and Budget (OMB) during the development of the existing regulations. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations (40 CFR Part 49) under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* and has assigned OMB control numbers (2060–0306 and 2060–0558). The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR Part 9. Therefore, the information collection requests have not been amended.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the Agency certifies the rule would not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For the purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final rule on small entities, I certify this action will not have a significant economic impact on a substantial number of small entities. This rule will not impact small entities due to the fact these amendments simply rename the title and reorganize existing sections for better placement within the regulation. There are no substantive changes to the regulation. Small entities will not incur any adverse impacts as a result of this rule because this action does not create any new requirements or burdens. No costs are associated with these amendments.

D. Unfunded Mandates Reform Act

This rule does not contain a Federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or to the private sector in any one year. This direct final rule is not expected to impact state, local, or tribal governments. Thus, this rule is not subject to the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act (UMRA).

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. These amendments simply rename the title and move subparts to fit more appropriately in later subparts. There are no substantive changes to the regulation.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This direct final rule does not impose any requirements on state and local governments. Thus, Executive Order 13132 does not apply to this rule.

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

This action does not have tribal implications as specified in Executive Order 13175 (65 FR 67249, November 6, 2000). These amendments do not impose requirements on tribal governments. This direct final action will not have tribal implications and we received no adverse comments when the proposed changes were presented to the National Tribal Air Association (NTAA) in March 2010. Tribes at the meeting supported these proposed changes; thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not have a substantive impact on existing regulations, and does not create any new requirements.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22,

2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

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

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

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA has determined this direct final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. These amendments simply rename the title and move subparts to fit more appropriately in later subparts. There are no substantive changes to the regulation.

K. Congressional Review Act

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 Congress and to the Comptroller General of the United States. The EPA will submit a report containing these amendments and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the amendments in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This direct final rule will be effective on July 28, 2011.

List of Subjects in 40 CFR Part 49

Environmental protection, Air pollution, Indians—lands, Indians—tribal government.

Dated: April 22, 2011.

Lisa P. Jackson,

Administrator.

For the reasons stated in the preamble, Title 40, Chapter I, Part 49 of the Code of Federal Regulations is amended as follows:

PART 49—[AMENDED]

■ 1. The authority citation for Part 49 continues to read as follows:

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

PART 49—INDIAN COUNTRY: AIR QUALITY PLANNING AND MANAGEMENT

■ 2. Revise the part heading for part 49 as set forth above. §§ 49.22–49.24 [Redesignated]

■ 3. Redesignate § 49.22 in subpart A as § 49.5511 in subpart L.

■ 4. Redesignate § 49.23 in subpart A as § 49.5512 in subpart L.

■ 5. Redesignate § 49.24 in subpart A as § 49.5513 in subpart L.

■ 6. Add and reserve new §§ 49.22–49.24 in subpart A.

[FR Doc. 2011–10321 Filed 4–28–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2009–0729; FRL–9299–7]

Approval and Promulgation of Air Quality Implementation Plans; Indiana; Removal of Vehicle Inspection and Maintenance Programs for Clark and Floyd Counties

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to approve a State Implementation Plan (SIP) revision submitted by the State of Indiana to allow the State to discontinue the vehicle inspection and maintenance (I/M) program in Clark and Floyd Counties, IN, the Indiana portion of the Louisville (IN–KY) 1997 8-hour ozone area. The revision specifically provides that I/M program regulations be removed from the active control measures portion of the SIP. The regulations will remain in the contingency measures portion of the Clark and Floyd Counties ozone maintenance plans. EPA is approving Indiana's request because the State has demonstrated that discontinuing the I/M program in Clark and Floyd Counties will not interfere with the attainment and maintenance of the 8-hour ozone National Ambient Air Quality Standard (NAAQS) or with the attainment and maintenance of other air quality standards and requirements of the Clean Air Act (CAA).

DATES: This final rule is effective on May 31, 2011.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2009–0729. 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., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly-available only in hard copy. Publicly-available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the U.S. Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Francisco J. Acevedo at (312) 886–6061 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Francisco J. Acevedo, Environmental Protection Specialist, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6052.

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This supplementary information section is arranged as follows:

I. What is the background for this action?

II. What is our response to comments received on the notice of proposed rulemaking?
III. What action is EPA taking?
IV. Statutory and Executive Order Reviews

I. What is the background for this action?

Clark and Floyd Counties were originally required to implement a "basic" I/M program under section 182(b)(4) of the CAA because they had been designated as part of the Louisville moderate 1-hour ozone nonattainment area. In order to maximize the emissions reductions from the I/M program, IDEM chose to implement an "enhanced" program in those areas and incorporated an on-board diagnostic (OBD) component into the program. EPA fully approved Indiana's I/M program on March 19, 1996 (61 FR 11142). The enhanced I/M program began operation in 1997, to help meet nonattainment area requirements for the ozone NAAQS effective at the time. The Louisville 1-hour ozone nonattainment area was redesignated to attainment for that standard on October 23, 2001 (66 FR 53665).

Subsequently, Clark and Floyd Counties were designated as a portion of the IN–KY Louisville nonattainment area for the 1997 8-hour ozone NAAQS. On November 15, 2006, IDEM submitted a request to redesignate the Indiana portion of the Louisville nonattainment area to attainment for the 8-hour NAAQS, and for EPA approval of a 14-year maintenance plan for Clark and Floyd Counties. At the same time, IDEM requested EPA approval to terminate the I/M program in these counties. EPA approved the redesignation and maintenance plan for Clark and Floyd Counties on July 19, 2007 (72 FR 39571). The approved maintenance plan shows that control measures in place in this area are sufficient for overall emissions to remain beneath the attainment level of emissions until the end of the maintenance period, even without operation of I/M. In addition, the conformity budget in the maintenance plan reflects mobile source emissions without I/M in future years, and the maintenance plan demonstrates that the applicable standard will continue to be met without I/M. *See* 72 FR 26057, 26064–26065 (May 8, 2007).

In accordance with the CAA and EPA redesignation guidance, states are free to adjust control strategies in the maintenance plan as long as they can demonstrate that the revision will not interfere with attainment or maintenance of the NAAQS, or any other CAA requirements. *See* CAA sections 175A and 110(l). With such a demonstration of noninterference with attainment or other applicable requirements, control programs may be discontinued and removed from the SIP. However, section 175A(d) of the CAA requires that contingency measures in the maintenance plan include all measures in the SIP for the area before that area was redesignated to attainment. Since the I/M program was approved into the SIP prior to redesignation to attainment for ozone, the I/M program must be included in the contingency portion of the ozone maintenance plan as required by section 175A(d).

The SIP revision submitted by IDEM for Clark and Floyd Counties included a 110(l) demonstration that addressed all applicable requirements and a request that the Indiana I/M program in Clark and Floyd Counties be moved from the active control measures portion of the SIP to the contingency measures portion of the Clark and Floyd Counties 1997 8–Hour Ozone Maintenance Plan.

On January 12, 2011, EPA proposed to approve Indiana's request to discontinue operation of the I/M program in Clark and Floyd Counties (76 FR 2066). As noted in the proposal, in order to finalize this rulemaking EPA needed to complete rulemaking on a determination of attainment for $PM_{2.5}$ for the Louisville area. EPA has subsequently published a final action determining that this area is attaining the $PM_{2.5}$ NAAQS, published on March 9, 2011, at 76 FR 12860.

II. What is our response to comments received on the notice of proposed rulemaking?

The public comment period for EPA's proposal to approve Indiana's request closed on February 11, 2011. EPA received two comments. Those comments and EPA's responses follow:

Comment: "The notice of the proposed rule does not state that EPA conducted a modeling analysis to demonstrate that removal of the I/M program will not interfere with maintenance or attainment of the new 1-hour NO_X [sic] NAAQS. It likely will. Therefore, EPA cannot approve this SIP modification without a quantitative analysis of its impacts on the 1-hour NO_X [sic] NAAQS."

Response: In its notice of proposed rulemaking, EPA noted that the area is designated attainment for nitrogen dioxide (NO_2) (addressing air quality for the annual standard) and that EPA has "no reason to believe that discontinuation of the I/M program in Clark and Floyd Counties has caused or will cause the Louisville area to become nonattainment" for NO_2 or other criteria pollutants. The commenter offered no data or supporting information on whether discontinuation of the I/M program would likely interfere with attainment or maintenance of the 1-hour NO_2 NAAQS. In response to this comment, EPA further examined air quality data as part of an assessment of whether the discontinuation of the I/M program has interfered or might interfere with attainment or maintenance of the 1-hour NO_2 air quality.

No NO_2 air quality monitors are currently located in Clark or Floyd Counties in Indiana. However, as noted above, Clark and Floyd Counties were included in the IN-KY Louisville nonattainment area for the 1997 8-hour ozone NAAQS, and air quality data are collected nearby in Louisville, Kentucky (at site number 21–111–1021). Since Louisville is more urbanized and is also a higher traffic area than Clark and Floyd Counties, these air quality data provide a conservative representation of air quality in Clark and Floyd Counties for NO_2. Furthermore, the impact of mobile sources is declining as newer cleaner vehicles replace older dirtier vehicles. Accordingly, the impact of discontinuing the I/M program in Clark and Floyd Counties is expected to decline in the future as well. For the most recent 3-year period with certified, quality assured data (2007 to 2009), the design value (i.e., the NO_2 concentration computed for comparison to the 1-hour standard) for this site was 53 parts per billion, well below the standard of 100 parts per billion.

These three years are a period when the I/M program both in Louisville and in Clark and Floyd Counties had been discontinued. Therefore, the air quality data from this period (and mobile source emission trends) provide a basis for concluding that the discontinuation of the I/M program has not interfered and will not interfere with attainment and maintenance of the 1-hour NO_2 standard. While the commenter did not address the annual average NO_2 standard, the annual average design value for the Louisville site is 14 parts per billion, well below the 53 parts per billion standard; thus EPA also finds that the discontinuation of the I/M program has not interfered and will not interfere with attainment and maintenance of the annual average NO_2 standard.

Comment: "From my point of view, these plans are good in different perspectives because the good is that it could help the state to cut down the budget for the two counties in I/M program as it doesn't involve equipment and technologies to maintain it while

the bad thing is that the emission could destroy the ozone layer and harm people's health which is worse because people get sick and people that own the cars neglect to have their cars inspected as they don't have people to warn and check them so it has both pros and cons.

Even though, they keep the program as an emergency plan but for the best interest of the people or to prevent global warming, the state or EPA should study thoroughly about the advantages and disadvantages of the plans in order to prevent bad things from happening in the future. Although, it could help to save money but it could not save human's life when something bad happens. So for the best interest, it would be better not to remove the program but keep it to check once in a while or issue the people in those two counties a letter to have their cars inspected regularly according to state's law in order to make them alert and be aware of their vehicle's problem."

Response: EPA recognizes that there would be advantages as well as disadvantages to continuing to operate the I/M program in Clark and Floyd Counties. However, at issue in this rulemaking is whether discontinuation would be consistent with CAA provisions, including whether discontinuation might interfere with attainment and maintenance of air quality standards and whether other criteria for discontinuation of programs have been met. EPA notes that the NAAQS are required by the CAA to be set to protect public health with an adequate margin of safety, and that EPA is finding that approval of this revision will not interfere with attainment or maintenance of the NAAQS. EPA believes that the applicable criteria for discontinuation of the I/M program in Clark and Floyd Counties have been met and therefore the revision should be approved.

III. What action is EPA taking?

EPA is taking final action to approve Indiana's demonstration that eliminating the I/M program in Clark and Floyd Counties will not interfere with the attainment and maintenance of the ozone NAAQS or with the attainment and maintenance of other air quality standards and requirements of the CAA. We are further approving Indiana's request to modify the SIP such that I/M is no longer an active program in Clark and Floyd Counties and is instead a contingency measure in the area's maintenance plan.

For the reasons stated in the proposed notice, EPA believes that Indiana has satisfied the requirements for discontinuing I/M in Clark and Floyd Counties.

IV. Statutory and Executive Order Reviews

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

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

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

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 28, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Ozone, Particulate matter, Volatile organic compounds.

Dated: April 20, 2011.

Susan Hedman,

Regional Administrator, Region 5.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart P—Indiana

■ 2. Section 52.777 is amended by adding paragraph (rr) to read as follows:

§ 52.777 Control strategy: Photochemical oxidants (hydrocarbons).

* * * * *

(rr) Approval—EPA is approving a request submitted by the State of Indiana on October 10, 2006, and supplemented on November 15, 2006,

November 29, 2007, November 25, 2008, April 23, 2010 and November 19, 2010, to discontinue the vehicle inspection and maintenance (I/M) program in Clark and Floyd Counties. The submittal also includes Indiana's demonstration that eliminating the I/M programs in Clark and Floyd Counties will not interfere with the attainment and maintenance of the ozone NAAQS and the fine particulate NAAQS and with the attainment and maintenance of other air quality standards and requirements of the CAA. We are further approving Indiana's request to modify the SIP such that I/M is no longer an active program in these areas and is instead a contingency measure in this area's maintenance plan.

[FR Doc. 2011–10323 Filed 4–28–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2005–0308; FRL–8869–1]

Metiram; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of metiram in or on bananas and wine grapes. BASF Corporation requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective April 29, 2011. Objections and requests for hearings must be received on or before June 28, 2011, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2005–0308. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Andrew Ertman, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9367; e-mail address: *ertman.andrew@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=%2Findex.tpl*.

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2005–0308 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before June 28, 2011. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2005–0308, by one of the following methods:

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

II. Summary of Petitioned-For Tolerance

In the **Federal Register** issue of November 30, 2005 (70 FR 71829) (FRL–7747–2), EPA issued a notice pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 9E6006) by BASF Corporation, 26 Davis Dr., Research Triangle Park, NC 27709. The petition requested that 40 CFR part 180 be amended by establishing tolerances for residues of the fungicide metiram: A mixture of 5.2 parts by weight of ammoniates of ethylenebis(dithiocarbamato) zinc with 1 part by weight ethylenebis(dithiocarbamic acid) bimolecular and trimolecular cyclic anhydrosulfides and disulfides, calculated as zinc ethylenebisdithiocarbamate in or on

imported bananas (whole fruit) at 5.0 parts per million (ppm) and grapes at 7.0 ppm. That notice referenced a summary of the petition prepared by BASF Corporation, the registrant, which is available in the docket, *http://www.regulations.gov*. BASF subsequently revised their petition by requesting that the tolerances be set for banana at 3.0 ppm and for grape wine at 5.0 ppm.

In the **Federal Register** issue of September 16, 2009, (74 FR 47507) (FRL–8431–4) in a document titled "Mancozeb, Maneb, Metiram, and Thiram; Proposed Tolerance Actions," EPA proposed:

1. Revising the existing tolerances for apple and potato.

2. Adding a tolerance for apple, pomace, wet.

3. Revising the tolerance expression in § 180.217. The reasons for these changes are explained in Unit V.D.

EPA did not receive comments on the **Federal Register** notice of November 30, 2005, but comments were received on the **Federal Register** proposed rule of September 16, 2009. EPA's response to these comments is discussed in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue * * *."

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for metiram, including exposure resulting from the tolerances established by this action.

Metiram is a member of the ethylene bisdithiocarbamate (EBDC) group of fungicides that also includes the related active ingredients mancozeb and maneb. Mancozeb, maneb, and metiram are all metabolized to ethylenethiourea (ETU) in the body and all degrade to ETU in the environment. Therefore, EPA has considered the aggregate or combined risks from food, water, and non-occupational exposure resulting from metiram alone and ETU from all sources (*i.e.,* the other EBDC fungicides) for this action.

In response to the petitions submitted to establish tolerances for residues of metiram on bananas and grapes, EPA completed two risk assessments in 2007: A metiram risk assessment which considered all existing and proposed uses for metiram and an ETU risk assessment that considered exposure to ETU from all sources (mancozeb, maneb, and metiram) for all existing and proposed uses.

Although the 2007 metiram review showed risks that were acceptable, the 2007 ETU review demonstrated unacceptable cancer risks, therefore preventing the Agency from acting on the petition for bananas and grapes. The Agency worked to refine the cancer risk assessment for ETU. A refined cancer risk assessment for ETU from all sources has been completed and the Agency is now prepared to act on the proposed tolerances for bananas and wine grapes. Because the 2010 ETU review dealt strictly with refining the cancer risk, the Agency will be relying on three risk assessments to support this tolerance document. These assessments are as follows:

- A 2007 risk assessment for metiram for acute, chronic, and cancer risk (refer to the risk assessment in docket ID number EPA–HQ–OPP–2005–0308 titled "Metiram: Human Health Risk Assessment for PP#9E6006. Petition for the Establishment of Import Tolerances on Grapes and Bananas").
- A 2007 risk assessment for ETU for acute, short-term, intermediate-term, and chronic risk (refer to the risk assessment in docket ID number EPA–HQ–OPP–2005–0308 titled "Ethylenethiourea (ETU) from EBDCs: Health Effects Division (HED) Human Health Risk Assessment of the Common Metabolite/Degradate ETU").
- A 2010 addendum to the 2007 ETU assessment for cancer risk (refer to the risk assessment in docket ID number EPA–HQ–OPP–2005–0308 titled "Addendum to the Aggregate Human Health Risk Assessment of the Common Metabolite/Degradate Ethylene Thiourea (ETU) to Support New Tolerances on Imported Grapes and Bananas for Metiram and for New Tolerances for Mancozeb on Almonds, Broccoli, Cabbage, Lettuce, and Peppers").

In the **Federal Register** issue of April 16, 2010 (75 FR 19967) (FRL–8822–2), the voluntary cancellation of the last product containing maneb registered for use in the United States was announced by the Agency. Therefore, it is important to note that since all products for maneb have been cancelled and there are limited existing stocks for maneb still in the channels of trade, the risk assessments for ETU likely overestimates the exposures to this common metabolite. EPA's assessment of exposures and risks associated with metiram and ETU follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. In addition to evaluating metiram, EPA also evaluated the risks of ETU, a contaminant, metabolite, and degradation product of metiram and the other EBDC group of fungicides, which includes the related active ingredients mancozeb and maneb.

1. *Metiram.* Metiram is not acutely toxic via the oral, dermal, or inhalation routes of exposure, nor is it a skin or eye irritant. It is, however, a strong-to-severe skin sensitizer. The thyroid is a target organ for metiram. Thyroid effects observed in subchronic studies in rats include increased thyroid weights, increased thyroid stimulating hormone (TSH), and decreased T_4 (serum thyroxin) values. Metiram degrades and/or is metabolized to ETU. In oral rat metabolism studies with radiolabelled metiram and other EBDCs, an average 7.5% *in vivo* metabolic conversion of EBDC to ETU occurred, on a weight-to-weight basis. Metabolism data indicate metiram does not bio-accumulate.

The nervous system is a target for metiram. Neurotoxic signs and neuropathology have been observed in subchronic studies in rats following oral dosing with metiram. Signs of neurotoxicity occurred after 2 weeks of dosing, including reduced forelimb grip strength, hind limb paralysis, muscle wasting, and ataxia. Neuropathology findings indicated decreased areas of myelinated axons in the sciatic, sural, and tibial nerves.

Metiram has been tested in a series of *in vitro* and *in vivo* genotoxicity assays. Metiram did not cause bacterial gene mutation, but there was evidence of mammalian gene mutation in two studies. The genotoxic effect was not considered to be related to the metabolism of metiram to ETU.

Metiram degrades and/or metabolizes to ETU which causes thyroid tumors; therefore, EPA has historically attributed metiram's potential for carcinogenicity to the formation of ETU, which is classified as a probable human carcinogen. The Agency has used the cancer potency factor (Q_1*) of 0.0601 (milligram/kilogram/day (mg/kg/day) ^{1}) for ETU (based on liver tumors in female mice) for risk assessment.

Developmental toxicity was observed for metiram in the rat (increased incidence of post-implantation loss, decreased litter size, and decreased litter weight) at a dose level where minimal maternal toxicity (decreased body-weight gains) was observed. However, there is low concern for the qualitative susceptibility observed in the rat study since the dose response was well characterized; there was a clear NOAEL (no observed adverse effect level)/LOAEL (lowest observed adverse effect level) for maternal and developmental toxicity; and the doses selected for risk assessment were based on neurotoxicity and address concerns for developmental toxicity and thyroid toxicity, which occurred at higher doses. Additionally, in a rabbit developmental study, in which the maternal animals were adequately assessed, maternal toxicity observed included abortions and decreased body-weight gains.

2. *ETU.* The thyroid is a target organ for ETU; thyroid toxicity in subchronic and chronic rat, mouse, and dog studies included decreased levels of T_4, increases or decreases in T_3, compensatory increases in levels of TSH, increased thyroid weight, and microscopic thyroid changes, chiefly hyperplasia. Overt liver toxicity was observed in one chronic dog study. ETU is classified as a probable human carcinogen based on liver tumors in female mice.

Developmental defects in the rat developmental study were similar to those seen with metiram, and included hydrocephaly and related lesions, skeletal system defects, and other gross defects. These defects showed increased susceptibility to fetuses because they occurred at a dose which only caused decreased maternal food consumption and body weight (BW) gain.

Specific information on the studies received and the nature of the adverse effects caused by metiram as well as the NOAEL and the LOAEL from the toxicity studies can be found at *http://www.regulations.gov* in the document titled "Metiram: Human Health Risk Assessment for PP#9E6006. Petition for the Establishment of Import Tolerances on Grapes and Bananas" on pages 18–21 in docket ID number EPA–HQ–OPP–2005–0308.

Additionally, specific information on the studies received and the nature of the toxic effects caused by ETU as well as the NOAEL and the LOAEL from the toxicity studies can be found at *http://www.regulations.gov* in the document titled "Ethylenethiourea (ETU) from EBDCs: Health Effects Division (HED) Human Health Risk Assessment of the Common Metabolite/Degradate ETU" on pages 16–17 in docket ID number EPA–HQ–OPP–2005–0308.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern (LOC) to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which the NOAEL and the LOAEL are identified. Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological endpoints for metiram used for human risk assessment is shown in Table 1 of this unit.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR METIRAM FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/scenario	POD and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary (General population including infants and children).	There was no appropriate endpoint attributable to a single dose in the available toxicity studies.		
Acute dietary (Females 13–50 years of age).	NOAEL = 10 mg/kg/day ..... UF_A = 10x UF_H = 10x FQPA SF = 10x UF_{DB}	Acute RfD = 0.01 mg/kg/day ..... aPAD = 0.01 mg/kg/day	Developmental Toxicity (Rabbit). LOAEL = 40 mg/kg/day, based on abortions.
Chronic dietary (All populations)	NOAEL = 0.4 mg/kg/day ..... UF_A = 10x UF_H = 10x FQPA SF = 10x UF_{DB}	Chronic RfD = 0.0004 mg/kg/day cPAD = 0.0004 mg/kg/day	Subchronic Oral Toxicity (Rat, bridging study). LOAEL = 6.7 mg/kg/day based on decreased forelimb grip strength.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR METIRAM FOR USE IN HUMAN HEALTH RISK ASSESSMENT—Continued

Exposure/scenario	POD and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Cancer (Oral, dermal, inhalation) ..	Q_1* = 6.01x10 ^{2} (mg/kg/day) ^{1} Metiram is classified as Group B2 carcinogen (probable human carcinogen); use low-dose extrapolation for human risk assessment, based on ETU. Quantitative cancer risk assessments for metiram and other EBDCs are based on exposure to the ETU degradate.		

EBDC = ethylene bisdithiocarbamate. ETU = ethylenethiourea. FQPA SF = Food Quality Protection Act Safety Factor. LOC = level of concern. LOAEL = lowest observed adverse effect level. Mg/kg/day = milligram/kilogram/day. NOAEL = no observed adverse effect level. PAD = population adjusted dose (a = acute, c = chronic). POD = point of departure. Q_1* = cancer potency factor. RfD = reference dose. UF_A = extrapolation from animal to human (interspecies). UF_{DB} = to account for the absence of data or other data deficiency. UF_H = potential variation in sensitivity among members of the human population (intraspecies).

A summary of the toxicological endpoints for ETU used for human risk assessment is discussed in Unit IV.B. of the final rule published in the **Federal Register** issue of August 18, 2010 (75 FR 50902) (FRL–8841–1).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to metiram, EPA considered exposure under the petitioned-for tolerances as well as all existing metiram tolerances in 40 CFR 180.217. In evaluating dietary exposure to ETU, EPA considered exposure under the petitioned-for tolerances discussed in this document as well as all existing and proposed uses of the EBDC group of fungicides (mancozeb, maneb, and metiram,) including the uses for which there are maneb tolerances even though all maneb registrations have been cancelled. EPA assessed dietary exposures from metiram and ETU in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. Such effects were identified for metiram and ETU. In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and the 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII).

a. *Metiram.* The following assumptions were made for the acute exposure assessments: The Agency conducted a refined probabilistic assessment using a distribution of either field trial or monitoring data for commodities considered to be either non-blended or partially blended. Average field trial or monitoring residues were used for blended commodities. Maximum percent crop treated (PCT) and relevant processing factors were also included in the assessment. The PCT information is not available for the proposed import tolerances; however, percent imported factors were incorporated for wine grapes. It was assumed 100% of imported wine grapes would contain residues of metiram. EPA assumed 100% of bananas are imported and would contain residues of metiram.

b. *ETU.* The following assumptions were made for the acute exposure assessments: The Agency conducted a highly refined, probabilistic acute dietary assessment incorporating maximum PCT information for new and existing EBDC uses, field trial, or monitoring data for existing EBDC uses, and processing and cooking factors. It was assumed that PCT of total EBDCs could not exceed 100%; and if commodities were treated with more than one EBDC in a season, the combination of EBDC applications leading to the highest total exposure potential was assumed to occur.

The PCT was estimated by summing the PCT for the individual EBDCs. For residue values, EPA used either market basket survey data or field trial data. For a few commodities mancozeb-derived ETU from mancozeb field trial data were used for both mancozeb and maneb because maneb field trial data were not available and application rates were sufficiently similar to estimate maneb-derived ETU values.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII.

a. *Metiram.* To estimate chronic dietary exposure and risk to metiram per se, a refined assessment was conducted using average field trial or average monitoring residues. In addition, average PCT and relevant processing factors were included. The PCT information is not available for the proposed import tolerances; however, percent imported factors were incorporated for bananas and wine grapes. It was assumed 100% of imported wine grapes would contain residues of metiram. EPA assumed 100% of bananas are imported and would contain residues of metiram.

b. *ETU.* Chronic anticipated residues were calculated from field trial data on EBDCs or monitoring data for ETU. Averages of the field trial and market basket survey residues were used. EPA also used PCT data.

iii. *Cancer.* EPA determines whether quantitative cancer exposure and risk assessments are appropriate for a food-use pesticide based on the weight of the evidence from cancer studies and other relevant data. If quantitative cancer risk assessment is appropriate, cancer risk may be quantified using a linear or nonlinear approach. If sufficient information on the carcinogenic mode of action is available, a threshold or nonlinear approach is used and a cancer RfD is calculated based on an earlier non-cancer key event. If carcinogenic mode of action data are not available, or if the mode of action data determines a mutagenic mode of action, a default linear cancer slope factor approach is utilized.

Metiram degrades and/or metabolizes to ETU which causes thyroid tumors; therefore, EPA has historically attributed metiram's potential for carcinogenicity to the formation of ETU, which is classified as a probable human carcinogen. The Agency has used the Q_1* of 0.0601 (mg/kg/day) ^{1} for ETU (based on liver tumors in female mice) for risk assessment. Therefore, cancer risk from exposure to metiram has been calculated by estimating exposure to metiram-derived ETU and using the Q_1* for ETU. The same approach has been taken for the other EBDCs. EPA's estimated exposure to metiram-derived ETU and ETU from other EBDCs included ETU residues found in food as well as ETU formed by metabolic conversion on parent metiram in the body (conversion rate of 0.075).

EPA relied on the same estimates used for the chronic exposure assessment in assessing cancer risk.

iv. *Anticipated residue and percent crop treated (PCT) information.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

- *Condition a.* The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.
- *Condition b.* The exposure estimate does not underestimate exposure for any significant subpopulation group.
- *Condition c.* Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area.

In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

In the 2007 acute risk assessment for metiram, the Agency estimated the PCT for existing uses as follows: Apple, 25% and potatoes, 10%.

In the 2007 chronic risk assessment for metiram the Agency estimated the PCT for existing uses as follows: Apple, 15% and potatoes, 10%.

In the 2007 acute risk assessment for ETU the Agency estimated the PCT for existing uses as follows: Apple, 65%; asparagus, 30%; barley, 2%; beans, dried, 2.5%; beets, sugar, 15%; Brussels sprouts, 32%; cantaloupe, 12.5%; carrot, 2.5%; casaba, 12.5%; cauliflower, 15%; celery, 12%; chickpea, 2.5%; Chinese waxgourd, 15%; chive, 20%; collards, 10%; corn, field, 2.5%; corn, sweet, 17.5%; cottonseed, oil, 3.5%; cranberry, 31%; cucumber, 40%; eggplant, 65%; fennel, Florence, 12%; fig, 1%; garlic, 25%; grape, 81.5%; guar, seed, 1%; honeydew melon, 12.5%; kale, 5%; leek, 25%; mustard greens, 5%; oat, 2%; onion, dry bulb, 85%; peanut, 3.5%; pear, 55%; potato, 85%; pumpkin, 15%; rice, 2.5%; rye grain, 2%; squash, summer, 35%; squash, winter, 0%; tomato, fresh, 80%; tomato, processed, 25%; turnip tops, 86%; walnut, 37.5%; watermelon, 55%; and wheat, grain, 3.5%.

For the 2007 chronic risk assessment for ETU the Agency estimated the PCT for existing uses as follows: Apple, 42%; asparagus, 21%; barley, 2%; beans, dried, 1%; beets, sugar, 6%; Brussels sprouts, 21%; cantaloupe, 6%; carrot, 8%; casaba, 6%; cauliflower, 5%; celery, 12%; chickpea, 1%; Chinese waxgourd, 5%; chive, 10%; collards, 10%; corn, field, 1%; corn, sweet, 11%; cottonseed, oil, 2%; cranberry, 31%; cucumber, 20%; eggplant, 45%; fennel, Florence, 12%; fig, 1%; garlic, 25%; grape, 60%; guar, seed, 1%; honeydew melon, 6%; kale, 5%; kohlrabi, 1%; leek, 10%; mustard greens, 5%; oat, 2%; onion, dry bulb, 60%; peanut, 2%; pear, 40%; potato, 63%; pumpkin, 6%; rice, 1%; rye grain, 2%; squash, summer, 25%; squash, winter, 25%; tomato, fresh, 54%; tomato, processed, 54%; walnut, 31%; watermelon, 10%; and wheat, grain, 31%.

For the 2010 ETU cancer risk assessment the Agency estimated the PCT for existing uses as follows: Apple, 51%; asparagus, 15%; barley, 1%; beans, dried, 1%; beets, sugar, 3.5%; Brussels sprouts, 15%; cantaloupe, 7.5%, carrot, 5%; cauliflower, 10%; chickpea, 1%; collards, 31%; corn, field, 1%; corn, sweet, 6%; cottonseed, oil, 11%; cranberry, 45%; cucumber, 30%; eggplant, 30%; fig, 5%; flaxseed, 11%; garlic, 25%; grape, 6%; guar, seed, 1%; kale, 73%; leek, 15%; mustard greens, 22%; oat, 11%; onion, dry bulb, 75%; peanut, 2%; pear, 35%; potato, 67.5%; pumpkin, 20.5%; rice, 1%; rye grain, 11%; safflower, oil, 11%; squash, summer, 57%; squash, winter, 26%; tomato, fresh, 30%; tomato, processed, 30%; turnip tops, 36%; walnut, 36%; watermelon, 45%; and wheat, grain, 11%.

In most cases, EPA uses available data from USDA/National Agricultural Statistics Service (NASS), proprietary market surveys, and the National Pesticide Use Database for the chemical/crop combination for the most recent 6–7 years. EPA uses an average PCT for chronic dietary risk analysis. The average PCT figure for each existing use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding to the nearest 5%, except for those situations in which the average PCT is less than one. In those cases, 1% is used as the average PCT and 2.5% is used as the maximum PCT. EPA uses a maximum PCT for acute dietary risk analysis. The maximum PCT figure is the highest observed maximum value reported within the recent 6 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%.

Percent crop treated information is not available for the proposed import tolerances; however, percent imported factors were incorporated for wine grapes.

In the 2007 acute risk assessment for metiram, the Agency estimated the percent imported factors for new uses as follows: Wine grape, 20%.

In the 2007 chronic risk assessment for metiram, the Agency estimated the percent imported factors for new uses as follows: Wine grape, 20%.

In the 2007 acute risk assessment for ETU the Agency estimated the percent imported for existing uses as follows: Wine grape, 81.5%.

For the 2007 chronic risk assessment for ETU the Agency estimated the percent imported for existing uses as follows: Wine grape, 60%.

For the 2010 ETU cancer risk assessment the Agency estimated the percent imported for existing uses as follows: Wine grape, 26%.

EPA estimates the percent crop treated for new uses (PCTn) of a pesticide represent the upper bound of use expected during the pesticide's initial 5 years of registration. The PCTn recommended for use in the chronic dietary assessment is calculated as the average PCT of the pesticide or pesticides that are the market leader or leaders, (*i.e.,* the pesticides with the greatest PCT) on that site over the 3 most recent years of available survey data. The PCTn recommended for use in the acute dietary assessment is the maximum observed PCT over the same period. Comparisons are only made among pesticides of the same pesticide types (e.g., the market leader for fungicides on the use site is selected for comparison with a new fungicide). The market leader included in the estimation may not be the same for each year since different pesticides may dominate at different times.

Typically, EPA uses USDA/NASS as the source data because it is publicly available and directly reports values for PCT. When a specific use site is not reported by USDA/NASS, EPA uses proprietary data and calculates the PCT given reported data on acres treated and

acres grown. If no data are available, EPA may extrapolate PCTn from other crops, if the production area and pest spectrum are substantially similar.

EPA refines PCTn estimates based on approaches other than the market leader approach if the previous PCTn estimates based on the market leader indicate that the chemical exposure potentially pose a risk of concern. EPA considers the pest or pest spectrum targeted by the chemical for the new uses and identifies other pesticides already registered on that crop that target the same pest or pest spectrum. The PCTn is calculated based on the data from the three most recently available pesticide usage surveys. If multiple chemicals are identified that target the same pest spectrum, then the one with the highest PCT is selected from each year/crop combination. Consideration is also given to the potential for the development of resistance for each chemical using data available from the Resistance Action Committees.

EPA has considered all available relevant information and concludes that it is unlikely that the PCTn values will be exceeded during the next 5 years.

The Agency believes that the three conditions discussed in Unit III.C.1.iv. have been met. With respect to Condition a, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions b and c, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available reliable information on the regional consumption of food to which metiram may be applied in a particular area.

2. *Dietary exposure from drinking water*—i. *Metiram.* The Agency has determined that metiram is very short-lived in soil and water, and would not reach water used for human consumption whether from surface water or ground water.

ii. *ETU.* ETU is highly water soluble, and may reach both surface and ground water under some conditions. The ETU surface water Estimated Drinking Water Concentrations (EDWCs) were generated using a combined monitoring/modeling approach. Results of a surface water monitoring study conducted by the ETU Task Force were used to refine the outputs of the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM–EXAMS) models; the site/scenario modeled was application of an EBDC fungicide on peppers in Florida, and was chosen to produce the highest EDWC acute values. The ground water EDWC was detected in a Florida community water system intake in a targeted ground water monitoring study conducted by the EBDC Task Force from 1999 to 2003. Both these surface and ground water values represent upper-bound conservative estimates of the total ETU residual concentrations that might be found in surface water and ground water due to the use of the EBDC fungicides.

Based on the PRZM/EXAMS and monitoring studies, the EDWCs of ETU acute and chronic exposures are estimated to be 25.2 parts per billion (ppb), and 0.1 ppb, respectively, for surface water. The EDWC for chronic exposure is estimated to be 0.21 ppb for ground water.

Estimates of drinking water concentrations were directly entered into the dietary exposure model. For acute dietary risk assessment, the water concentration value of 25.2 ppb was used to assess the contribution to drinking water. For chronic dietary risk assessment of ETU, the water concentration of value 0.21 ppb was used to assess the contribution to drinking water. For cancer dietary risk assessment of ETU, the water concentration of value 0.21 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

i. *Metiram.* Metiram is not registered for any specific use patterns that would result in residential exposure.

ii. *ETU.* ETU non-dietary exposure is expected as a result of the registered uses of mancozeb and the other EBDCs on home gardens, golf courses, and sod farms. For ETU, aggregate exposure sources include food, drinking water, home gardening activities, and golfing. The Agency has determined that it is appropriate to aggregate chronic exposure through food with short- and intermediate-term residential exposures to ETU.

The three scenarios that were evaluated for ETU are as follows: The first is the Short/Intermediate-Term Home Garden Aggregate, which combines handler exposures (inhalation and dermal) and post application garden exposures (dermal) plus average daily food and drinking water exposure for adults and post application garden exposures (dermal) plus average daily food and drinking water exposure for youth. The second is the Short-Term Treated Turf Aggregate (Toddlers), which combines treated turf post application exposures (incidental oral and dermal) plus average daily food and drinking water exposure for toddlers. The third is the Short/Intermediate-Term Treated Turf Aggregate, which considers short-term residential exposures (dermal) plus average daily food and drinking water exposure for adults such as golfing on treated turf. This assessment is protective of adult and youth golfers. Although exposure to children golfing could be almost twice that of the adult golfer because of increased surface area (SA)/BW ratios, younger golfers are not expected to use the golf course for the same length of time as adolescents and adults. The shorter duration on the golf course for younger golfers offsets the higher SA/BW; therefore, risks from short-term post-application exposures to young golfers are likely to be similar to risks for adult golfers.

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/trac/science/trac6a05.pdf.*

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

As previously mentioned, the risk estimates summarized in this document are those that result only from the use of metiram, and ETU derived from metiram and the other EBDC chemicals, which are all dithiocarbamates. For the purposes of this action, EPA has concluded that metiram does not share a common mechanism of toxicity with other substances. The Agency reached this conclusion after a thorough internal review and external peer review of the

data on a potential common mechanism of toxicity.

EPA concluded that the available evidence does not support grouping the dithiocarbamates based on a common toxic effect (neuropathology) occurring by a common mechanism of toxicity (related to metabolism to carbon disulfide (CS_2)). After a thorough internal and external peer review of the existing data bearing on a common mechanism of toxicity, EPA concluded that the available evidence shows that neuropathology cannot be linked with CS_2 formation. For more information, please see the December 19, 2001 memo, "The Determination of Whether Dithiocarbamate Pesticides Share a Common Mechanism of Toxicity" on the Internet at *http://www.epa.gov/oppsrrd1/cumulative/dithiocarb.pdf.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the Food Quality Protection Act Safety Factor (FQPA SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity*—i. *Metiram.* Developmental toxicity was observed in the rat (increased incidence of post-implantation loss, decreased litter size, and decreased litter weight) at a dose level where minimal maternal toxicity (decreased BW gains) was observed. However, there is low concern for the qualitative susceptibility observed in the rat study since the dose response was well characterized; there was a clear NOAEL/LOAEL for maternal and developmental toxicity; and the doses selected for risk assessment were based on neurotoxicity and address concerns for developmental toxicity and thyroid toxicity, which occurred at higher doses. In a rabbit developmental study, in which the maternal animals were adequately assessed, maternal toxicity observed included abortions and decreased BW gains. No qualitative or quantitative sensitivity was identified in the young in this study for the developmental effects assessed. Although many developmental effects were assessed, a new study was required because the study did not assess soft tissue and internal structures of the head. In a recently submitted developmental rabbit study with ETU, developmental effects in the brain were not observed at dose levels below those currently used for quantifying metiram risks, reducing concerns for these effects (see further description of study in this unit).

ii. *ETU.* There was evidence of increased susceptibility of fetuses to ETU in the rat developmental studies because hydrocephaly occurred at doses below those causing maternal toxicity. Recently the Agency reviewed a new developmental study in rabbits. Effects seen in the pups (decreased BW, domed heads, and hydrocephaly) were observed in the presence of maternal toxicity. The incidence of domed heads and hydrocephaly is within the range of historical controls. In addition, these effects are observed at levels higher than the effects observed in the rat study. An acceptable reproductive study was not available for ETU. As a result, the Agency evaluated the level of concern for the effects observed when considered in the context of all available toxicity data. In addition, the Agency evaluated the database to determine if there were residual uncertainties after establishing toxicity endpoints and traditional uncertainty factors to be used in the ETU risk assessment.

3. *Conclusion*—i. *Metiram.* Although there are no residual uncertainties for pre- and/or postnatal toxicity, the FQPA SF of 10X was retained due to database uncertainties for metiram. There are data gaps for a developmental neurotoxicity study (DNT), a developmental toxicity study in the rabbit and a 2-generation reproduction study in the rat. EPA determined that the FQPA SF must be retained to account for the lack of these studies, since the available data do not provide a basis to support reduction or removal of the factor.

No additional FQPA SF is needed beyond the 10X database uncertainty factor that was applied to account for the data gaps for a developmental neurotoxicity study, a developmental toxicity study in the rabbit, and a 2-generation reproduction study in the rat with metiram. The reasons for this conclusion are:

a. There are data gaps for studies that are critical for assessing effects on infants and children, but the Agency does have developmental toxicity (rat and rabbit) and reproduction data on metiram that provides some characterization of developmental and reproductive hazard. Although there was incomplete assessment of the fetal rabbit and there was incomplete measurement of some reproductive parameters in the reproduction study, the submitted studies provide a partial assessment of the effects of concern and sufficient information on pertinent toxic effects for EPA to conclude that a 10x database uncertainty factor is adequately protective.

b. Pre- and/or postnatal susceptibility has been adequately characterized in one species (rat).

c. The exposure assessment, although refined, is unlikely to underestimate potential exposures.

d. Although there is a data gap for a developmental neurotoxicity study, since the available metiram database includes NOAELs for neurotoxicity and neuropathology (decreased grip strength at lower doses, demyelination at high doses) in adult animals upon which risk assessments are based, this information helps to characterize the dose range at which effects can be expected in the developmental neurotoxicity study and thus informs dose selection for that study. Selected doses would be in the range of the dose levels from the prior studies at the NOAEL and LOAEL levels (0.4 and 6.7 mg/kg/day, respectively). Significant toxic effects occurring at doses more than 10-fold below these levels are unlikely.

ii. *ETU.* The toxicity database for ETU is not complete. EPA lacks the following studies: A DNT study, a 2-generation reproduction study, and a comparative thyroid study in adults and offspring. The Agency has recently received and evaluated a developmental toxicity study in rabbits. Given the remaining data gaps are for studies that directly assess the risk to the young, EPA does not have reliable data to remove or modify the presumptive 10X FQPA SF.

No additional safety factor beyond 10X is needed to account for the missing toxicity data for ETU for the following reasons:

a. The teratogenic effects of ETU have been well characterized in numerous studies in the published literature, as well as in a guideline study submitted by the registrant. In addition, since metabolism studies have shown that approximately 7.5% of the EBDCs (mancozeb, maneb, and metiram,) convert to ETU in mammalian systems, the extensive toxicity database on the EBDCs on developmental effects provide information about the pre- and postnatal toxicity of ETU as well as the parent compound;

b. There are clear NOAELs for developmental effects seen in the ETU developmental studies, and the dose-

response relationships, although steep, are well characterized.

c. The developmental endpoint with the lowest NOAEL was selected for deriving the acute PAD (aPAD).

d. Thyroid toxicity was selected for deriving the chronic PAD (cPAD) as well as endpoints for non-dietary exposures (incidental oral, dermal, and inhalation). Since the available ETU database includes NOAELs for thyroid toxicity in adult animals upon which risk assessments are based, this information helps to characterize the dose range at which effects can be expected in the developmental neurotoxicity study and thus would inform dose selection for the comparative thyroid study; selected doses would be in the range of these dose levels (NOAEL of 0.2 mg/kg/day and LOAEL of 2 mg/kg/day). Significant toxic effects occurring at doses more than 10-fold below these levels are unlikely.

e. Information on ETU gleaned from the extensive EBDC database on effects other than development effects also reduces, to a degree, the uncertainty arising from the significant data gaps for ETU.

f. EPA has concluded that the exposure assessment, although refined, is unlikely to underestimate potential exposures especially considering exposure to maneb was included even though all maneb products have been canceled. In making this judgment, EPA has taken into account that it is relying on three separate reviews in this document:

- A 2007 risk assessment for mancozeb for acute, short-term, intermediate-term, chronic, and cancer risk.
- A 2007 risk assessment for ETU for acute, short-term, intermediate-term, and chronic risk.
- A 2010 addendum to the 2007 ETU assessment for cancer risk—and that the PCT estimates differ slightly between reviews.

In comparing the PCT information from 2007 and 2010, there are some increases in usage for some crops, and there are decreases in usage for other crops. These differences appear to largely offset each other. Further, most of the increases are attributable to estimated increases in maneb usage but, as noted, maneb was canceled in 2010 and it is unlikely that existing stocks are sufficient to sustain prior usage levels much less any increased usage. An EPA sensitivity analysis of the main contributors to ETU exposure showed no significant increase in exposure from the changed PCT estimated. The PCT values used in these risk assessments are detailed in the memo titled "Mancozeb. Discussion on Percent Crop Treated Values Used in Aggregate and Chronic Assessments" in docket ID number EPA–HQ–OPP–2005–0308.

In any event, there are two other aspects of the exposure assessment that are likely to significantly overstate exposure to mancozeb and ETU. First, exposure estimates for some crops, including bananas, a high-consumption food, include the assumption that everything consumed in the United States has been treated. Second, the residue data used in the assessment for the proposed commodities and many other crops are based on crop field trials. Monitoring studies conducted for several crops have shown that residues on foods close to the point of consumption are much lower than the residues found in crop field trials.

For all of these reasons, EPA concludes that it has not underestimated exposure to mancozeb and ETU.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the aPAD and cPAD. For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk*—i. *Metiram.* The metiram acute aggregate assessment considers acute exposure to metiram only and not ETU. Further, this assessment is based on residues of metiram in food only since residues of metiram are not expected in drinking water. Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food to metiram will occupy 22% of the aPAD for females 13–49 years of age, the only population group of concern.

ii. *ETU.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to ETU will occupy 87% of the aPAD for females 13–49 years of age, the only population group of concern.

2. *Chronic risk*—i. *Metiram.* There are no long-term residential exposure scenarios for metiram and there is not likely to be residues of metiram in drinking water. Therefore, the long-term or chronic (non-cancer) aggregate risk for metiram includes contribution from food alone. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to metiram from food will utilize 70% of the cPAD for children 1–2 years of age, the population group receiving the greatest exposure.

ii. *ETU.* The aggregate chronic risks were calculated using food and water exposure only because golfing and toddler transplanted turf exposure scenarios were considered to occur only on a short term basis. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to ETU from food and water will utilize 50% of the cPAD for children (1 to 2 years old), the population group receiving the greatest exposure.

3. *Short- and Intermediate-term risk*—i. *Metiram.* Short- and intermediate-term aggregate exposure takes into account short- and intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

A short- and/or intermediate-term adverse effect was identified; however, metiram is not registered for any use patterns that would result in short- and/or intermediate-term residential exposure. Short- and intermediate-term risk is assessed based on short- and/or intermediate-term residential exposure plus chronic dietary exposure. Because there is no short- or intermediate-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess short-term risk), no further assessment of short- and/or intermediate-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating short- and intermediate-term risk for metiram.

ii. *ETU.* Short- and intermediate-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Although there are no residential uses for metiram, the previous ETU aggregate assessment included residential exposures to other EBDCs. Mancozeb is currently registered for uses that could result in short- and intermediate-term residential exposure to ETU. The 2007 ETU assessment also included products containing maneb which were expected to result in short- and intermediate-term exposure. As previously discussed, these products have since been cancelled. The Agency determined that

it was appropriate to aggregate chronic exposure through food with short- and intermediate-term residential exposures to ETU. The three scenarios that were evaluated for ETU are the following:

a. *ETU Short/Intermediate-Term Home Garden Aggregate.* The ETU short/intermediate-term home garden aggregate MOEs are 13,000 and 17,000 for adults and youth, respectively. For ETU EPA is concerned only with MOEs that are below 1,000, these MOEs do not raise a risk concern.

b. *ETU Short-Term Treated Turf Aggregate (Toddlers).* The ETU short-term treated turf aggregate MOE for toddlers is 1,100. For ETU EPA is concerned only with MOEs that are below 1,000; therefore, this MOE does not raise a risk concern.

c. ETU Short/Intermediate-Term Treated Turf Aggregate. The ETU short-term treated turf aggregate MOE for golfers is 6,100. For ETU EPA is concerned only with MOEs that are below 1,000; therefore, this MOE does not raise a risk concern.

4. *Aggregate cancer risk for U.S. population—Metiram and ETU.* As noted earlier in this document, EPA has historically attributed metiram's potential for carcinogenicity to the formation of ETU, which is classified as a probable human carcinogen (B2).

The cancer risks were aggregated using the food and drinking water exposures for the general population and the food, water and recreational exposures for golfers, home gardeners and athletes. The average daily dose was used for food and water exposures and the lifetime average daily dose was used for the recreational exposures. The aggregate doses were multiplied times the potency factor for ETU, 0.0601 $(mg/kg/day)^{-1}$ to determine the cancer risks. The risk is estimated to be 3×10^{-6}.

EPA generally considers cancer risks (expressed as the probability of an increased cancer case) in the range of 1 in 1 million (or 1×10^{-6}) or less to be negligible. The precision which can be assumed for cancer risk estimates is best described by rounding to the nearest integral order of magnitude on the logarithmic scale; for example, risks falling between 3×10^{-7} and 3×10^{-6} are expressed as risks in the range of 10^{-6}. Considering the precision with which cancer hazard can be estimated, the conservativeness of low-dose linear extrapolation, and the rounding procedure described in this unit, cancer risk should generally not be assumed to exceed the benchmark level of concern of the range of 10^{-6} until the calculated risk exceeds approximately 3×10^{-6}. This is particularly the case where some conservatism is maintained in the exposure assessment. Although the ETU exposure risk assessment is refined, it retains significant conservatism in that, for leafy greens, field trial data and not monitoring data on similar crops is used in estimating exposure. The leafy greens have tended to be among the top contributors to the aggregate risk (along with water and leaf lettuce). For other commodities, market basket data has shown reductions in residues one to two orders of magnitude lower than field trial data. Moreover, the only remaining EBDC registration for leafy greens (maneb) was canceled in 2010 but the exposure assessment does not take this into account. Additional conservatism is included in the exposure assessment by the assumption of 100 PCT for many commodities. Accordingly, EPA has concluded the aggregate cancer risk for all existing mancozeb and other EBDC uses and the uses associated with the tolerances established in this action fall within the range of 1×10^{-6} and are thus negligible.

5. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population or to infants and children from aggregate exposure to metiram and/or ETU residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

The available analytical methodology is considered adequate for tolerance enforcement. The Pesticide Analytical Manual (PAM) Vol. II lists Methods I, II, III, IV, and A for the determination of dithiocarbamate residues in or on plant commodities. The Keppel Colorimetric Method (PAM Method III) is the preferred method for tolerance enforcement. The Keppel Colorimetric Method determines EBDCs as a group by degradation to CS_2. For determination of ETU residues, the Agency recommends the gas chromatography (GC) Method of Onley (Association of Analytical Communities (AOAC) 14th Edition 29.119:554).

The methods may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (CODEX), as required by FFDCA section 408(b)(4). The CODEX is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a CODEX MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the CODEX level.

There are no established or proposed CODEX MRLs for residues of metiram per se; however, CODEX limits for dimethyldithiocarbamates fungicides are grouped under dithiocarbamates. There are CODEX MRLs for banana and grapes.

Tolerances for the EBDC pesticides are expressed in terms of CS_2, which is the same as the CODEX tolerance expression. The level of 5 ppm for wine grapes is the same as the CODEX MRL, although the CODEX MRL is for simply "grapes." The recommended tolerance for banana (3 ppm) cannot be harmonized with CODEX because residues in field trials exceeded the CODEX MRL of 2 ppm.

C. Response to Comments

As discussed in Unit II., EPA proposed tolerance actions for metiram in the **Federal Register** issue of September 16, 2009. EPA did receive comments on the proposed rule; however, none of these comments are related to the uses in this action.

D. Revisions to Petitioned-For Tolerances

EPA has revised the tolerance expression to clarify that:

1. As provided in FFDCA section 408(a)(3), the tolerance covers metabolites and degradates of metiram not specifically mentioned.

2. Compliance with the specified tolerance levels is to be determined by measuring only the specific compounds mentioned in the tolerance expression. The change in the tolerance expression has resulted in the existing tolerances for apple and potato needing to be modified. These tolerances are being modified by this document. In addition, as a follow-up to recommendations made in the Metiram RED document, a tolerance is being added for apple, pomace, wet at 2 ppm. All of these revisions were proposed in the **Federal Register** issue of September 16, 2009.

V. Conclusion

Therefore, tolerances are established for residues of metiram (a mixture of 5.2 parts by weight of ammoniates of [ethylenebis (dithiocarbamato)] zinc with 1 part by weight ethylenebis [dithiocarbamic acid] bimolecular and trimolecular cyclic anhydrosulfides and disulfides), including its metabolites and degradates, in or on banana at 3 ppm and grape, wine at 5 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Pursuant to the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency hereby certifies that this action will not have significant negative economic impact on a substantial number of small entities. Establishing a pesticide tolerance or an exemption from the requirement of a pesticide tolerance is, in effect, the removal of a regulatory restriction on pesticide residues in food and thus such an action will not have any negative economic impact on any entities, including small entities.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 20, 2011.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.217 is amended by revising the section heading and paragraph (a) to read as follows:

§ 180.217 Metiram; tolerances for residues.

(a) *General.* Tolerances are established for residues of a metiram (a mixture of 5.2 parts by weight of ammoniates of [ethylenebis (dithiocarbamato)] zinc with 1 part by weight ethylenebis [dithiocarbamic acid] bimolecular and trimolecular cyclic anhydrosulfides and disulfides), including its metabolites and degradates, in or on the commodities in the following table. Compliance with the tolerance levels specified in this paragraph is to be determined by measuring only those metiram residues convertible to and expressed in terms of the degradate carbon disulfide.

Commodity	Parts per million
Apple	0.5
Apple, pomace, wet	2
Banana [1]	3
Grape, wine [1]	5
Potato	0.2

[1] There are no U.S. registrations on bananas and grape, wine as of April 29, 2011.

* * * * *

[FR Doc. 2011–10333 Filed 4–28–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2010–0266; FRL–8869–5]

Pyrasulfotole; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes or revises tolerances for residues of pyrasulfotole in or on grain sorghum, grass, and livestock commodities. Bayer CropScience LLC requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective April 29, 2011. Objections and requests for hearings must be received on or before June 28, 2011, and must be filed in accordance with the instructions provided in 40 CFR part 178 (*see* also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2010–0266. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available,

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

FOR FURTHER INFORMATION CONTACT:

Susan Stanton, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (703) 305–5218; *e-mail address: stanton.susan@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

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

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2010–0266 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before June 28, 2011. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2010–0266, by one of the following methods:

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

II. Summary of Petitioned-for Tolerance

In the **Federal Register** of June 23, 2010 (75 FR 35801) (FRL–8831–3), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 9F7680) by Bayer CropScience LLC, 2 T. W. Alexander Drive, Research Triangle Park, NC 27709. The petition requested that 40 CFR part 180 be amended by establishing tolerances for residues of the herbicide pyrasulfotole, (5-hydroxy-1,3-dimethyl-1*H*-pyrazol-4-yl)[2-(methylsulfonyl)-4-(trifluoromethyl)phenyl]methanone, in or on sorghum, grain at 0.8 parts per million (ppm); sorghum, forage at 1.2 ppm; sorghum, stover at 0.35 ppm; grass, hay at 2.5 ppm; and grass, forage at 10 ppm. The petition also requested that established tolerances in 40 CFR 180.631 for residues of pyrasulfotole on livestock commodities be increased to the following levels: Cattle, goat, hog, sheep, horse, meat at 0.04 ppm; cattle, goat, hog, sheep, horse, fat at 0.04 ppm; cattle, goat, hog, sheep, horse, meat byproducts, except liver at 2 ppm; and cattle, goat, hog, sheep, horse, liver at 8 ppm. The petition requested that the new and revised tolerances be established for residues of pyrasulfotole, including its metabolites and degradates, but that compliance with the specified tolerance levels be determined by measuring only residues of pyrasulfotole, (5-hydroxy-1,3-dimethyl-1*H*-pyrazol-4-yl)-[2-(methylsulfonyl)-4-(trifluoromethyl)-phenyl]-methanone, and its desmethyl metabolite, (5–Hydroxy-3-methyl-1*H*-pyrazol-4-yl)-[2-(methylsulfonyl)-4-(trifluoromethyl)phenyl] methanone, calculated as the stoichiometric equivalent of pyrasulfotole, in or on the commodities. That notice referenced a summary of the petition prepared by Bayer CropScience LLC, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has revised the sorghum commodity terms and the proposed tolerances levels for sorghum, grass; and livestock commodities. The reasons for these changes are explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure

of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. * * *"

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for pyrasulfotole including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with pyrasulfotole follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Pyrasulfotole has low to moderate acute toxicity via the oral, dermal, and inhalation routes of exposure. It is not a dermal sensitizer or skin irritant but has been shown to be a moderate eye irritant.

Chronic oral exposure of rats to pyrasulfotole resulted in extensive eye toxicity at almost all doses tested. Eye effects included corneal opacity, neovascularization of the cornea, inflammation of the cornea, regenerative corneal hyperplasia, corneal atrophy, and/or retinal atrophy. Ocular toxicity is believed to be an indirect result of tyrosinemia caused by inhibition of hepatic HPPD (4-hydroxyphenylpyruvate dioxygenase). In mice, ocular toxicity was not observed at any dose, thereby reflecting accepted differences in effects among rodent species for HPPD inhibitors. Long-term exposure of mice to pyrasulfotole did cause toxicity of the urinary system, including the kidney, urinary bladder, and ureters at the highest dose tested (HDT), as well as gallstone formation at all doses tested. Dogs treated with pyrasulfotole for 1 year exhibited toxicity of the urinary system (kidneys and bladder) at mid and high doses, as well as cataracts at a very low incidence at the HDT.

In the combined chronic/carcinogenicity study in rats, two male rats had rare treatment-related corneal tumors at the HDT (104/140 milligrams/kilograms/day (mg/kg/day), M/F)), a dose associated with widespread corneal inflammation, hyperplasia, metaplasia, neurovascularization and atrophy. In the mouse carcinogenicity study, treatment-related urinary bladder transitional cell tumors were seen in males and females only at the HDT (560/713 mg/kg/day, M/F). The evidence from animal data is suggestive of carcinogenicity, which raises a concern for carcinogenic effects but is judged not sufficient for quantification of cancer risk in humans. In the case of pyrasulfotole, cancer risk from dietary exposure is less of a concern based on the following weight of evidence considerations:

- The incidence of ocular tumors was low (2/55), seen only at the high dose, and was associated with widespread corneal inflammation, hyperplasia, metaplasia, neurovascularization, and atrophy;
- It is biologically plausible for corneal tumors to result from a nongenotoxic mode of action that is secondary to corneal inflammation and regenerative hyperplasia caused by tyrosine;
- The urinary bladder tumors in mice were seen only at the high dose (one-half of the Limit Dose), which was determined to be an excessive dose due to occurrence of death, bladder stones, and bladder hyperplasia;
- Data from available toxicity studies showed dose and temporal concordance among putative key events for the biological plausibility for a nongenotoxic proliferative mechanism for the bladder tumors. This was evidenced by the concurrent presence of secondary inflammation and hyperplastic lesions in the urinary bladder induced by the urinary stones;
- In both species tumors were observed only at the highest dose tested (i.e., lack of dose-response);
- Pyrasulfotole and its benzoic metabolite, AE B197555, do not pose a mutagenic concern; and
- The NOAEL of 1.0 mg/kg/day used for deriving the chronic RfD is approximately 100- to 500-fold lower than the doses that induced ocular tumors in rats (104 mg/kg/day) and urinary bladder tumors in mice (560 mg/kg/day).

Thus, for all these reasons, the Agency has determined that a non-linear approach is adequate for assessing cancer risk and that the chronic PAD (0.01 mg/kg/day) will adequately account for all chronic effects, including carcinogenicity, likely to result from exposure to the pyrasulfotole.

Signs of potential neurotoxicity were observed in the acute neurotoxicity study in rats (decreased locomotor activity on the day of treatment), as well as in the rat subchronic neurotoxicity study (urine staining in the high dose females during the Functional Observational Battery) and rat developmental neurotoxicity (DNT) study (decreased brain weights, learning deficits, and the changes in brain morphometry).

In the prenatal developmental toxicity study in rats, an increased incidence of skeletal variations was observed in fetal offspring at the mid dose, as was decreased fetal body weight in male offspring. Both effects were observed in the presence of maternal toxicity (decreased body weight gain, enlarged placenta, clinical signs) at the same dose. In the DNT study in rats, ocular toxicity as well as several adverse developmental effects (delayed preputial separation, morphometric changes, and delays in learning/memory) were observed at the mid dose. Ocular toxicity was also observed at this dose in maternal animals; an identical NOAEL was established in both dams and offspring. In the prenatal developmental toxicity study in rabbits, an increased incidence of skeletal variations was observed in fetal offspring at the mid dose. However, maternal toxicity (decreased body weight gain and food consumption) was observed only at the next highest dose tested. Therefore, increased quantitative susceptibility of offspring was observed in the rabbit developmental toxicity study, but not in the developmental toxicity or DNT studies in rats.

In the 2-generation reproductive toxicity study in rats, ocular toxicity (keratitis, corneal opacity and/or corneal neovascularization), was observed at the mid and high doses in the adults and offspring of 2-generations. Thyroid (colloid alteration, pigment deposition) and kidney (tubular dilation) toxicity were observed in adult animals of each generation. Colloid alteration and pigment deposition were also observed in rats following short-term dermal and chronic oral exposure of rats, although they were attributed to aging in the latter case. At the highest dose tested, decreased viability and decreased body weight were observed in offspring of both generations. At the mid and/or high doses, delays in balanopreputial separation (males) and vaginal patency (females) were observed in first-generation offspring.

Specific information on the studies received and the nature of the adverse effects caused by pyrasulfotole as well as the NOAEL and the lowest-observed-

adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document "Pyrasulfotole: Human-Health Risk Assessment for Proposed Section 3 Uses on Grain Sorghum and Grass Grown for Seed," p. 30 in docket ID number EPA–HQ–OPP–2010–0266.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, *see http://www.epa.gov/pesticides/factsheets/riskassess.htm*.

A summary of the toxicological endpoints for pyrasulfotole used for human risk assessment is shown in the following Table:

TABLE—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR PYRASULFOTOLE FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary (All populations)	NOAEL = 3.8 milligrams/kilograms/day (mg/kg/day). UF_A = 10x UF_H = 10x FQPA SF = 1x	Acute RfD = 0.038 mg/kg/day ..... aPAD = 0.038 mg/kg/day	Developmental neurotoxicity (rat; dietary). LOAEL = 37 mg/kg/day based on delayed preputial separation (males), decreased cerebrum length (PND 21 females), and decreased cerebellum height (PND 21 males).
Chronic dietary (All populations)	NOAEL= 1.0 mg/kg/day ..... UF_A = 10x UF_H = 10x FQPA SF = 1x	Chronic RfD = 0.01 mg/kg/day ..... cPAD = 0.01 mg/kg/day	Combined chronic toxicity/carcinogenicity (rat; dietary). LOAEL = 10/14 mg/kg/day (M/F) based on corneal opacity, neovascularization of the cornea, inflammation of the cornea, regenerative corneal hyperplasia, corneal atrophy, and/or retinal atrophy (both sexes), and hepatocellular hypertrophy along with increased serum cholesterol (males).
Cancer (Oral, dermal, inhalation) ..	Classification: "Suggestive Evidence of Carcinogenic Potential" based on increased incidences of corneal tumors in male rats (oral carcinogenicity study) and urinary bladder tumors in male and female mice (oral carcinogenicity study).		

UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). UF_L = use of a LOAEL to extrapolate a NOAEL. UF_S = use of a short-term study for long-term risk assessment. UF_{DB} = to account for the absence of data or other data deficiency. FQPA SF = Food Quality Protection Act Safety Factor. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. MOE = margin of exposure. LOC = level of concern.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to pyrasulfotole, EPA considered exposure under the petitioned-for tolerances as well as all existing pyrasulfotole tolerances in 40 CFR 180.631. EPA assessed dietary exposures from pyrasulfotole in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. Such effects were identified for pyrasulfotole. In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, EPA assumed that residues are present in all commodities at the tolerance level and that 100% of commodities are treated with pyrasulfotole. Dietary Exposure Evaluation Model (DEEM) ™ 7.81 default concentration factors were used to estimate residues of pyrasulfotole in processed commodities.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII. As to residue levels in food, EPA assumed tolerance-level residues and 100 percent crop treated (PCT) and used DEEM™ 7.81 default concentration factors to estimate residues of pyrasulfotole in processed commodities.

iii. *Cancer.* EPA determines whether quantitative cancer exposure and risk assessments are appropriate for a food-use pesticide based on the weight of the evidence from cancer studies and other relevant data. Cancer risk is quantified using a linear or nonlinear approach. If

sufficient information on the carcinogenic mode of action is available, a threshold or non-linear approach is used and a cancer RfD is calculated based on an earlier noncancer key event. If carcinogenic mode of action data are not available, or if the mode of action data determines a mutagenic mode of action, a default linear cancer slope factor approach is utilized. Based on the data summarized in Unit III.A., EPA has concluded that a nonlinear RfD approach is appropriate for assessing cancer risk to pyrasulfotole. Cancer risk was assessed using the same exposure estimates as discussed in Unit III.C.1.ii., *chronic exposure.*

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for pyrasulfotole in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of pyrasulfotole. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm*.

Based on the First Index Reservoir Screening Tool (FIRST) and Screening Concentration in Ground Water (SCI–GROW) models, the estimated drinking water concentrations (EDWCs) of pyrasulfotole for acute exposures are estimated to be 6.9 parts per billion (ppb) for surface water and 2.4 ppb for ground water. For chronic exposures for non-cancer assessments the EDWCs are estimated to be 4.8 ppb for surface water and 2.4 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For acute dietary risk assessment, the water concentration value of 6.9 ppb was used to assess the contribution to drinking water. For chronic dietary risk assessment, the water concentration of value 4.8 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Pyrasulfotole is not registered for any specific use patterns that would result in residential exposure.

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

Pyrasulfotole, mesotrione, isoxaflutole, and topramezone belong to a class of herbicides that inhibit the liver enzyme HPPD, which is involved in the catabolism (metabolic breakdown) of tyrosine (an amino acid derived from proteins in the diet). Inhibition of HPPD can result in elevated tyrosine levels in the blood, a condition called tyrosinemia. HPPD-inhibiting herbicides have been found to cause a number of toxicities in laboratory animal studies including ocular, developmental, liver, and kidney effects. Of these toxicities, it is the ocular effect (corneal opacity) that is highly correlated with the elevated blood tyrosine levels. In fact, rats dosed with tyrosine alone show ocular opacities similar to those seen with HPPD inhibitors. Although the other toxicities may be associated with chemically-induced tyrosinemia, other mechanisms may also be involved.

There are marked differences among species in the ocular toxicity associated with inhibition of HPPD. Ocular effects following treatment with HPPD-inhibitor herbicides are seen in the rat but not in the mouse. Monkeys also seem to be recalcitrant to the ocular toxicity induced by HPPD inhibition. The explanation of this species-specific response in ocular opacity is related to the species differences in the clearance of tyrosine. A metabolic pathway exists to remove tyrosine from the blood that involves a liver enzyme called tyrosine aminotransferase (TAT). In contrast to rats where ocular toxicity is observed following exposure to HPPD-inhibiting herbicides, mice and humans are unlikely to achieve the levels of plasma tyrosine necessary to produce ocular opacities, because the activity of TAT in these species is much greater compared to rats. Thus, humans and mice have a highly effective metabolic process for handling excess tyrosine.

HPPD inhibitors (e.g., nitisinone) are used as effective therapeutic agents to treat patients suffering from rare genetic diseases of tyrosine catabolism. Treatment starts in childhood but is often sustained throughout the patient's lifetime. The human experience indicates that a therapeutic dose (1 mg/kg/day dose) of nitisinone has an excellent safety record in infants, children, and adults and that serious adverse health outcomes have not been observed in a population followed for approximately a decade. Rarely, ocular effects are seen in patients with high plasma tyrosine levels; however, these effects are transient and can be readily reversed upon adherence to a restricted protein diet. This indicates that an HPPD inhibitor in and of itself cannot easily overwhelm the tyrosine-clearance mechanism in humans.

Therefore, due to an efficient metabolic process to handle excess tyrosine, exposure to environmental residues of HPPD-inhibiting herbicides is unlikely to result in high blood levels of tyrosine and ocular toxicity in humans; and EPA has concluded that a cumulative risk assessment with other HPPD inhibitors is unnecessary. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative*.

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the Food Quality Protection Act (FQPA) Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* The prenatal and postnatal toxicity database for pyrasulfotole includes developmental toxicity studies in rats and rabbits, a DNT study in rats and a 2-generation reproductive toxicity study in rats. As discussed in unit III.A, there was quantitative evidence of increased susceptibility of fetal offspring in the developmental toxicity study in rabbits. In this study, an increased incidence of skeletal variations was observed in fetal offspring at the mid dose; whereas maternal toxicity (decreased body weight gain and food consumption) was observed only at the next highest dose tested.

The concern for increased susceptibility seen in the rabbit developmental toxicity study is low because a) there is well established developmental NOAEL in this study, b) the increased susceptibility was not seen in the rat developmental toxicity study, the DNT study in rats, or the 2-generation reproduction study in rats,

and c) the NOAEL of the study chosen for the chronic RfD (1 mg/kg/day) is 10-fold lower than the NOAEL observed in the rabbit developmental toxicity study.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for pyrasulfotole is largely complete, lacking only an immunotoxicity study. There is no evidence of potential immunotoxicity (such as effects on the spleen or thymus, or increased globulins) in the available toxicity studies for pyrasulfotole; and EPA is using critical studies for the chronic and acute RfDs that have the lowest NOAELs in the database for those exposure durations. Therefore, EPA does not believe that conducting a functional immunotoxicity study will result in a lower POD than that currently used for overall risk assessment, and a database uncertainty factor (UF_{DB}) is not needed to account for lack of this study.

ii. Although there were signs of neurotoxicity observed in the acute, subchronic and developmental neurotoxicity studies, EPA's concern for these effects is low. The critical study (developmental neurotoxicity study in rats) chosen for the acute RfD has a well-defined NOAEL that is 54-fold lower than the dose at which effects (decreased locomotor activity on day 0) were seen in the acute neurotoxicity study. The critical study (chronic toxicity/carcinogenicity study in the rat) chosen for the chronic RfD also has a well-defined NOAEL that is 42- and 37-fold lower than the doses at which effects were observed in the subchronic and developmental neurotoxicity studies, respectively. Therefore, EPA does not believe that an additional uncertainty factor is needed to account for neurotoxicity.

iii. Although there is evidence of increased quantitative susceptibility of *in utero* rabbits in the prenatal developmental toxicity study, the degree of concern for developmental effects is low, and EPA did not identify any residual uncertainties after establishing toxicity endpoints and traditional UFs to be used in the risk assessment of pyrasulfotole.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100 PCT and tolerance-level residues. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to pyrasulfotole in drinking water. These assessments will not underestimate the exposure and risks posed by pyrasulfotole.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to pyrasulfotole will occupy 9% of the aPAD for children 1 to 2 years old, the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to pyrasulfotole from food and water will utilize 16% of the cPAD for children 1 to 2 years old, the population group receiving the greatest exposure. There are no residential uses for pyrasulfotole.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). A short-term adverse effect was identified; however, pyrasulfotole is not registered for any use patterns that would result in short-term residential exposure. Short-term risk is assessed based on short-term residential exposure plus chronic dietary exposure. Because there is no short-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess short-term risk), no further assessment of short-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating short-term risk for pyrasulfotole.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). An intermediate-term adverse effect was identified; however, pyrasulfotole is not registered for any use patterns that would result in intermediate-term residential exposure. Intermediate-term risk is assessed based on intermediate-term residential exposure plus chronic dietary exposure. Because there is no intermediate-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess intermediate-term risk), no further assessment of intermediate-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating intermediate-term risk for pyrasulfotole.

5. *Aggregate cancer risk for U.S. population.* As explained in Unit III.A, risk assessments based on the endpoint selected for chronic risk assessment are considered to be protective of any potential carcinogenic risk from exposure to pyrasulfotole. Based on the results of the chronic risk assessment discussed above in Unit III.E.2, EPA concludes that pyrasulfotole is not expected to pose a cancer risk.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to pyrasulfotole residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology is available to enforce the tolerance expression. Bayer Method AI–001–P04–02 (a high-performance liquid chromatography (HPLC)/mass spectrometry (MS)/MS method) is available to enforce pyrasulfotole tolerances in plants. Bayer Method AI–006–A08–01 (an HPLC–MS/MS method) is suitable as an enforcement method for livestock commodities. The methods may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4).

The Codex Alimentarius is a joint U.N. Food and Agriculture Organization/ World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established a MRL for pyrasulfotole on grain sorghum, grass, or livestock commodities.

C. Revisions to Petitioned-For Tolerances

EPA has revised the sorghum commodity terms and the tolerance levels for both sorghum and grass commodities. The sorghum commodity terms have been revised (from "sorghum, grain;" sorghum, forage;" and sorghum, stover" to "sorghum, grain, grain;" "sorghum, grain, forage;" and "sorghum, grain, stover") to agree with the accepted terminology in the Agency's Food and Feed Vocabulary. The tolerance levels for sorghum and grass commodities have been revised as follows based on analysis of the field trial data using the Agency's NAFTA-harmonized tolerance/MRL calculator in accordance with the *Guidance for Setting Pesticide Tolerances Based on Field Trial Data:* Sorghum, grain, grain from 0.8 ppm to 0.70 ppm; sorghum, grain, forage from 1.2 ppm to 1.5 ppm; sorghum, grain, stover from 0.35 ppm to 0.80 ppm; grass, forage from 10 ppm to 25 ppm; and grass, hay from 2.5 ppm to 3.5 ppm.

Based on the results of the cattle feeding study and the calculated maximum reasonable dietary burden (MRDB) for cattle, EPA determined that the existing tolerance of 0.02 ppm in or on the meat of cattle, goat, horse, and sheep is adequate and need not be raised to 0.04 ppm, as proposed; but that tolerances should be established for residues of pyrasulfotole and its desmethyl metabolite in or on milk at 0.03 ppm (no increase in the established tolerance of 0.01 ppm was proposed); fat of cattle, goat, horse and sheep at 0.03 ppm (proposed at 0.04 ppm); liver of cattle, goat, horse, and sheep at 3.0 ppm (proposed at 8 ppm); and meat byproducts, except liver, of cattle, goat, horse, and sheep at 0.70 ppm (proposed at 2 ppm).

Based upon a MRDB for hogs, there is no reasonable expectation of finding quantifiable residues of pyrasulfotole or its desmethyl metabolite in hog muscle and fat; thus, the current tolerances of 0.02 ppm are adequate (proposed at 0.04 ppm). There is a reasonable expectation of residues of pyrasulfotole and/or its desmethyl metabolite in hog liver and kidney, and EPA has determined that tolerances for these commodities should be set at the following levels: hog, meat byproducts, except liver at 0.05 ppm (proposed at 2 ppm); and hog, liver at 0.30 ppm (proposed at 8 ppm).

The petitioner did not propose changes to the existing poultry tolerances for pyrasulfotole; however, based on the results of the poultry metabolism study and the calculated MRDB for poultry, EPA has determined that the existing tolerance for residues of pyrasulfotole and its desmethyl metabolite in or on poultry, meat byproducts should be increased from 0.02 ppm to 0.20 ppm.

V. Conclusion

Therefore, tolerances are established for residues of pyrasulfotole, including its metabolites and degradates as set forth in the regulatory text.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 21, 2011.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.631 is amended by revising the introductory text and table in paragraph (a) to read as follows:

§ 180.631 Pyrasulfotole; tolerances for residues.

(a) *General.* Tolerances are established for residues of the herbicide pyrasulfotole, including its metabolites and degradates, in or on the commodities in the table below. Compliance with the tolerance levels specified below is to be determined by measuring only the sum of pyrasulfotole ((5-hydroxy-1,3-dimethyl-1*H*-pyrazol-4-yl)[2-(methylsulfonyl)-4-(trifluoromethyl)phenyl]methanone) and its desmethyl metabolite (5-hydroxy-3-methyl-1*H*-pyrazol-4-yl)[2-(methylsulfonyl)-4-(trifluoromethyl)phenyl]methanone), calculated as the stoichiometric equivalent of pyrasulfotole, in or on the commodities:

Commodity	Parts per million
Aspirated grain fractions	0.40
Barley, grain	0.02
Barley, hay	0.30
Barley, straw	0.20
Cattle, fat	0.03
Cattle, liver	3.0
Cattle, meat	0.02
Cattle, meat byproducts, except liver	0.70
Eggs	0.02
Goat, fat	0.03
Goat, liver	3.0
Goat, meat	0.02
Goat, meat byproducts, except liver	0.70
Grass, forage	25
Grass, hay	3.5
Hog, fat	0.02
Hog, liver	0.30
Hog, meat	0.02
Hog, meat byproducts, except liver	0.05
Horse, fat	0.03
Horse, liver	3.0
Horse, meat	0.02
Horse, meat byproducts, except liver	0.70
Milk	0.03
Oat, forage	0.10
Oat, grain	0.08
Oat, hay	0.50
Oat, straw	0.20
Poultry, fat	0.02
Poultry, meat	0.02
Poultry, meat byproducts	0.20
Rye, forage	0.20
Rye, grain	0.02
Rye, straw	0.20
Sheep, fat	0.03
Sheep, liver	3.0
Sheep, meat	0.02
Sheep, meat byproducts, except liver	0.70
Sorghum, grain, forage	1.5
Sorghum, grain, grain	0.70
Sorghum, grain, stover	0.80
Wheat, forage	0.20
Wheat, grain	0.02
Wheat, hay	0.80
Wheat, straw	0.20

* * * * *

[FR Doc. 2011–10435 Filed 4–28–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2010–0267; FRL–8870–9]

Mefenpyr-diethyl; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of mefenpyr-diethyl in or on multiple commodities. Bayer CropScience LLC requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA). This regulation also moves established tolerances for canola and soybean commodities to correct an administrative error.

DATES: This regulation is effective April 29, 2011. Objections and requests for hearings must be received on or before June 28, 2011, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2010–0267. All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Bethany Benbow, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 347–8072; e-mail address: *benbow.bethany@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

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

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–

OPP–2010–0267 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before June 28, 2011. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2010–0267, by one of the following methods:

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

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of June 23, 2010 (75 FR 35804) (FRL–8831–3), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 9F7679) by Bayer CropScience LLC, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709. The petition requested that 40 CFR 180.509 be amended by establishing tolerances for residues of the herbicide safener, mefenpyr-diethyl including its metabolites and degradates with compliance to be determined by measuring residues of mefenpyr-diethyl, (1-(2,4-dichlorophenyl)-4,5-dihydro-5-methyl-1H-pyrazole-3,5-dicarboxylic acid, diethyl ester) and its dichlorophenyl-pyrazoline metabolites, in or on grass, forage at 1.5 parts per million (ppm); grass, hay at 0.05 ppm; sorghum, forage at 0.1 ppm; sorghum, grain at 0.01 ppm; and sorghum, stover at 0.05 ppm. That notice referenced a summary of the petition prepared by Bayer CropScience LLC, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has increased the proposed tolerance for all proposed commodities as follows: Grass, forage from 1.5 to 1.6 ppm; grass, hay from 0.05 to 0.2 ppm; sorghum, forage from 0.1 to 0.4 ppm; sorghum, grain from 0.01 to 0.04 ppm; and sorghum, stover from 0.05 to 0.2 ppm. The reasons for these changes are explained in Unit IV.C.

In the **Federal Register** of December 10, 2008 (73 FR 74977) (FRL–8390–8), EPA established tolerances for residues of mefenpyr-diethyl in or on canola, seed; soybean, forage; soybean, hay; and soybean, seed. These tolerances were identified as rotational crop tolerances in the final rule; however, they were placed in paragraph (a) of 40 CFR 180.509 in error. They should have been placed in paragraph (d) as tolerances for indirect or inadvertent residues. EPA is moving these tolerances from paragraph (a) to paragraph (d) to correct this administrative error. Moving these tolerances between subsections has no substantive effect, it merely makes them easier to identify as rotational crop tolerances.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. * * *"

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for mefenpyr-diethyl including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with mefenpyr-diethyl follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Mefenpyr-diethyl has low acute toxicity by the oral, dermal, and inhalation routes of exposure. It is not a dermal irritant but is a slight ocular irritant and dermal sensitizer. Repeated exposure of rats *via* the dermal route did not induce any treatment-related effects at dose levels up to and including the limit dose. Repeated exposure studies *via* the oral route demonstrate that the target organs are the liver and hematopoietic system in dogs, mice, and rats. Effects observed in dogs included increased liver weight and alkaline phosphatase activity (both sexes), focal liver lesions (females), slight anemia (both sexes), decreased mean body weight and body weight gain (females) and decreased food consumption (both sexes). Effects observed in mice included decreased body weight and kidney weight, increased liver weight, and hepatocyte hypertrophy (males), as well as decreased bilirubin and increased lactic acid dehydrogenase values (females). Effects observed in rats included increases in reticulocyte counts (both sexes), and decreased red blood count, hemoglobin, and hematocrit values (females). Mefenpyr-diethyl was negative for carcinogenicity in rats and mice, and is classified as "not likely to be carcinogenic to humans." The available studies did not indicate any genotoxic or neurotoxic potential. Developmental toxicity was not observed in the rat but was observed in the rabbit (abortions) at the same dose level producing maternal toxicity. Mefenpyr-diethyl did not induce any signs of reproductive toxicity. The developmental toxicity studies in rats and rabbits, as well as the reproductive toxicity study in rats, did not demonstrate any pre- or post-natal sensitivity.

Specific information on the studies received and the nature of the adverse effects caused by mefenpyr-diethyl as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document, *Mefenpyr-diethyl (HOE 107892) Safener: Revised Human Health Risk Assessment to Support the New use Petition on Sorghum [grain, stover, and forage] and Grass Grown for Seed (including Conservation Reserve Program areas),* at pages 31–36 in docket ID number EPA–HQ–OPP–2010–0267.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological endpoints for mefenpyr-diethyl used for human risk assessment is shown in Table 1 of this unit.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR MEFENPYR-DIETHYL FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary (Females 13–50 years of age).	No hazard was identified in any toxicity study for this duration of exposure.		
Acute dietary (General population including infants and children).	No hazard was identified in any toxicity study for this duration of exposure.		
Chronic dietary (All populations)	NOAEL = 51 mg/kg/day ..... UF_A = 10x UF_H = 10x FQPA SF = 1x	Chronic RfD = 0.51 mg/kg/day ..... cPAD = 0.51 mg/kg/day	chronic oral toxicity study (dog). LOAEL = 260 mg/kg/day, based on increased liver weight in both sexes, cholestasis, and increased alkaline phosphatase. chronic toxicity/carcinogenicity study (rat). LOAEL = 252 (males)/318 (females) mg/kg/day, based on statistically significant increases in reticulocyte counts in both sexes, and decreased RBC, hemoglobin, and hematocrit values in females. NOAEL = 48.5 (males)/60 (females) mg/kg/day.
Cancer (oral)	Classification: Not likely to be carcinogenic to humans.		

UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). UF_L = use of a LOAEL to extrapolate a NOAEL. UF_S = use of a short-term study for long-term risk assessment. UF_{DB} = to account for the absence of data or other data deficiency. FQPA SF = Food Quality Protection Act Safety Factor. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. MOE = margin of exposure. LOC = level of concern.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to mefenpyr-diethyl, EPA considered exposure under the petitioned-for tolerances as well as all existing mefenpyr-diethyl tolerances in 40 CFR 180.509. EPA assessed dietary exposures from mefenpyr-diethyl in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. No such effects were identified in the toxicological studies for mefenpyr-diethyl; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII. As to residue levels in food, EPA conducted a highly conservative chronic dietary risk assessment for mefenpyr-diethyl using tolerance level residues and assuming 100% crop treated for all commodities.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA classified mefenpyr-diethyl as "not likely to be carcinogenic to humans." Therefore, an exposure assessment to evaluate cancer risk is unnecessary for this chemical.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for mefenpyr-diethyl in drinking water. These simulation models take into

account data on the physical, chemical, and fate/transport characteristics of mefenpyr-diethyl. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Based on the First Index Reservoir Screening Tool (FIRST) and Screening Concentration in Ground Water (SCI–GROW2) models, the estimated drinking water concentrations (EDWCs) of mefenpyr-diethyl for chronic exposures for non-cancer assessments are estimated to be 3 ppb for surface water and 4 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For chronic dietary risk assessment, the water concentration of value 4 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Mefenpyr-diethyl is not registered for any specific use patterns that would result in residential exposure.

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity." EPA has not found mefenpyr-diethyl to share a common mechanism of toxicity with any other substances, and mefenpyr-diethyl does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that mefenpyr-diethyl does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* There is little concern for prenatal toxicity resulting from exposure to mefenpyr-diethyl. There is no evidence of increased susceptibility [qualitative and quantitative] following *in utero* exposure to mefenpyr-diethyl in either the rat or rabbit developmental toxicity study, and there is no evidence of increased susceptibility [qualitative or quantitative] following *in utero* and/or pre-/post-natal exposure in the 2-generation reproduction study in rats. Developmental toxicity was not observed in the rat at the limit dose (1000 mg/kg/day) in one of two available rat developmental studies. In the second study, the only effects observed were decreased body-weight gain and food efficiency during the first week of dosing and increased spleen weights in the maternal animal and a marginal decrease in fetal body weight/body-weight gain during lactation (postnatal study). Developmental toxicity (abortions) was observed in the rabbit at a dose level of 250 mg/kg/day. In the reproduction study, decreased body weight and body-weight gain (parental animal and offspring) and an increase in spleen weight and in the severity (not incidence) of splenic extramedullary hematopoiesis were observed in females. There is no evidence of neurotoxicity, and there are no residual concerns.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA safety factor were reduced to 1X. That decision is based on the following findings:

i. The toxicology database for mefenpyr-diethyl is largely complete, missing only acute and subchronic neurotoxicity studies and an immunotoxicity study. EPA has determined that an additional uncertainty factor is not needed to account for the lack of these studies for the following reasons:

- There is no evidence in the existing studies to suggest that mefenpyr-diethyl targets either the immune system or the nervous system. EPA considered the entire toxicity database (subchronic, chronic, carcinogenicity, developmental and reproductive studies) of mefenpyr-diethyl for evidence of potential immunotoxic and neurotoxic effects. EPA did note that enlarged spleens, more severe hematopoiesis and hemosiderin deposits, and increased spleen weights were observed in mice at doses greater than the limit dose. However, these were determined to be non-specific changes not indicative of immunotoxicity. Additionally, no evidence of neurotoxicity was found. Therefore, based on the above considerations, EPA does not believe that conducting acute and subchronic neurotoxicity or immunotoxicity studies will result in a NOAEL less than the NOAEL of 51 mg/kg/day already set for mefenpyr-diethyl.
- Overall, the toxicity of mefenpyr-diethyl is low. The endpoints were assumed by EPA to be treatment-related, a conservative assumption intended to ensure the risk assessment is protective of potential effects.

Based on these considerations, EPA does not expect the required studies to provide lower points of departure than those currently selected for risk assessment, and an additional uncertainty factor is not needed to account for the lack of these studies.

ii. There is no evidence of neurotoxicity in the available toxicology database and no evidence of significant developmental toxicity in either the rat or rabbit developmental toxicity studies. Based on these considerations, there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

iii. There is no evidence of increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2-generation reproduction study.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100% CT and tolerance-level residues. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to mefenpyr-diethyl in drinking water. These assessments will not underestimate the exposure and risks posed by mefenpyr-diethyl.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the

estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. No adverse effect resulting from a single oral exposure was identified and no acute dietary endpoint was selected. Therefore, mefenpyr-diethyl is not expected to pose an acute risk.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to mefenpyr-diethyl from food and water will utilize less than 1% of the cPAD for infants, less than 1 year old, the population group receiving the greatest exposure. There are no residential uses for mefenpyr-diethyl.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Because mefenpyr-diethyl does not have residential uses that would result in residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess short-term risk), no further assessment of short-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating short-term risk for, mefenpyr-diethyl.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Because mefenpyr-diethyl does not have residential uses that would result in residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess short-term risk), no further assessment of intermediate-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating intermediate-term risk for, mefenpyr-diethyl.

5. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, mefenpyr-diethyl is not expected to pose a cancer risk to humans.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to mefenpyr-diethyl residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology is available to enforce the tolerance expression. An enforcement method for plants entitled "An Analytical Method for Determination of Residues of AE F107892 (mefenpyr-diethyl) and its Metabolites in Wheat and Barley by Gas Chromatography using Mass Selective Detection" is available. Radiovalidation and independent laboratory validation (ILV) data have been submitted for the plant method. The Agency determined that this method is suitable for food tolerance enforcement of mefenpyr-diethyl and the three metabolites AE F094270, AE F113225, and/or AE F109453.

This method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint U.N. Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level. The Codex has not established a MRL for mefenpyr-diethyl.

C. Revisions to Petitioned-for Tolerances

EPA has revised the sorghum commodity terms and the tolerances levels for both sorghum and grass commodities. The sorghum commodity terms have been revised from "sorghum, grain;" "sorghum, forage;" and "sorghum, stover" to "sorghum, grain, grain;" "sorghum, grain, forage;" and "sorghum, grain, stover" respectively to agree with the accepted terminology in the Agency's Food and Feed Vocabulary. EPA has increased the proposed tolerance for all proposed commodities as follows: Grass, forage from 1.5 to 1.6 ppm; grass, hay from 0.05 to 0.2 ppm; sorghum, grain, forage from 0.1 to 0.4 ppm; sorghum, grain, grain from 0.01 to 0.04 ppm; and sorghum, grain, stover from 0.05 to 0.2 ppm. The grass, forage tolerance was increased from 1.5 ppm to 1.6 ppm because total mefenpyr-diethyl resides were detected up to 1.59 ppm at the proposed pre-harvest interval of 0 days in crop field trials. Since there were no detectible residues of parent or metabolites in the crop field trials for grass (hay) or sorghum, grain (forage; grain; or stover), the tolerances are being set based on the sum of the lowest level of method validation (LLMV) of the parent (mefenpyr-diethyl) and the three metabolites. The LLMV is 0.05 ppm for grass, hay and sorghum, grain, stover; 0.10 ppm in sorghum, grain, forage; and 0.01ppm in sorghum, grain, grain.

Finally, as noted in Unit II, the petitioner requested that the proposed tolerances be established for residues of mefenpyr-diethyl, including its metabolites and degradates, but that compliance with the tolerance levels be determined by measuring only the sum of mefenpyr-diethyl and its dichlorophenyl-pyrazoline metabolites, calculated as the stoichiometric equivalent of mefenpyr-diethyl, in or on the commodities. EPA is revising the tolerance expression for existing tolerances in 40 CFR 180.509 to agree with the tolerance expression proposed in this petition. EPA has determined that it is reasonable to make this change final without prior proposal and opportunity for comment, because public comment is not necessary, in that the change has no substantive effect on the tolerance, but rather is merely intended to clarify the existing tolerance expression.

V. Conclusion

Therefore, tolerances are established for residues of the safener, mefenpyr-diethyl, including its metabolites and degradates, in or on grass, forage at 1.6 ppm; grass, hay at 0.2 ppm; sorghum, grain, forage at 0.4 ppm; sorghum, grain, grain at 0.04 ppm; and sorghum, grain, stover at 0.2 ppm. Compliance with these tolerances is to be determined by measuring the sum of mefenpyr-diethyl, (1-(2,4-dichlorophenyl)-4,5-dihydro-5-methyl-1H-pyrazole-3,5-dicarboxylic acid, diethyl ester) and its dichlorophenyl-pyrazoline metabolites, calculated as the stoichiometric

equivalent of mefenpyr-diethyl, in or on the commodity.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children From Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or Tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or Tribal governments, on the relationship between the national government and the States or Tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian Tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination With Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 21, 2011.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.509 is amended by revising paragraph (a) and adding paragraph (d) to read as follows:

§ 180.509 Mefenpyr-diethyl; tolerances for residues.

(a) *General.* Tolerances are established for residues of the safener, mefenpyr-diethyl, including its metabolites and degradates, when applied at a rate no greater than 0.053 pound safener per acre per growing season in or on the commodities in the table below. Compliance with the tolerance levels specified below is to be determined by measuring only the sum of mefenpyr-diethyl (1-(2,4-dichlorophenyl)-4,5-dihydro-5-methyl-1H-pyrazole-3,5-dicarboxylic acid, diethyl ester) and its 2,4-dichlorophenyl-pyrazoline metabolites, calculated as the stoichiometric equivalent of mefenpyr-diethyl, in or on the commodity.

Commodity	Parts per million
Barley, grain	0.05
Barley, hay	0.2
Barley, straw	0.5
Cattle, meat byproducts	0.1
Goat, meat byproducts	0.1
Grass, forage	1.6
Grass, hay	0.2
Hog, meat byproducts	0.1
Horse, meat byproducts	0.1
Sheep, meat byproducts	0.1
Sorghum, grain, forage	0.4
Sorghum, grain, grain	0.04
Sorghum, grain, stover	0.2
Wheat, forage	0.2
Wheat, grain	0.05
Wheat, hay	0.2
Wheat, straw	0.5

* * * * *

(d) *Indirect or inadvertent residues.* Tolerances are established for the indirect or inadvertent residues of mefenpyr-diethyl, including its metabolites and degradates, when applied at a rate no greater than 0.053 pound safener per acre per growing season in or on the commodities identified in the table below. Compliance with the tolerance levels specified below is to be determined by measuring only the sum of mefenpyr-diethyl (1-(2,4-dichlorophenyl)-4,5-dihydro-5-methyl-1H-pyrazole-3,5-dicarboxylic acid, diethyl ester) and its 2,4-dichlorophenyl-pyrazoline metabolites, calculated as the stoichiometric equivalent of mefenpyr-diethyl, in or on the commodity.

Commodity	Parts per million
Canola, seed	0.02
Soybean, forage	0.1
Soybean, hay	0.1
Soybean, seed	0.02

[FR Doc. 2011–10439 Filed 4–28–11; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 110103005–1255–02]

RIN 0648–BA48

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Greater Amberjack Management Measures

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement a regulatory amendment to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP) prepared by the Gulf of Mexico Fishery Management Council (Council). This final rule establishes a June through July seasonal closure of the recreational sector for greater amberjack in or from the Gulf of Mexico (Gulf) exclusive economic zone (EEZ). The intended effect of this final rule is to mitigate the social and economic impacts associated with implementing in-season closures. This rule also revises codified text to clarify the definition of a venting device used to deflate the abdominal cavity of a Gulf reef fish.

DATES: This rule is effective May 31, 2011.

ADDRESSES: Copies of the regulatory amendment, which includes an environmental assessment and a regulatory impact review, may be obtained from the Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607; telephone 813–348–1630; fax 813–348–1711; e-mail *gulfcouncil@gulfcouncil.org;* or may be downloaded from the Council's Web site at *http://www.gulfcouncil.org/.*

FOR FURTHER INFORMATION CONTACT: Rich Malinowski, 727–824–5305; *fax:* 727–824–5308.

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf of Mexico is managed under the FMP. The FMP was prepared by the Council and is implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

On January 24, 2011, NMFS published a proposed rule for the greater amberjack regulatory amendment and requested public comment (76 FR 4084). On March 10, 2011, NMFS extended the comment period for an additional 15 days (76 FR 13122) in order to ensure that the public fully understood the intent of the greater amberjack regulatory amendment. The proposed rule and the regulatory amendment outline the rationale for the measures contained in this final rule. The final rule establishes a 2-month seasonal closure (June and July each year) of the recreational sector for greater amberjack within the Gulf reef fish fishery. During the closure, harvest and possession of recreational greater amberjack is prohibited in or from the EEZ.

This final rule also revises the definition of "venting device" to more accurately characterize the part of a fish's anatomy where the venting device should be utilized.

Comments and Responses

The following is a summary of the comments NMFS received on the proposed rule and the greater amberjack regulatory amendment, and NMFS's respective responses. During the initial comment period, NMFS received 64 submissions on the proposed rule. During the second comment period, NMFS received an additional 57 submissions. All submissions were from private or for-hire fishers. Overall, NMFS received 10 comments that expressed general support of the action contained in this final rule. The remainder of the comments either did not support the proposed action or suggested alternative management approaches. These comments are grouped in the comments addressed below.

Comment 1: Allowing fishing during June and July is very important for the economy of Gulf coast communities; this is the major time of year for both private and for-hire fishing trips. Marinas, charter boats, fishing tournaments, bait and tackle shops, hotels, and restaurants will be hurt by this closure. People will start limiting their trips to the Gulf coast because of the limited opportunity to keep the fish they catch during a trip. If a closure must be implemented to protect greater amberjack from overfishing, it should occur either earlier or later in the year when fishing effort is reduced. A spring spawning season closure or a winter seasonal closure would be preferable.

Response: In 2009, the recreational sector met its greater amberjack quota in August. In early 2010, NMFS projected that the 2010 and 2011 quotas would also be met between August and October. Even with the extensive fishery closures that were in place in 2010 because of the Deepwater Horizon MC252 oil spill, preliminary recreational landings data indicate the recreational quota was met. The Council recognized that these projected lengthy and early in-season closures could cause economic and social disruption to for-hire businesses, private anglers, and shoreside support facilities, such as marinas, bait shops, hotels, and restaurants.

The Council considered several closure options, including spring and fall closures, but determined the 3-to 5-month closed periods needed in the spring and fall to adequately constrain harvest to the quota were too long, and would create an economic burden to the recreational sector through the longer duration seasonal closure. Thus, they selected a shorter closure period during the peak of fishing effort, which is expected to constrain harvest, and allow fishing for the other 10 months of the year. During the Council's deliberations, many for-hire operators indicated a June-July closure was a preferred option, as it occurs during the red snapper recreational sector open season, thereby allowing them to market greater amberjack as a trophy fish during the other approximately 10 months their preferred target species of red snapper was unavailable.

Comment 2: Greater amberjack are closer to shore and more abundant during the summer, whereas in the winter they are farther offshore and more dispersed, thus making them more difficult to catch than in the summer. The most favorable summer weather is during June and July, allowing small-boat fishermen greater opportunity to go fishing as a result of the ocean conditions. Forcing fishermen to fish for greater amberjack during other times of the year will mean traveling farther offshore, decreasing vessel safety because of distance from shore and less favorable weather, and/or reduce fishing opportunities because of bad weather. Discards will increase because of the summer closure.

Response: NMFS and the Council recognize that there may be reduced opportunities to fish for greater amberjack during off-peak periods because of weather or other circumstances. However, the social and economic impacts of a June-July closure will be less than an early in-season closure, as described in the response to Comment 1. NMFS and the Council also recognize that discards will occur during the closed season. However, by ending the targeting of greater amberjack during the closure, overall removals are expected to decrease. Release mortality

is not well documented, but is thought to be low, so mortality is expected to be reduced during the closure.

Comment 3: A seasonal closure for greater amberjack is not necessary. The stock is healthy off Alabama and Louisiana; the oil and gas platforms are teeming with large greater amberjack. The data used in the stock assessment are incorrect and do not represent what fishermen and divers observe every day when on a fishing trip. No additional regulations should be implemented until the data collection process has been improved. The Deepwater Horizon MC252 oil spill led to an extensive area closed to all fishing during the peak of the fishing season. This reduced fishing pressure during 2010 should be considered in allowing harvest for 2011.

Response: The seasonal closure helps constrain the recreational harvest to the allowable catch, which in turn prevents overfishing. The recreational sector has demonstrated the continued ability to harvest the quota within the fishing year. As noted in Comment 1, the quota was met in August of 2009, and even with the extensive fishery closures during 2010 because of the Deepwater Horizon MC252 oil spill, preliminary recreational landings data for 2010 indicate the quota was met. The closure is intended to constrain recreational harvest to within the quota while providing the longest duration fishing season possible, thus minimizing social and economic disruptions.

Comment 4: It seems inconsistent to state that a closure is a way to increase recreational fishing opportunities.

Response: As noted in Comments 1 and 3, without additional action to constrain recreational catch and effort, the recreational sector met its fishing year quota in August 2009, met its quota in 2010, even with the extensive fishery closures during 2010 because of the Deepwater Horizon MC252 oil spill, and is projected to meet its recreational quota by August 2011, for the current fishing year. To minimize the social and economic impacts of lengthy and early in-season quota closures, the Council selected the shortest duration seasonal closure that is projected to constrain recreational harvest to the quota while still allowing harvest to occur through the end of the fishing year. During the Council's public hearing process, many for-hire operators indicated a June-July closure was preferred, because this seasonal closure period would allow them to market greater amberjack as a trophy fish during the fall and winter months when their preferred target of red snapper was unavailable as a result of the recreational season being closed.

Comment 5: Recreational harvest of greater amberjack is not the problem; commercial fishermen harvest much more fish than recreational fishermen do. Recreational fishermen account for only a small part of the total catch. Commercial fishing is depleting this resource.

Response: Regulations allocate the Gulf greater amberjack total allowable catch between the commercial and recreational sectors. Total annual allowable catch for greater amberjack in the Gulf of Mexico is 1,871,000 lb (848,671 kg), whole weight. The recreational quota, allocated at 73 percent of the total allowable catch, is 1,368,000 lb (620,514 kg), whole weight. The commercial quota, which is 27 percent of the total allowable catch is 503,000 lb (228,157 kg), whole weight.

Comment 6: Several alternative management options were suggested in lieu of a closure. These included issuing tags to allow recreational fishermen to harvest specific numbers of fish, reducing the recreational bag limit from one per person to one per vessel or one per two people onboard, creating a slot limit, increasing the size limit, or regionalized management.

Response: The Council has a variety of management options available to constrain harvest of any fishing sector, including those identified in the comments. The for-hire fishing industry provided input to the Council during their development of the greater amberjack regulatory amendment. They requested seasonal closures to help them properly plan for their fishing activities so that for-hire bookings are not unexpectedly cancelled because of early in-season quota closures. The Council considered both spring and fall closures, ranging from 3 to 5 months in length but determined these longer closures resulted in greater social and economic impact. In addition, early in-season quota closures affect many fishing tournaments held during the fall of the year. With the establishment of a fixed closed season, such tournaments can be scheduled around the fixed closed season.

Classification

The Regional Administrator, Southeast Region, NMFS has determined that this regulatory amendment is necessary for the conservation and management of Gulf greater amberjack, to reduce the social and economic impacts to the Gulf greater amberjack recreational sector, and is consistent with the Magnuson-Stevens Act and other applicable laws.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

A final regulatory flexibility analysis (FRFA) was prepared for this rule. The FRFA incorporates the initial regulatory flexibility analysis (IRFA), a summary of the significant economic issues raised by public comments, NMFS' responses to those comments, and a summary of the analyses completed to support the action. The FRFA follows.

No public comments specific to the IRFA or that have socioeconomic implications were received and therefore no comments are addressed in this FRFA, although the response to Comment 4 addressed the economic impacts of the final rule more generally and may be referred to for additional information. No changes in the final rule were made in response to public comments.

The Magnuson-Stevens Act provides the statutory basis for this final rule. This final rule will not establish any new reporting, record-keeping, or other compliance requirements. No duplicative, overlapping, or conflicting Federal rules have been identified.

The preamble of this final rule and the previously published proposed rule provides a statement of the need for and objectives of this rule, and it is not repeated here.

The final rule is expected to directly affect for-hire fishing vessels that harvest greater amberjack in the Gulf. The for-hire sector is comprised of charterboats, which charge a fee on a vessel basis, and headboats, which charge a fee on an individual angler (head) basis. For-hire vessels are required to have a Gulf reef fish for-hire permit to harvest greater amberjack in the Gulf. The Small Business Administration has established size criteria for all major industry sectors in the U.S. including fish harvesters. A for-hire business involved in fish harvesting is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $7.0 million (NAICS code 713990, recreational industries).

In 2009, there were 1,422 unique for-hire vessels that were permitted to operate in the Gulf reef fish recreational sector. These vessels were distributed as follows: 140 vessels in Alabama, 877 vessels in Florida, 101 vessels in Louisiana, 54 vessels in Mississippi, and 232 vessels in Texas. The Federal for-hire permit does not distinguish between headboats and charter boats, but in 2009, the headboat survey program included 79 headboats. The

majority of headboats were located in Florida (43), followed by Texas (22), Alabama (10), and Louisiana (4). It cannot be determined with available data how many of the 1,422 for-hire vessels permitted to operate in the Gulf reef fish fishery harvest greater amberjack, so all permitted for-hire vessels are assumed to comprise the universe of potentially affected vessels. The average charterboat is estimated to earn approximately $88,000 (2008 dollars) in annual revenues, while the average headboat is estimated to earn approximately $461,000 (2008 dollars).

Based on these revenue estimates, all for-hire vessels expected to be directly affected by this final rule are determined for the purpose of this analysis to be small business entities. Some fleet activity (i.e., multiple vessels owned by a single entity) may exist in the for-hire sector but its extent is unknown, and all vessels are treated as independent entities in this analysis.

All entities expected to be directly affected by the final rule are determined for the purpose of this analysis to be small business entities, so no disproportionate effects on small entities relative to large entities are expected because of this action.

The final rule establishes a June 1 through July 31 seasonal closure of the recreational greater amberjack sector of the Gulf reef fish fishery. On the other hand, the no action alternative would likely result in a recreational sector closure commencing on approximately August 27, 2011, as a result of the quota being met or exceeded. Relative to the no action alternative, the final rule is expected, for the first year, to result in an increase in profits by $52,526 for the charterboat sector as a whole, or by $39 per charterboat. On the other hand, the final rule is expected, for the first year, to result in a decrease in profits by $59,832 for the headboat sector as a whole, or by $757 per headboat. Relative to the average revenues of $88,000 per charterboat and $461,000 per headboat, the estimated effects of the final rule may be deemed relatively small. Considering the effects on charterboats and headboats as a whole, the final rule is expected, in the first year, to result in a net decrease in overall for-hire vessel profits of $7,306. This net amount is deemed small, particularly when spread over all 1,422 for-hire vessels. In addition, it is expected that net profits for both charterboats and headboats would not deteriorate as much as they would under an unplanned quota closure associated with the no action alternative. Based on the resulting net effects on profits, it is concluded that the final rule would not have a significant economic impact on a substantial number of small entities.

Four alternatives, including the final action, were considered in this amendment. The first alternative to the final action is the no action alternative. This alternative, which would not establish a recreational seasonal closure, resulted in a quota closure and overages in 2009, prompting a reduction in the following year's (2010) quota. In April 2010, the recreational sector requested that the Council consider a seasonal closure to minimize the adverse effects of the quota closure. The second alternative to the final action would establish a March through May seasonal closure. This alternative would be expected to result in larger overall adverse economic effects than the final action. While this alternative would result in lower headboat profit reductions of $32,713 for the first year, the charterboat profit reductions would be substantially larger at $516,062 for the first year. The third alternative to the final action would establish a May through June seasonal closure. This third alternative would likely result in larger adverse economic effects than the final action. Similar to the second alternative to the final action, this third alternative would result in lower headboat profit reductions of $29,844 for the first year but substantially larger charterboat reductions of $252,017 for the first year.

The provision contained in this final rule that corrects the definition of venting device would have no additional economic effects on small entities because this tool is already required to be used, and this correction merely clarifies how it should be used.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as small entity compliance guides. As part of the rulemaking process, NMFS prepared a fishery bulletin, which also serves as a small entity compliance guide. The fishery bulletin will be sent to all vessel permit holders for the Gulf reef fish for-hire sector as well as other interested parties.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: April 26, 2011.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. In § 622.2, the definition for "venting device" is revised to read as follows:

§ 622.2 Definitions and acronyms.

* * * * *

Venting device means a device intended to deflate the abdominal cavity of a fish to release the fish with minimum damage.

* * * * *

■ 3. In § 622.34, paragraph (o) is added to read as follows:

§ 622.34 Gulf EEZ seasonal and/or area closures.

* * * * *

(o) *Seasonal closure of the recreational sector for greater amberjack.* The recreational sector for greater amberjack in or from the Gulf EEZ is closed from June 1 through July 31, each year. During the closure, the bag and possession limit for greater amberjack in or from the Gulf EEZ is zero.

* * * * *

■ 4. In § 622.41, the first sentence of paragraph (m)(3) is revised to read as follows:

§ 622.41 Species specific limitations.

* * * * *

(m) * * *

(3) *Venting tool.* At least one venting tool is required and must be used to deflate the abdominal cavities of Gulf reef fish to release the fish with minimum damage. * * *

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[FR Doc. 2011–10479 Filed 4–28–11; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 0907151138–1235–03]

RIN 0648–AY03

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Queen Conch Fishery of Puerto Rico and the U.S. Virgin Islands; Queen Conch Management Measures

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

ACTION: Final rule.

SUMMARY: This final rule implements measures to address overfishing of Caribbean queen conch in the U.S. Caribbean. This rule extends the queen conch seasonal closure from 3 months to 5 months, and prohibits fishing for and possession of queen conch in or from the Caribbean exclusive economic zone (EEZ) east of 64°34′ W. longitude, which includes Lang Bank east of St. Croix, U.S. Virgin Islands (USVI), when harvest and possession of queen conch is prohibited in St. Croix territorial waters as a result of a territorial quota closure. The intended effects of this final rule are to prevent additional fishing pressure on queen conch in the U.S. Caribbean, and to improve enforcement of regulations affecting the queen conch resource by improving compatibility among Federal and territorial regulations.

DATES: This rule is effective May 31, 2011.

ADDRESSES: Copies of the regulatory amendment, which includes an Environmental Assessment (EA), and the final regulatory flexibility analysis (FRFA) may be obtained from Britni Tokotch, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701 or may be downloaded from the Southeast Regional Office Web site at *http://sero.nmfs.noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Britni Tokotch, 727–824–5305.

SUPPLEMENTARY INFORMATION: The Caribbean queen conch fishery is managed under the Fishery Management Plan for Queen Conch Resources of Puerto Rico and the USVI (FMP). The FMP was prepared by the Caribbean Fishery Management Council (Council), and is implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

This final rule extends the current 3-month (July 1 through September 30) closure in Federal waters in the area east of 64°34′ W. longitude, which includes Lang Bank east of St. Croix, USVI (Lang Bank), to a 5-month closure, from June 1 through October 31 each year. This final rule also implements a compatible queen conch harvest quota closure for Federal waters. Under this rule, when the USVI closes territorial waters off St. Croix to the harvest and possession of queen conch, NMFS will concurrently close the queen conch harvest in Lang Bank. NMFS will notify the public of the closure by filing a notice with the Office of the Federal Register. During the closure, fishing for or possession of Caribbean queen conch on board a fishing vessel, in or from Lang Bank is prohibited. Closure of Lang Bank is in effect until the next fishing season for territorial waters opens November 1, each year.

Comments and Responses

The following is a summary of the comments NMFS received on the proposed rule and the queen conch regulatory amendment, and NMFS' respective responses. During the comment period, NMFS received four comments on the proposed rule. The submissions included one letter from a Federal agency, which was in agreement with the actions in this proposed rule. The remaining submissions were unique letters from individuals, one of which is unrelated to the actions contained in the regulatory amendment and, therefore, is not addressed; the other two comments are addressed below.

Comment 1: One commenter questioned why a 4-month seasonal closure was not considered as an alternative to the existing 3-month closure and the proposed 5-month closure.

Response: The intent of the regulatory amendment and this proposed rule is to establish consistent regulations between the USVI and U.S. Federal waters. The USVI territorial government requested the Council and NMFS implement compatible regulations, including a compatible seasonal closure and a compatible quota closure, to simplify enforcement efforts. The lack of compatible regulations makes enforcement difficult, which inhibits resource protection. A 4-month closure was not considered because it would not be consistent with USVI regulations, and would not alleviate the concerns about enforcement that prompted this action.

Comment 2: One commenter expressed concern regarding Federal consistency with the 50,000-lb (28,680-kg) quota set by the USVI. Specifically, the commenter expressed concern regarding the possibility the USVI territorial government could increase the queen conch quota in the future.

Response: The queen conch regulatory amendment and this proposed rule do not address a Federal quota for queen conch. This proposed rule recognizes the quota already established by the USVI. The intent of this proposed rule is to establish consistency between Federal regulations and those already established by the USVI territorial government to prevent additional fishing pressure when the USVI quota is met and to enhance enforcement efforts.

In Amendment 2 to the Fishery Management Plan for Queen Resources of Puerto Rico and the USVI and Amendment 5 to the Reef Fish Fishery Management Plan of Puerto Rico and the USVI (2010 Caribbean ACL Amendment), the Council is considering actions that establish annual catch limits (ACLs) and accountability measures (AMs) to ensure the ACLs are not exceeded. The Council's preferred alternative is to set the ACL for queen conch at 50,000 lb (28,680 kg). Once the ACL is reached or projected to be reached, Lang Bank would be closed to the harvest and possession of queen conch. The 2010 Caribbean ACL Amendment is expected to be implemented in the near future. When this amendment is implemented, the ACLs and AMs will apply even if the USVI territorial government increases the territorial quota in the future.

Classification

The Regional Administrator, Southeast Region, NMFS, determined that the regulatory amendment is necessary for the conservation and management of the queen conch fishery and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

NMFS prepared an FRFA, as required by section 604 of the Regulatory Flexibility Act. The FRFA describes the economic impact this final rule is expected to have on small entities. A description of the action implemented through this final rule, the need for and objectives of this final rule, and the legal basis for this final rule are contained in the preamble of the proposed rule, and are not repeated here. A copy of this analysis is available from the Council

(see **ADDRESSES**). A summary of the analysis follows.

No significant issues associated with the economic analysis contained in the proposed rule were raised through public comment. A summary of the comments received is provided in the previous section of this preamble. No changes were made in this final rule as a result of these comments.

No duplicative, overlapping, or conflicting Federal rules have been identified. Additionally, this final rule would not establish any new reporting, recordkeeping, or other compliance requirements.

This final rule will directly apply to and may directly affect commercial fishermen and for-hire vessels in St. Croix that harvest queen conch. The Small Business Administration (SBA) has established size criteria for all major industry sectors in the U.S., including commercial fish harvesters and for-hire operations. A business involved in fish harvesting is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $4.0 million (NAICS code 114111, finfish fishing) for all its affiliated operations worldwide. For for-hire vessels, the other qualifiers apply and the revenues threshold is $7.0 million (NAICS code 713990, recreational industries).

All commercial fishermen who may be affected by this final rule are determined, for the purpose of this analysis, to be small entities. Federal permits are not required to fish in the U.S. Caribbean. The USVI, however, requires a commercial fishing permit to harvest marine species for commercial purposes. In 2008, there were 383 permitted fishermen in the USVI, of which 223 were in St. Croix and 160 were in St. Thomas and St. John. The ex-vessel value of total harvests by USVI fishermen in 2008 was approximately $8.8 million, or approximately $23,000 per fisherman. This estimate is substantially lower than the SBA small entity threshold. Comparable values for St. Croix fishermen are not available. However, if all revenues from marine species for the USVI are attributed to St. Croix fishermen, the appropriate average revenue per entity would be only approximately $39,000. Even this value, as an extreme upper bound for average revenues for St. Croix fishermen, is significantly lower than the SBA threshold.

The number of for-hire dive operations in the USVI is unknown. However, 27 for-hire vessels were identified in the USVI in 2000. Information on the economic profile of these vessels is not available. However, for-hire vessels have been determined to be small business entities in all Federal fishery-related regulatory actions to date in the Gulf of Mexico and South Atlantic. Therefore, all for-hire businesses that may be affected by this final rule are determined, for the purpose of this analysis, to be small business entities.

It is unknown whether this final rule will have any direct adverse economic effects on any small entities. Available queen conch harvest data do not distinguish between queen conch harvested from territorial waters and from Lang Bank. Incompatible Federal and St. Croix territorial water seasonal closures only began in 2008, and the first quota closure of St. Croix territorial waters occurred in 2009. It is unknown whether landings originating from Lang Bank continued after closure of the territorial waters in these years, or whether the territorial closure resulted in fishermen ceasing harvest activity in Lang Bank. If the territorial possession prohibition resulted in fishermen stopping all harvest activity, including activity that historically occurred in the Lang Bank, then this final rule will not have any direct effect on harvest activity or associated revenues from Lang Bank, because no such harvest activity would be expected to continue to occur. As a result, the only direct effect of this action on fishery participants will be the benefits of regulatory simplicity.

If, however, queen conch has traditionally continued to be harvested in Lang Bank during the period when the territorial waters closed, this final rule will result in a reduction in the revenues associated with these harvests. As previously stated, available data do not allow quantification of any harvests from Lang Bank that may be affected. In general, however, because queen conch are distributed in habitats where water depth is less than 100 fathoms (183 m), and the majority of the benthos at that depth around St. Croix is located in territorial waters, it is assumed that the majority of queen conch in the USVI are harvested from territorial waters. As a result, any reduction in harvests, and associated revenues, from Lang Bank that might occur as a result of compatible closures is expected to be minimal.

Because of the absence of location-specific harvest data and the inability to assess with certainty the economic effects of compatible quota and seasonal closures, public comment on the economic analysis was solicited in the proposed rule. No comments on the economic analysis were received and, as a result, no information was provided to either confirm or refute the conclusion in the economic analysis that any reduction in revenues as a result of compatible closures would be minimal.

Only one alternative to the proposed rule was considered. This alternative, the no action alternative (status quo), would not implement compatible closures and would not achieve the Council's objectives. Therefore, NMFS did not adopt this alternative.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare an FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides." As part of the rulemaking process, NMFS prepared a fishery bulletin, which also serves as a small entity compliance guide. The fishery bulletin will be distributed to interested parties in the Caribbean.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: April 26, 2011.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. In § 622.32, paragraph (b)(1)(iv) is revised to read as follows:

§ 622.32 Prohibited and limited harvest species.

* * * * *

(b) * * *

(1) * * *

(iv) No person may fish for or possess on board a fishing vessel a Caribbean queen conch in or from the Caribbean EEZ, in the area east of 64E34' W. longitude which includes Lang Bank east of St. Croix, U.S. Virgin Islands, except during November 1 through May 31.

* * * * *

■ 3. In § 622.33, paragraph (d) is added to read as follows:

§ 622.33 Caribbean EEZ seasonal and/or area closures.

* * * * *

(d) *Queen conch closure in the Caribbean EEZ.* (1) Pursuant to the procedures and criteria established in the FMP for Queen Conch Resources of Puerto Rico and the U.S. Virgin Islands, when the U.S. Virgin Islands closes territorial waters off St. Croix to the harvest and possession of queen conch, the Regional Administrator will concurrently close the Caribbean EEZ, in the area east of 64°34′ W. longitude which includes Lang Bank, east of St. Croix, U.S. Virgin Islands, by filing a notification of closure with the Office of the Federal Register. Closure of the adjacent EEZ will be effective until the next fishing season for territorial waters opens November 1.

(2) During the closure, as specified in paragraph (d)(1) of this section, no person may fish for or possess on board a fishing vessel, a Caribbean queen conch, in or from the Caribbean EEZ, in the area east of 64°34′ W. longitude which includes Lang Bank, east of St. Croix, U.S. Virgin Islands.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket Nos. 100610255–0257–01 and 040205043–4043–01]

RIN 0648–XA353

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Gulf of Mexico Reef Fish Fishery; 2011 Accountability Measures for Greater Amberjack and Closure of the 2011 Gulf of Mexico Commercial Sector for Greater Amberjack

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS implements accountability measures (AMs) for commercial and recreational greater amberjack in the Gulf of Mexico (Gulf) for the 2011 fishing year through this temporary final rule, announces the closure date for the 2011 commercial sector for greater amberjack of the Gulf reef fish fishery, and provides an estimated season length for the 2011 recreational greater amberjack sector of the Gulf reef fish fishery. This rule reduces the 2011 commercial and recreational quotas for greater amberjack based on the 2010 quota overages. Additionally, NMFS has determined that the 2011 adjusted commercial quota for Gulf greater amberjack will have been reached by June 18, 2011. These actions are necessary to reduce overfishing of the Gulf greater amberjack resource.

DATES: This rule is effective April 29, 2011 through December 31, 2011, except for the greater amberjack commercial sector closure provision. The closure of the commercial sector for Gulf greater amberjack is effective 12:01 a.m., local time, June 18, 2011, until 12:01 a.m., local time, on January 1, 2012.

ADDRESSES: Copies of the final rule for Amendment 30A, the Final Supplemental Environmental Impact Statement (FSEIS) for Amendment 30A, and other supporting documentation may be obtained from Rich Malinowski, NMFS, Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701; telephone: 727–824–5305.

FOR FURTHER INFORMATION CONTACT: Rich Malinowski, telephone: 727–824–5305, e-mail *Rich.Malinowski@noaa.gov.*

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf is managed under the Fishery Management Plan for Reef Fish Resources of the Gulf of Mexico (FMP). The FMP was prepared by the Gulf of Mexico Fishery Management Council (Council) and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

Background

The 2006 reauthorization of the Magnuson-Stevens Act implemented new requirements that annual catch limits (ACLs) and AMs be established to end overfishing and prevent overfishing from occurring. AMs are management controls to prevent ACLs from being exceeded, and correct or mitigate overages of the ACL if they occur. Section 303(a)(15) of the Magnuson-Stevens Act mandates the establishment of ACLs at a level such that overfishing does not occur in the fishery, including measures to ensure accountability.

On July 3, 2008, NMFS issued a final rule (73 FR 38139) to implement Amendment 30A to the FMP (Amendment 30A). Amendment 30A established commercial and recreational quotas for Gulf greater amberjack and AMs that would go into effect if the commercial and recreational quotas for greater amberjack are exceeded. In accordance with regulations at 50 CFR 622.49(a)(1)(i), when the applicable commercial quota is reached, or projected to be reached, the Assistant Administrator for Fisheries, NOAA, (AA), will file a notification with the Office of the Federal Register to close the commercial sector for the remainder of the fishing year. If despite such closure, commercial landings exceed the quota, the AA will reduce the quota the year following an overage by the amount of the overage of the prior fishing year.

Amendment 30A also implemented AMs for the Gulf greater amberjack recreational sector of the reef fish fishery. As described at 50 CFR 622.40(a)(1)(ii), if recreational landings are met or projected to be met, the AA will close the recreational sector for the remainder of the fishing year. In addition, if recreational landings exceed the quota, the AA will reduce the length of the recreational fishing season the year following an overage by the amount necessary to recover the overage of the prior fishing year. Also, if necessary, the reduced fishing season may be adjusted during the fishing year to ensure the recreational harvest achieves, but does not exceed the intended harvest level.

Management Measures Contained in This Temporary Rule

In 2009, the commercial sector of greater amberjack was closed on November 7, when the commercial quota of 503,000 lb (228,157 kg) was determined to be reached. Finalized 2009 commercial landings data indicated the commercial quota was exceeded by 25.8 percent, or 129,928 lb (58,934 kg). The reduced 2010 commercial quota for Gulf greater amberjack was 373,072 lb (169,222 kg). NMFS closed the commercial sector for Gulf greater amberjack on October 28, 2010 (75 FR 64171), when NMFS projected that the 373,072 lb (169,222 kg) quota had been reached. Finalized 2010 commercial landings data indicate the commercial quota was exceeded by 50.7 percent, or 189,100 lb (85,774 kg). Therefore, the reduced 2011 commercial quota for Gulf greater amberjack is 313,900 lb (142,383 kg).

The NMFS Southeast Fisheries Science Center (SEFSC) estimates that 189,618 lb (86,009 kg) of greater amberjack were landed by the commercial sector during the months of January and February of 2011. Commercial harvest of greater amberjack is prohibited during the months of March through May each year to protect spawning aggregations. The fishing season for commercial greater amberjack re-opens on June 1, 2011 at which time the remaining 124,282 lb (56,373 kg) of

the 2011 adjusted commercial quota established through this rulemaking will be available for harvest. Based on current statistics, NMFS has determined that the remaining commercial adjusted quota will be harvested by June 18, 2011. Accordingly, NMFS is closing commercial harvest of greater amberjack in the Gulf EEZ at 12:01 a.m., local time, on June 18, 2011, and it will remain closed until 12:01 a.m., local time, on January 1, 2012. The operator of a vessel with a valid commercial vessel permit for Gulf reef fish having greater amberjack aboard must have landed and bartered, traded, or sold such greater amberjack prior to 12:01 a.m., local time, June 18, 2011.

During the closure, all commercial harvest or possession of greater amberjack in or from the Gulf of Mexico EEZ, and the sale or purchase of greater amberjack taken from the EEZ is prohibited. The prohibition on sale or purchase does not apply to sale or purchase of greater amberjack that were harvested, landed ashore, and sold prior to 12:01 a.m., local time, June 18, 2011, and were held in cold storage by a dealer or processor. In addition to the Gulf EEZ closure, a person on board a vessel for which a commercial vessel permit for Gulf reef fish has been issued must comply with these closure provisions regardless of where the Gulf greater amberjack are harvested, i.e., in state or Federal waters. This closure is intended to prevent overfishing of Gulf greater amberjack and increase the likelihood that the 2011 quota will not be exceeded.

The 2012 commercial quota for greater amberjack will return to the quota specified at 50 CFR 622.42(a)(1)(v) unless accountability measures are implemented due to a quota overage and a reduced quota is specified through notification in the **Federal Register**, or subsequent regulatory action is taken to adjust the quota.

Also, in 2009, the recreational quota for Gulf greater amberjack of 1,368,000 lb (620,514 kg) was projected to be met and the sector closed on October 24, 2009. Finalized 2009 recreational landings data indicated the recreational quota was exceeded by 9 percent or 124,817 lb (56,616 kg). Based on the 2009 quota overage, the reduced 2010 recreational quota of 1,243,184 lb (563,899 kg) for Gulf greater amberjack was projected to be met in late August. However, because of the extensive fishery area closures established because of the Deepwater Horizon MC252 oil spill, recreational fishing effort was severely curtailed during the summer period. For the 2010 fishing year, the recreational sector of Gulf greater amberjack remained open through December 2010. However, finalized 2010 landings data have determined that the recreational quota was exceeded by 4.2 percent or 52,776 lb (23,939 kg). Therefore, the reduced 2011 recreational quota for Gulf greater amberjack is 1,315,224 lb (596,576 kg).

The 2012 recreational quota for greater amberjack will return to the quota specified at 50 CFR 622.42(a)(2)(ii) unless accountability measures are implemented due to a quota overage in 2011 and a reduced quota is specified through notification in the **Federal Register**, or subsequent regulatory action is taken to adjust the quota.

If required, the exact closure date of the 2011 recreational season for greater amberjack will be published in the **Federal Register** after preliminary 2011 landings data become available and NMFS can project when, and if, the 2011 recreational quota will be reached. However, taking into account current projections based on the 2010 quota overage, the reduced 2011 recreational quota of 1,315,224 lb (596,576 kg), and a June through July seasonal closure of the recreational sector for greater amberjack as approved by the Council at its October 2010 meeting, NMFS does not expect that the recreational sector will meet, or exceed, its quota for the 2011 fishing year. NMFS will monitor recreational landings throughout the year and take appropriate action if landings appear they will meet the recreational quota prior to the end of the fishing year.

Classification

The Administrator, Southeast Region, NMFS, (RA) has determined this temporary rule is necessary for the conservation and management of the Gulf greater amberjack component of the Gulf reef fish fishery and is consistent with the Magnuson-Stevens Act and other applicable laws.

The temporary rule has been determined to be not significant for purposes of Executive Order 12866.

These measures are exempt from the procedures of the Regulatory Flexibility Act because the temporary rule is issued without opportunity for prior notice and comment.

NMFS prepared a FSEIS for Amendment 30A. A notice of availability for the FSEIS was published on April 18, 2008 (73 FR 21124). A copy of the FSEIS and the Record of Decision are available from NMFS (*see* **ADDRESSES**).

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive the requirements to provide prior notice and opportunity for public comment on this temporary rule. Such procedures are unnecessary because the AMs established by Amendment 30A and located at 50 CFR 622.49(a)(1)(i) and (ii) and the quota closure provisions located at 50 CFR 622.43(a) authorize the AA to file a notice with the Office of the **Federal Register** to reduce the commercial and/or recreational quotas the following fishing year if an overage occurs, close harvest for a species or species group when the quota for that species or species group is reached, or is projected to be reached, and reduce the length of the recreational fishing season the following fishing year if an overage occurs. The final rule for Amendment 30A implementing these AMs was subject to notice and comment as well as the rule implementing the commercial quota and the associated requirement for closure of commercial harvest when the quota is reached or projected to be reached, and all that remains is to notify the public of the 2011 commercial and recreational quotas, the closure of the commercial sector for Gulf greater amberjack, and the season length for the 2011 recreational fishing season.

Also, providing prior notice and opportunity for public comment on this action would be contrary to the public interest. Many of those affected by the recreational season duration, particularly charter vessel and headboat operations, book trips for clients in advance and, therefore need as much time as possible to adjust business plans to account for the season length. Those persons affected by the commercial season duration need to plan fishing trips, vessel provisioning, and vessel modifications in advance and, therefore, they also need as much time as possible to adjust business plans to account for the commercial season length. Additionally, advance notice is required for business planning given the short duration of time between the opening date of the commercial season and the quota closure date of the commercial season. Delaying the announcement of the projected recreational season duration and the commercial sector closure to accommodate prior notice and comment would result in significantly less advance notice of the duration of the seasons for these individuals; decrease the time available for affected participants to adjust business plans; and be very disruptive. Given the regulatory obligation for NMFS to announce the duration of the commercial and recreational seasons in a timely manner, it is important this announcement be made as soon as

possible to allow affected participants the maximum amount of time to adjust their fishing activities to account for a projected closure of the commercial sector in June and no projected closure of the recreational sector.

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).

Dated: April 26, 2011.

James P. Burgess,

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

[FR Doc. 2011–10449 Filed 4–28–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 110207101–1257–02]

RIN 0648–BA54

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Red Snapper Management Measures

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement a regulatory amendment to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP) prepared by the Gulf of Mexico Fishery Management Council (Council). This final rule increases the commercial and recreational quotas for red snapper for the 2011 fishing year and closes the recreational red snapper component of the Gulf of Mexico (Gulf) reef fish fishery at 12:01 a.m., local time, July 19, 2011. This rule also makes minor revisions to codified text, including revisions to the definition of "actual ex-vessel price," extending the maintenance window for the Gulf individual fishing quota (IFQ) programs, and removing obsolete codified text for Gulf grouper. The intended effect of this final rule is to help achieve optimum yield (OY) for Gulf red snapper without increasing the risk of the red snapper resource experiencing overfishing, allow for better functioning and enforcement of the Gulf IFQ programs, and to remove obsolete text from the regulations.

DATES: This rule is effective May 31, 2011.

ADDRESSES: Copies of the regulatory amendment, which includes an environmental assessment and a regulatory impact review, may be obtained from Dr. Steve Branstetter, NMFS, Southeast Regional Office, 263 13th Ave South, Saint Petersburg, FL 33701; telephone 727–824–5308; e-mail *Steve.Branstetter@noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Dr. Steve Branstetter, 727–824–5308.

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf of Mexico is managed under the FMP. The FMP was prepared by the Council and is implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

On February 22, 2011, NMFS published a proposed rule for the regulatory amendment and requested public comment (76 FR 9735). The proposed rule and the regulatory amendment outline the rationale for the actions contained in this final rule. A summary of the actions implemented by this final rule are provided below.

This final rule sets the Gulf red snapper commercial quota at 3.664 million lb (1.662 million kg) and the recreational quota at 3.521 million lb (1.544 million kg). NMFS has determined that the combined commercial and recreational quota from 2010 was not exceeded, therefore, NMFS may increase the commercial and recreational quotas for red snapper in 2011, consistent with the rebuilding plan.

The regulatory text contained in this final rule reflects the commercial and recreational quotas for the 2011 fishing year only. This differs from the proposed rule because the proposed rule contained regulatory text for the 2010 fishing year and the 2011 fishing year, with a caveat that if the 2010 landings, as estimated by the Southeast Fisheries Science Center (SEFSC), NMFS, indicate the combined quota is exceeded, then the recreational quota would be maintained at the 2010 quota. Because NMFS has determined that the combined quota from 2010 was not exceeded, the 2010 quota and the caveat following the 2011 quota have been removed from the regulatory text.

The Magnuson-Stevens Act requires NMFS to close the recreational red snapper sector in Federal waters when the quota is met or projected to be met. Finalized 2010 recreational landings data indicate that the recreational red snapper quota is projected to be met on or by July 18, 2011. Therefore, NMFS will close the recreational red snapper fishing season at 12:01 a.m., local time, July 19, 2011, which constitutes a 48-day fishing season. NMFS will continue to monitor landings after the 2011 fishing season opens June 1. If, as a result of the continuous monitoring, the quota is not projected to be met on or by July 18, 2011, a re-opening of the recreational sector could occur later in the fishing season.

The red snapper management measures contained in this final rule will achieve the goal of National Standard 1 of the Magnuson-Stevens Act, which states that conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield for the fishery. Because the 2010 recreational red snapper quota was not met, the Council has requested that the SEFSC re-run the 2009 update assessment projections using final landings data for 2009 and 2010. These projections will be provided to the Council's Scientific and Statistical Committee (SSC) for review at the SSC's May meeting, which could potentially change the allowable biological catch (ABC) recommendation. The Council will receive the SSC's recommendation for ABC at its June Council meeting. If the SSC recommends a higher ABC, red snapper TAC could be adjusted for the 2012 fishing year.

Additional Measures Contained in This Final Rule

This final rule removes the definition of "actual ex-vessel value" and adds the definition of "actual ex-vessel price," so that actual ex-vessel price represents the total monetary sale amount per pound of fish before any deductions are made for transferred (leased) allocation and goods and services (e.g., bait, ice, fuel, repairs, machinery replacement, etc.), extends the IFQ maintenance window an additional 8 hours to allow for more time to conduct end-of-year maintenance, and removes obsolete text regarding the sale and purchase of Gulf grouper from the old February 15–March 15 seasonal closure for commercial gag, red, and black grouper. These additional measures are unrelated to the actions contained in the regulatory amendment.

Comments and Responses

The following is a summary of the comments NMFS received on the proposed rule and the regulatory amendment, and NMFS respective responses. During the comment period, NMFS received 88 comments on the proposed rule. The majority of the comments addressed issues beyond the scope of rule and therefore these

comments are not addressed below. Some noted that red snapper are more abundant than the stock assessments have determined and recommended the Council should consider increasing the recreational bag limit and the recreational season length. One commenter opposed the increase in the total allowable harvest of red snapper and is addressed below. Two comments were made regarding the revision of the "actual ex-vessel price" definition, including one in general opposition to changing the definition, and the other comment is addressed below.

Comment 1: The red snapper total allowable catch should not be increased until the effects of the Deepwater Horizon MC252 Oil Spill are known for larval impacts.

Response: To date, there have been no observed fish kills from the Deepwater Horizon MC252 Oil Spill in Federal waters. However, the oil spill may have impacted spawning success of red snapper and other species that spawn in the summer months, either by reduced spawning activity or by reduced survival of the eggs and larvae. If this is the case, impacts on harvestable size red snapper will begin to be seen in 2 to 3 years when the 2010 year class becomes large enough to enter the fishery and be retained.

Substantial portions of the red snapper population are found in the northwestern and western Gulf (western Louisiana and Texas) and an increasing population of red snapper is developing off the west Florida continental shelf, thus spawning by this segment of the stock should not have been impacted, which would mitigate the overall impact of a failed spawn by that portion of the stock located in oil-affected areas.

Comment 2: The current method of reporting ex-vessel price paid to the fisherman who fishes leased allocation is correct. It is the price being paid to the fisherman.

Response: NMFS does not agree that this is the true ex-vessel price. Actual ex-vessel price represents the total monetary sale amount per pound of fish before any deductions are made. The revision to the definition of "actual ex-vessel price" will allow NMFS to more accurately analyze the total value of the Gulf commercial red snapper and grouper and tilefish IFQ programs, and will more appropriately align the definition with the original intent of the IFQ programs.

Classification

The Regional Administrator, Southeast Region, NMFS, determined that the regulatory amendment is necessary for the conservation and management of the red snapper component of the Gulf reef fish fishery and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

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

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: April 26, 2011.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. In § 622.2, the definition of "actual ex-vessel value" is removed and the definition of "actual ex-vessel price" is added in alphabetical order to read as follows:

§ 622.2 Definitions and acronyms.

* * * * *

Actual ex-vessel price means the total monetary sale amount a fisherman receives per pound of fish for IFQ landings from a registered IFQ dealer before any deductions are made for transferred (leased) allocation and goods and services (e.g. bait, ice, fuel, repairs, machinery replacement, etc.).

* * * * *

■ 3. In § 622.16, paragraph (c)(5) is revised to read as follows:

§ 622.16 Gulf red snapper individual fishing quota (IFQ) program.

* * * * *

(c) * * *

(5) *Restricted transactions during the 20-hour online maintenance window.* All electronic IFQ transactions must be completed by December 31 at 6 p.m. eastern time each year. Electronic IFQ functions will resume again on January 1 at 2 p.m. eastern time the following fishing year. The remaining 6 hours prior to the end of the fishing year, and the 14 hours at the beginning of the next fishing year, are necessary to provide NMFS time to reconcile IFQ accounts, adjust allocations for the upcoming year if the commercial quotas for Gulf red snapper have changed, and update shares and allocations for the upcoming fishing year. No electronic IFQ transactions will be available during these 20 hours. An advance notice of landing may still be submitted during the 20-hour maintenance window by using the vessel's VMS unit or calling IFQ Customer Service at 1–866–425–7627.

* * * * *

■ 4. In § 622.20, paragraph (c)(5) is revised to read as follows:

§ 622.20 Individual fishing quota (IFQ) program for Gulf groupers and tilefishes.

* * * * *

(c) * * *

(5) *Restricted transactions during the 20-hour online maintenance window.* All electronic IFQ transactions must be completed by December 31 at 6 p.m. eastern time each year. Electronic IFQ functions will resume again on January 1 at 2 p.m. eastern time the following fishing year. The remaining 6 hours prior to the end of the fishing year, and the 14 hours at the beginning of the next fishing year, are necessary to provide NMFS time to reconcile IFQ accounts, adjust allocations for the upcoming year if the commercial quotas or catch allowances for Gulf groupers and tilefishes have changed, and update shares and allocations for the upcoming fishing year. No electronic IFQ transactions will be available during these 20 hours. An advance notice of landing may still be submitted during the 20-hour maintenance window by using the vessel's VMS unit or calling IFQ Customer Service at 1–866–425–7627.

* * * * *

■ 5. In § 622.42, paragraphs (a)(1)(i) and (a)(2)(i) are revised to read as follows:

§ 622.42 Quotas.

* * * * *

(a) * * *

(1) * * *

(i) *Red snapper*—3.664 million lb (1.662 million kg), round weight.

* * * * *

(2) * * *

(i) *Recreational quota for red snapper.* The recreational quota for red snapper is 3.521 million lb (1.597 million kg), round weight.

* * * * *

§ 622.45 [Amended]

■ 6. In § 622.45, paragraph (c)(4) is removed.

[FR Doc. 2011–10477 Filed 4–28–11; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 76, No. 83
Friday, April 29, 2011

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

Agricultural Marketing Service

7 CFR Part 205

[Document Number AMS–NOP–10–0102; NOP–10–10]

RIN 0581–AD10

National Organic Program; Periodic Residue Testing

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would clarify a provision of the Organic Foods Production Act of 1990 and the regulations issued thereunder that require periodic residue testing of organically produced agricultural products by accredited certifying agents. The proposed rule would amend the U.S. Department of Agriculture's (USDA) National Organic Program (NOP) regulations to make clear that accredited certifying agents must conduct periodic residue testing of agricultural products that are to be sold, labeled, or represented as "100 percent organic," organic," or "made with organic (specified ingredients or food group(s))." The proposed rule would expand the amount of residue testing of organically produced agricultural products by clarifying that sampling and testing are required on a regular basis. The proposed rule would require that certifying agents, on an annual basis, sample and conduct residue testing from a minimum of five percent of the operations that they certify. This action would help further ensure the integrity of products produced and handled under the NOP regulations.

DATES: Comments must be received by June 28, 2011. Pursuant to the Paperwork Reduction Act, comments on the information collection burden that would result from this action must be received by June 28, 2011.

ADDRESSES: Interested parties may submit written comments on this proposed rule using one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Lisa M. Brines, Agricultural Marketing Specialist, National Organic Program, USDA–AMS–NOP, Room 2646–So., Ag Stop 0268, 1400 Independence Ave., SW., Washington, DC 20250–0268.

Instructions: All submissions received must include the docket number AMS–NOP–10–0102; NOP–10–10, and/or Regulatory Information Number (RIN) 0581–AD11 for this rulemaking. You should identify the topic and section number of this proposed rule to which your comment refers. You should clearly indicate whether or not you support the action being proposed for any or all of the items in this proposed rule. You should clearly indicate the reason(s) for your position. You should also offer any recommended language changes that would be appropriate for your position. Please include relevant information and data to support your position (*e.g.* scientific, environmental, manufacturing, industry impact information, etc.). All comments received will be posted without change to *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Comments submitted in response to this proposed rule will also be available for viewing in person at USDA–AMS, National Organic Program, Room 2646—South Building, 1400 Independence Ave., SW., Washington, DC, from 9 a.m. to 12 noon and from 1 p.m. to 4 p.m., Monday through Friday (except official Federal holidays). Persons wanting to visit the USDA South Building to view comments received in response to this proposed rule are requested to make an appointment in advance by calling (202) 720–3252.

Pursuant to the Paperwork Reduction Act, interested persons may comment on the information collection and recordkeeping requirements required by this proposed rule using one of the following methods:

- *Mail:* Comments should be sent to above address and to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, 725 17th Street, NW., Room 725, Washington, DC 20503.
- Written comments should be identified with the docket number AMS–NOP–10–0102; NOP–10–10 and should reference the date and page number of this issue of the **Federal Register** and indicate that the comment is regarding the information collection and recordkeeping requirements.
- Comments are specifically invited on: (1) The accuracy of the Agency's burden estimate of the proposed collection of information; (2) ways to minimize the burden of the collection of information on those affected; (3) whether the proposed collection of information is sufficient or necessary to demonstrate compliance with the requirement that certifying agents report all analyses and tests performed to the Administrator, applicable State organic program's governing State official, and to health agencies in accordance with the proposed amendments to § 205.670; and (4) ways to enhance the quality, utility, and clarity of the information to be collected.

All comments on the information collection and recordkeeping requirements required by the proposed amendments to § 205.670 will become a matter of public record and will be available for public viewing at the above referenced location.

FOR FURTHER INFORMATION CONTACT: Melissa Bailey, Ph.D., Director, Standards Division, Telephone: (202) 720–3252; Fax: (202) 205–7808.

SUPPLEMENTARY INFORMATION:

I. Background

Under the Organic Foods Production Act (OFPA) of 1990 (7 U.S.C. 6511), the National Organic Program (NOP) is authorized to implement regulations that require accredited certifying agents to conduct residue testing of organically produced agricultural products. The OFPA (7 U.S.C. 6506) also requires that the NOP include provisions for periodic residue testing by certifying agents of agricultural products produced or handled in accordance with the NOP.

Residue testing plays an important role in organic certification by providing a means for monitoring compliance with the NOP and by discouraging the mislabeling of agricultural products. Testing of organically produced agricultural products is promulgated in

§ 205.670(b) of the NOP regulations. This section provides that the Secretary, State organic programs, and certifying agents may require pre-harvest or post-harvest testing of any agricultural input used or agricultural product to be sold, labeled, or represented as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))" when there is reason to believe that the agricultural input or product has come into contact with a prohibited substance or has been produced using excluded methods.

The proposed rule would clarify the requirement for residue testing under the NOP by requiring residue testing by certifying agents on a regularly occurring basis, in addition to residue testing when there is reason to suspect contamination with a prohibited substance.

The Agricultural Marketing Service (AMS) is issuing this proposed rule in response to an audit of the NOP which was conducted in March 2010 by the USDA Office of Inspector General (OIG).[1] As part of the audit, the OIG visited four certifying agents accredited by the NOP. The audit found that none of the four certifying agents visited conducted periodic residue testing. The OIG indicated that these certifying agents noted that they considered periodic residue testing to be required by the regulations only under certain circumstances.

In response, the AMS conducted a legal review of this issue. The AMS has concluded that, under 7 U.S.C. 6506 of the OFPA, accredited certifying agents are required to conduct residue testing of organic products on a regular and random basis, as well as when there is reason to believe contamination has occurred.

Accordingly, the AMS has issued this proposed rule, which would amend § 205.670 of the NOP regulations to clarify that certifying agents conduct periodic testing of agricultural products that are to be sold, labeled or represented as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))." The OFPA requires periodic residue testing by certifying agents of organic products to determine if the products contain any pesticide, other nonorganic residue, or natural toxicants (7 U.S.C. 6506). This action will clarify the amount and frequency of testing and will ensure consistency across all certifying agents in their inspection and testing of agricultural products certified to the NOP regulations. The proposed rule specifies that certifying agents would be required, on an annual basis, to randomly sample and test agricultural products from a minimum of five percent of the operations they certify.

On June 23 and June 24, 2010, the NOP conducted two Webinar trainings with certifying agents on periodic residue testing under the NOP. The objective of the webinar was to present an overview of requirements for periodic residue testing under the OFPA and the NOP. The NOP also solicited feedback from the certifying agents who participated in the webinar. Of the certifying agencies accredited at that time, 55 individuals registered to participate in the webinar. Ten participants in the webinar provided written feedback to the NOP in response to the information provided. These comments were considered in the development of this proposed rule.

While the proposed action would expand the amount of testing of organically produced agricultural products to include a requirement that is regular and random in scope, certifying agents are already required, under § 205.504(b)(6), to have procedures in place for sampling and residue testing pursuant to § 205.670. Certifying agents should already be conducting sampling and laboratory testing in instances where contamination is suspected under § 205.403(c)(3) and § 205.670(b).

II. Overview of Proposed Amendments

Requirement for Periodic Residue Testing

This proposed rule would amend § 205.670 of the NOP regulations to require accredited certifying agents to conduct random, periodic testing of agricultural products that are to be sold, labeled or represented as "100 percent organic," organic," or "made with organic (specified ingredients or food group(s))."

The proposed rule would amend the title of § 205.670 to reflect the scope of products currently listed under § 205.670(a) and (b). The amended title would read as follows: § 205.670 Inspection and testing of agricultural product to be sold, labeled, or represented as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))."

Number of Samples

The proposed rule would require that all certifying agents conduct a minimum level of periodic residue testing. Under the proposed rule, the minimum number of operations to be sampled for periodic residue testing would be at least five percent of the operations that the certifying agency certifies on an annual basis, rounded to the nearest whole number. Certifying agents that certify fewer than 30 operations on an annual basis would be required to sample from at least one operation annually. For example, a certifying agency that certifies 29 operations would be required to sample a minimum of 1 operation annually (i.e., $0.05 \times 29 = 1.45$, which rounds to 1 operation). A certifying agency that certifies 30 operations would be required to sample a minimum of 2 operations annually (i.e., $0.05 \times 30 = 1.50$, which rounds to 2 operations). The minimum number of samples required would be calculated based on the overall number of certified operations. Certifying agents may collect more than one sample per operation for residue testing; however, a minimum of five percent of all its certified operations must be sampled annually, regardless of the number of samples collected per operation.

The proposed five percent minimum for periodic residue testing would be in addition to any testing that certifying agents conduct when there is reason to believe that the agricultural product has come into contact with a prohibited substance. Testing of products when there is reason to believe a violation has occurred, e.g. complaint-driven testing, would not be considered to be random, periodic testing, and must continue to be conducted in addition to the proposed five percent requirement for periodic residue testing.

The NOP understands that a minority of accredited certifying agents currently conduct residue testing on a regular, periodic basis. Any additional costs for residue testing under this proposed rule will need to be provided by the applicable certifying agent and are considered a cost of doing business. The additional costs of residue testing will be borne by the applicable certifying agent, as previously discussed in the preamble to the December 21, 2000 final rule (65 FR 80548).

Testing Methodology

The proposed rule maintains the current requirement under § 205.670(c) that chemical analysis must be made in accordance with the methods described in the most current edition of the *Official Methods of Analysis of the AOAC International* or other current applicable validated methodology for determining the presence of contaminants in agricultural products. On February 2, 2011, the NOP provided instructions on laboratory selection criteria for pesticide residue testing to certifying agents. These instructions are

[1] Audit Report 01601–03–Hy, March 2010.

further described below under *Related Documents* and are available on the NOP Web site at *http://www.ams.usda.gov/nop.* The AMS anticipates that these instructions will change over time in response to advances in testing methodology, analytical instrumentation, and residue detection techniques.

Analytes for Pesticide Residue Testing

On February 2, 2011, the NOP published a list of target pesticides that are suggested for certifying agents that conduct pesticide residue testing of organically produced agricultural products. This list is available at the NOP Web site at *http://www.ams.usda.gov/nop* and is discussed below under *Related Documents.* The AMS does not intend to amend the NOP regulations to include a specific list of pesticide residues to allow flexibility in revising the list of target pesticide residues as new pesticides enter the market. In addition, this flexibility will allow the NOP to respond more quickly to observed trends in detection of residues on specific commodities.

Reporting Requirements

The proposed rule would maintain the current reporting requirements for submitting results of all analyses and tests performed under § 205.670. Certifying agents would continue to be required to submit results promptly to the Administrator; except, that, where a State organic program exists, all results shall be provided to the State organic program's governing State official. Required reporting would include copies of original laboratory results, including analyses where residues are not detected or are not in violation of the NOP standards. Submission of copies of original test results, rather than requiring that results be provided in a specific format, is intended to minimize the reporting burden on certifying agents.

The proposed rule would amend § 205.670 to clarify the reporting requirements when test results indicate that a specific agricultural product contains pesticide residues or environmental contaminates that exceed the Food and Drug Administration's or Environmental Protection Agency's regulatory tolerances. Under the OFPA (7 U.S.C. 6506), certifying agents, to the extent that they are aware of a violation of applicable laws relating to food safety, are required to report such violation to the appropriate health agencies. This is promulgated in § 205.670(e) of the NOP regulations, which requires reporting to the Federal health agency whose regulatory tolerance or action level has been exceeded. The NOP has previously provided additional information on reporting health and safety violations to stakeholders and interested parties and is available on the NOP Web site at *http://www.ams.usda.gov/nop.* [2] The proposed rule would amend § 205.670(e) to clarify that these results must also be reported to the appropriate State health agency or foreign equivalent. This change is proposed to acknowledge the role of State agencies, or their foreign equivalents, in responding to residues in violation of food safety requirements.

The proposed rule would not change the requirement that certifying agents provide copies of test results, including results when residues are not detected, to certified operations in accordance with § 205.403(e)(2).

In addition to the reporting requirements outlined in the proposed rule, the NOP plans to publish a guidance document that will outline the actions to be taken by accredited certifying agents if test results from residue analysis show evidence of prohibited substance(s) in or on the product. This document will be published in the NOP Program Handbook, as described under *Related Documents.* Under § 205.671, when residue testing detects prohibited substances that are greater than five percent of the EPA's tolerance for the specific residue detected or unavoidable residual environmental contamination, the agricultural product must not be sold, labeled, or represented as organically produced. This proposed rule would not change this requirement. The guidance document will provide information to certifying agents on how to respond to results that indicate residues of prohibited substances and report results to the Administrator, or State organic program, under §§ 205.670 and 205.671.

Technical Correction

The proposed rule would amend § 205.670(e) by changing "tolerences" to "tolerances" to correct the spelling of this term.

III. Related Documents

Documents related to this proposed rule include the Organic Foods Production Act (OFPA), as amended (7 U.S.C. 6501 *et seq.*) and its implementing regulations (7 CFR part 205). The March 2010 USDA Office of Inspector General audit report of the National Organic Program is available as Audit Report 01601–03–Hy.

The NOP has also published three instruction documents related to residue testing as part of the NOP Program Handbook: (1) Sampling Procedures for Residue Testing (NOP 2610), (2) Laboratory Selection Criteria for Pesticide Residue Testing (NOP 2611), and (3) NOP Target Pesticide List (NOP 2611–1). The goal of the NOP Program Handbook is to provide those who own, manage, or certify organic operations with guidance, instructions, and policy memos that can assist them in complying with the NOP regulations. The most recent edition of the NOP Program Handbook is available for viewing and downloading through the NOP Web site at *http://www.ams.usda.gov/nop.*

The three instruction documents are meant to inform certifying agents about best practices for conducting residue testing of organically produced agricultural products. NOP 2610, Sampling Procedures for Residue Testing, contains recommended procedures for product sampling, including documentation, recommended sample sizes, shipping conditions to the laboratory, and chain of custody requirements. NOP 2611, Laboratory Selection Criteria for Pesticide Residue Testing, contains instructions for certifying agents in selecting a qualified laboratory for pesticide residue testing, including accreditation, quality assurance, proficiency testing, and reporting guidelines. NOP 2611–1, NOP Target Pesticide List, is a list of pesticide residues that certifying agencies can provide to laboratories which conduct pesticide residue testing of agricultural products. The three instruction documents were effective immediately upon their issuance and publication on February 2, 2011.

Members of the public who wish to request that the agency issue, reconsider, modify, or rescind a guidance or instruction document, or to complain that the agency is not following the procedures in the Office of Management and Budget's Bulletin on Good Guidance Practices published January 25, 2007 (72 FR 3432), or is improperly treating a guidance document as a binding requirement, may do so by sending an email to *NOP.Guidance@ams.usda.gov* or by mailing a letter to Standards Division, National Organic Program, U.S. Department of Agriculture, Room 2646–So. (Stop 0268), 1400 Independence Ave SW., Washington, DC 20250–0268.

[2] NOP Policy Memo 11–6.

IV. Statutory and Regulatory Authority

The Organic Foods Production Act of 1990 (OFPA), as amended (7 U.S.C. 6501 *et seq.*), authorizes the Agricultural Marketing Service (AMS) to administer to the NOP. Under the NOP, AMS oversees national standards for the production and handling of organically produced agricultural products.

Section 2107(a)(6) of the OFPA (7 U.S.C. 2107) requires periodic residue testing by certifying agents of agricultural products that have been produced on certified organic farms and handled through certified organic handling operations to determine whether such products contain any pesticide or other nonorganic residue or natural toxicants. This section also requires certifying agents to report violations of applicable laws relating to food safety (e.g. pesticide residues in excess of FDA action levels or EPA tolerances) to the appropriate health agencies. Additional information on reporting health and safety violations has been previously provided by the NOP to stakeholders and interested parties.[3] This information is available on the NOP Web site at *http://www.ams.usda.gov/nop.*

Section 2112(a) of the OFPA (7 U.S.C. 6511) requires the Secretary, the applicable governing State official, and the certifying agent to utilize a system of residue testing to test products sold or labeled as organically produced.

Section 2112(b) of the OFPA (7 U.S.C. 6511) allows the Secretary, the applicable governing State official, or the certifying agent to require preharvest tissue testing of any crop grown on soil suspected of harboring contaminants.

A. Executive Order 12866

This action has been determined non-significant for purposes of Executive Order 12866, and therefore, has not been reviewed by the Office of Management and Budget.

B. Executive Order 12988

Executive Order 12988 instructs each executive agency to adhere to certain requirements in the development of new and revised regulations in order to avoid unduly burdening the court system. This proposed rule is not intended to have a retroactive effect.

States and local jurisdictions are preempted under the OFPA from creating programs of accreditation for private persons or State officials who want to become certifying agents of organic farms or handling operations. A governing State official would have to apply to USDA to be accredited as a certifying agent, as described in § 2115(b) of the OFPA (7 U.S.C. 6514(b)). States are also preempted under §§ 2104 through 2108 of the OFPA (7 U.S.C. 6503 through 6507) from creating certification programs to certify organic farms or handling operations unless the State programs have been submitted to, and approved by, the Secretary as meeting the requirements of the OFPA.

Pursuant to § 2108(b)(2) of the OFPA (7 U.S.C. 6507(b)(2)), a State organic certification program may contain additional requirements for the production and handling of organically produced agricultural products that are produced in the State and for the certification of organic farm and handling operations located within the State under certain circumstances. Such additional requirements must: (a) Further the purposes of the OFPA, (b) not be inconsistent with the OFPA, (c) not be discriminatory toward agricultural commodities organically produced in other States, and (d) not be effective until approved by the Secretary.

Pursuant to § 2120(f) of the OFPA (7 U.S.C. 6519(f)), this proposed rule would not alter the authority of the Secretary under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Poultry Products Inspections Act (21 U.S.C. 451 *et seq.*), or the Egg Products Inspection Act (21 U.S.C. 1031 *et seq.*), concerning meat, poultry, and egg products, nor any of the authorities of the Secretary of Health and Human Services under the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301 *et seq.*), nor the authority of the Administrator of the EPA under the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 136 *et seq.*).

Section 2121 of the OFPA (7 U.S.C. 6520) provides for the Secretary to establish an expedited administrative appeals procedure under which persons may appeal an action of the Secretary, the applicable governing State official, or a certifying agent under this title that adversely affects such person or is inconsistent with the organic certification program established under this title. The OFPA also provides that the U.S. District Court for the district in which a person is located has jurisdiction to review the Secretary's decision.

C. Regulatory Flexibility Analysis (5 U.S.C. et seq.)

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) requires agencies to consider the economic impact of each rule on small entities and evaluate alternatives that would accomplish the objectives of the rule without unduly burdening small entities or erecting barriers that would restrict their ability to compete in the market. The purpose is to fit regulatory actions to the scale of businesses subject to the action. Section 605 of RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

Pursuant to the requirements set forth in the RFA, the AMS performed an economic impact analysis on small entities in the final rule published in the **Federal Register** on December 21, 2000 (65 FR 80548). The AMS has also considered the economic impact of this action on small entities. The AMS has determined that the impact on entities affected by this proposed rule would not be significant.

Small agricultural service firms, which include producers, handlers, and accredited certifying agents, have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $7,000,000 and small agricultural producers are defined as those having annual receipts of less than $750,000.

According to Economic Research Service (ERS) data based on information from USDA-accredited certifying agents, the number of certified U.S. organic crop and livestock operations totaled nearly 13,000 and certified organic acreage exceeded 4.8 million acres in 2008.[4] ERS, based upon the list of certified operations maintained by the NOP, estimated the number of certified handling operations was 3,225 in 2007.[5] AMS believes that most of these entities would be considered small entities under the criteria established by the SBA.

The U.S. sales of organic food and beverages have grown from $3.6 billion in 1997 to nearly $21.1 billion in 2008.[6] The organic industry is viewed as the fastest growing sector of agriculture, representing over 3% of overall food sales in 2009. Between 1990 and 2008, organic food sales have historically demonstrated a growth rate between 15

[3] NOP Policy Memo 11–6.

[4] U.S. Department of Agriculture, Economic Research Service. 2009. *Data Sets: U.S. Certified Organic Farmland Acreage, Livestock Numbers and Farm Operations, 1992–2008. http://www.ers.usda.gov/Data/Organic/.*

[5] U.S. Department of Agriculture, Economic Research Service, 2009. *Data Sets: Procurement and Contracting by Organic Handlers: Documentation. http://www.ers.usda.gov/Data/OrganicHandlers/Documentation.htm.*

[6] Dimitri, C., and L. Oberholtzer. 2009. *Marketing U.S. Organic Foods: Recent Trends from Farms to Consumers,* Economic Information Bulletin No. 58, U.S. Department of Agriculture, Economic Research Service, *http://www.ers.usda.gov/Publications/EIB58.*

to 24 percent each year. In 2009, organic food sales grew 5.1%.[7]

The USDA has 94 accredited certifying agents (ACAs) who provide certification services to producers and handlers under the NOP. A complete list of names and addresses of ACAs may be found on the AMS NOP Web site at: *http://www.ams.usda.gov/nop.* The AMS believes that most of those accredited certifying agents would be considered small entities under the criteria established by the SBA. Certifying agents reported approximately twenty-seven thousand certified operations worldwide in 2010.

The AMS is proposing a minimum testing requirement of five percent of certified operations. This level was chosen to ensure that all certifying agents, regardless of the number of operations they certify, are responsible for some level of regular residue testing at reasonable cost. Under § 205.670(b) of the current NOP regulations, certifying agents are responsible for expenses associated with preharvest and postharvest testing; this requirement would also apply to the requirements for periodic residue testing in this proposed rule. To estimate the annual costs associated with instituting periodic residue testing, the NOP conducted a preliminary assessment of costs at different minimum testing requirements (i.e. 3%, 5%, and 10% of certified operations).

Under this new action with a five percent minimum testing requirement, the two certifying agents with the largest number of certified operations (approximately 2,100 operations each for 2009) would be required to collect a minimum of 105 samples. Smaller certifying agents (those certifying fewer than 30 operations) would be required to collect and test at least 1 sample on an annual basis. In 2010, approximately one-third of accredited certifying agents certified fewer than 30 operations.[8] Over half of all certifying agents certified fewer than 200 operations in 2010 and would be required to sample 10 or fewer operations annually under this proposal for periodic residue testing.

At a five percent minimum testing requirement, the costs of sample analysis would range from approximately $500 to $53,000 per certifying agent per year based on the average cost of $500 per sample and the range in the number of operations certified by different certifying agents. Additional costs may be required to follow up on results if prohibited substances are detected.

The AMS is proposing a five percent level in this proposed rule because this level is expected to be, in most cases, no more than one percent of a given certifying agent's operating budget, a level that can be considered a reasonable cost to the organic industry given the benefits of residue testing in discouraging the mislabeling of agricultural products. Furthermore, the number of samples required at a five percent level would be consistent with the amount of residue sampling already being conducted by some certifying agents.

The AMS considered two additional alternatives to the 5% proportional requirement: (1) A requirement for certifying agents to sample 25% of all certified operations (a statistically based sample size based upon the rate of detection of residues in organic products sampled through the USDA AMS Pesticide Data Program (PDP)), and (2) a requirement for certifying agents to sample all 27,000 certified operations. The AMS determined that both alternatives are impractical due to the costs and the uneven burden that could be placed upon smaller certifying agents in either scenario.

The proposed rule is necessary to clarify a requirement of OFPA that certifying agents conduct periodic residue testing of organic products. The proposed rule would increase the amount of residue testing that certifying agencies must conduct when compared to the current regulations. The costs of testing will be borne by the applicable certifying agent and is considered a cost of doing business.

D. Paperwork Reduction Act

In accordance with Office of Management and Budget (OMB) regulations (5 CFR part 1320) that implement the Paperwork Reduction Act (44 U.S.C. 3501–3520) (PRA), the information collection requirements associated with the NOP have been previously approved by OMB and assigned OMB control number 0581–0191. A new information collection package is being submitted to OMB for approval of 776 hours in total burden hours to cover this new collection and recordkeeping burden of the amendments proposed to § 205.670 in this proposed rule. Upon OMB's approval of this new information collection, the NOP intends to merge this collection into currently approved OMB Control Number 0581–0191. In accordance with 5 CFR Part 1320, we have included below a description of the collection and recordkeeping requirements and an estimate of the annual burden on certifying agents who would be required to maintain information under this proposed rule. Authority for this action is the Organic Foods Production Act of 1990 (7 U.S.C. 6501 *et seq.*), as amended.

Title: National Organic Program; Periodic Residue Testing.

OMB Control Number: 0581–NEW.

Expiration Date of Approval: 3 years from OMB date of approval.

Type of Request: New collection.

Abstract: The information collection and recordkeeping necessitated by amendments to § 205.670 are essential to ensure that certifying agents conduct periodic residue testing of agricultural products produced or handled as required by OFPA (7 U.S.C. 6506). Based on available information, AMS estimates that there are 94 certifying agents, both foreign and domestic, who will be subject to the amendments at § 205.670. The proposed rule would expand the amount of residue testing of organically produced agricultural products by clarifying that sampling and testing are required on a regular, random basis. As a result of this action and per § 205.670(e)(1), certifying agents would be required to report more test results to the AMS Administrator or, if applicable, State organic program's governing State official. To meet this requirement, certifying agents would need to submit a copy of each test result to the Administrator or State organic program upon receiving these results from an accredited laboratory. Allowing the submission of copies of test results, rather than requiring that results are provided in a specific format to the Administrator or State organic program, should minimize the reporting burden on certifying agents. The frequency of this reporting would be dependent upon when, during the course of a year, the certifying agent conducts their testing (*i.e.* certifying agents may choose to complete their testing and reporting all in the same month or may choose to spread their testing and reporting throughout the year). The expansion of testing may also lead, under certain circumstances, to an increase in the reporting to a Federal health agency, State health agency, or foreign equivalent as required by § 205.670(f) of the proposed amendment. The frequency of this reporting would vary with the number of times that test results exceed a regulatory tolerance as specified at § 205.670(f).

The PRA also requires AMS to measure the recordkeeping burden. While certifying agents are already

[7] Organic Trade Association's *2010 Organic Industry Survey, http://www.ota.com.*

[8] As reported by certifying agents during the 2010 certification year and available at *http://apps.ams.usda.gov/nop/.*

required to maintain records under § 205.510(b) of the NOP regulations as part of accreditation, this action would increase the volume of records that certifying agents would need to maintain. Maintaining copies of laboratory results would be necessary for certifying agents to demonstrate compliance with the proposed requirement at § 205.670(c). This requirement would specify that certifying agents must annually conduct residue testing of agricultural products from at least five percent of the operations they certify. Certifying agents would also need to document correspondence that demonstrates their reporting to a Federal health agency, State health agency, or foreign equivalent, for results with residues that exceed the regulatory tolerance as specified at § 205.670(f) as proposed.

This information collection is used by the certifying agent; certified operation; authorized representatives of USDA, including AMS and NOP staff; applicable State organic program; and Federal health agencies, State health agencies, or foreign equivalent. Certifying agents and USDA are the primary users of the information.

Information Collection Burden

Estimate of Burden: Public reporting burden for the collection of information per sample analysis submitted to the Administrator or State organic program is estimated to be 15 minutes. The estimated reporting burden is based upon feedback provided to the NOP by domestic and foreign certifying agents. To meet the requirement to annually test for residues from at least five percent of the operations they certify, certifying agents would, on average, need to conduct and report results on fifteen samples on an annual basis. This estimate is based upon AMS data that the 94 certifying agents provide certification services to approximately 27,000 operations. AMS estimates the annual collection cost per certifying agent to be $121.58. This estimate is based on an estimated 3.75 labor hours per year (reporting 15 samples per year at 0.25 hour per sample) at $32.42 per hour for a total salary component of $121.58 per year. The hourly rate is estimated based on the mean hourly wage for auditors as published by the Bureau of Labor Statistics.[9] This classification was selected as an occupation with similar duties and responsibilities to that of a certifying agent. Such duties and responsibilities include conducting reviews of operations against accepted standards and evaluating audit or inspection findings for compliance.

Public reporting burden for information that requires submission to a Federal health agency, state agency, or foreign equivalent is estimated to be a one hour per response. Certifying agents would need to report on results that show residues that exceed regulatory tolerances per proposed § 205.670(f). Based upon the USDA AMS Pesticide Data Program data from calendar year 2008, results from residue testing of conventional commodities showed regulatory tolerances exceeded in approximately 4.2% of samples.[10] While it is expected that organic products would have a lower incidence of samples with residues that exceed regulatory tolerance, the 4.2% estimate provides an upper limit for how often certifying agents might have to report residue testing results to Federal health agencies, appropriate State health agency, or their foreign equivalent. As a result, each certifying agent, on average, would be expected to report less than one response to a Federal health agency, State health agency, or foreign equivalent. AMS estimates the annual collection cost per certifying agent to be $19.45. This estimate is based on an estimated 0.6 labor hours per year (reporting fewer than one result per year, on average, at one hour per submission) at $32.42 per hour for a total salary component of $19.45 per year.

Respondents: Certifying agents.

Estimated Number of Respondents: 94.

Estimated Number of Responses per Respondent: 15.6.

Estimated Total Annual Burden on Respondents: 409 hours.

Total Cost: $13,257.

Recordkeeping Burden

Estimate of Burden: Public recordkeeping burden is estimated to be an annual total of 3.9 hours per respondent at $32.42 per hour for a total salary component cost of $126.44. This accounts for both the recordkeeping associated with maintaining copies of test results and documenting any correspondence with a Federal health agency, state health agency, or foreign equivalent.

Respondents: Certifying agents.

Estimated Number of Respondents: 94.

Estimated Number of Responses per Respondent: 15.6.

Estimated Total Annual Burden on Respondents: 367 hours.

Total Cost: $11,898.

Comments: AMS is inviting comments from all interested parties concerning the information collection and recordkeeping required as a result of the amendments proposed to § 205.670 in this proposed rule. Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments that specifically pertain to the information collection and recordkeeping requirements of this action should be sent to Lisa M. Brines, Agricultural Marketing Specialist, Standards Division, National Organic Program, USDA–AMS–NOP, Room 2646–So., Ag Stop 0268, 1400 Independence Ave., SW., Washington, DC 20250–0268 and to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, 725 17th Street, NW., Room 725, Washington, DC 20503. Comments on the information collection and recordkeeping requirements should reference the date and page number of this issue of the Federal Register. All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

The comment period for the information collection and recordkeeping requirements contained in this proposed rule is 60 days.

The AMS is committed to complying with the E-Government Act to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects in 7 CFR Part 205

Administrative practice and procedure, Agriculture, Animals,

[9] U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Employment and Wages,* May 2009.

[10] U.S. Department of Agriculture, Agricultural Marketing Service, Pesticide Data Program Annual Summary, Calendar Year 2008. *http://www.ams.usda.gov/pdp.*

Archives and records, Imports, Labeling, Organically produced products, Plants, Reporting and recordkeeping requirements, Seals and insignia, Soil conservation.

For the reasons set forth in the preamble, 7 CFR part 205, subpart G is proposed to be amended as follows:

PART 205—NATIONAL ORGANIC PROGRAM

1. The authority citation for 7 CFR part 205 continues to read as follows:

Authority: 7 U.S.C. 6501–6522.

2. Section 205.670 is revised to read as follows:

§ 205.670 Inspection and testing of agricultural product to be sold or labeled as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))."

(a) All agricultural products that are to be sold, labeled, or represented as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))" must be made accessible by certified organic production or handling operations for examination by the Administrator, the applicable State organic program's governing State official, or the certifying agent.

(b) The Administrator, applicable State organic program's governing State official, or the certifying agent may require preharvest or postharvest testing of any agricultural input used or agricultural product to be sold, labeled, or represented as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))" when there is reason to believe that the agricultural input or product has come into contact with a prohibited substance or has been produced using excluded methods. Such tests must be conducted by the applicable State organic program's governing State official or the certifying agent at the official's or certifying agent's own expense.

(c) A certifying agent must conduct periodic residue testing of agricultural products to be sold, labeled, or represented as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))." Such tests must be conducted by the certifying agent at the certifying agent's own expense. A certifying agent must, on an annual basis, sample and test from a minimum of five percent of the operations it certifies, rounded to the nearest whole number. A certifying agent that certifies fewer than thirty operations on an annual basis must sample and test from at least one operation annually.

(d) Sample collection pursuant to paragraphs (b) and (c) of this section must be performed by an inspector representing the Administrator, applicable State organic program's governing State official, or certifying agent. Sample integrity must be maintained throughout the chain of custody, and residue testing must be performed in an accredited laboratory. Chemical analysis must be made in accordance with the methods described in the most current edition of the *Official Methods of Analysis of the AOAC International* or other current applicable validated methodology for determining the presence of contaminants in agricultural products.

(e) Results of all analyses and tests performed under this section:

(1) Must be promptly provided to the Administrator; *Except,* That, where a State organic program exists, all test results and analyses shall be provided to the State organic program's governing State official by the applicable certifying party that requested testing; and

(2) Will be available for public access, unless the testing is part of an ongoing compliance investigation.

(f) If test results indicate a specific agricultural product contains pesticide residues or environmental contaminants that exceed the Food and Drug Administration's or the Environmental Protection Agency's regulatory tolerances, the certifying agent must promptly report such data to the Federal health agency whose regulatory tolerance or action level has been exceeded. Test results that exceed federal regulatory tolerances must also be reported to the appropriate State health agency or foreign equivalent.

* * * * *

Dated: April 25, 2011.

David R. Shipman,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2011–10415 Filed 4–28–11; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0318; Directorate Identifier 2010–CE–033–AD]

RIN 2120–AA64

Airworthiness Directives; Burl A. Rogers (Type Certificate Previously Held by William Brad Mitchell and Aeronca, Inc.) Models 15AC and S15AC Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); Extension of the comment period.

SUMMARY: This document extends the period for public comment on the above-referenced NPRM. The proposed AD would require repetitive inspections of the upper and lower main wing spar cap angles for cracks and/or corrosion and installing inspection access panels. The proposed AD would also require replacing the wing spar cap angles if moderate or severe corrosion is found and applying corrosion inhibitor. The proposed AD was prompted by reports of intergranular exfoliation and corrosion of the upper and/or lower wing main spar cap angles found on the affected airplanes. We are proposing this AD to detect and correct cracks, intergranular exfoliation and corrosion in the wing main spar cap angles, which could result in reduced strength of the wing spar and the load carrying capacity of the wing. This could lead to wing failure and consequent loss of control. This extension of the comment period is necessary to assure that all interested persons have ample opportunity to present their views on the proposed requirements of the NPRM.

DATES: We must receive comments on this proposed AD by July 3, 2011. The comment due date is being extended from May 19, 2011.

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

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

between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Burl's Aircraft, LLC, P.O. Box 671487, Chugiak, Alaska 99567–1487; phone: (907) 688–3715; fax (907) 688–5031; e-mail *burl@biginalaska.com;* Internet: *http://www.burlac.com.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Eric Wright, Aerospace Engineer, FAA, Anchorage Aircraft Certification Office, 222 W. 7th Ave., #14, Anchorage, Alaska 99513; telephone: (907) 271–2648; fax: (907) 271–6365; e-mail: *eric.wright@faa.gov.*

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–2011–0318; Directorate Identifier 2010–CE–033–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

We issued an NPRM to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to all Burl A. Rogers (type certificate previously held by William Brad Mitchell and Aeronca, Inc.) Models 15AC and S15AC airplanes. The NPRM published in the **Federal Register** on April 4, 2011 (76 FR 18454). The NPRM proposed to require repetitive inspections of the upper and lower main wing spar cap angles for cracks and/or corrosion and installing inspection access panels. The NPRM also proposed to require replacing the wing spar cap angles if moderate or severe corrosion is found and applying corrosion inhibitor.

Since we issued the NPRM, we received a request to extend the comment period of the NPRM to 90 days.

FAA's Determination

We have considered the request and find it appropriate to extend the comment period to give all interested persons additional time to examine all data and the proposed requirements of the NPRM and submit comments. We determined that extending the comment period to 90 days will not compromise the safety of these airplanes.

The comment period for Docket No. FAA–2011–0318; Directorate Identifier 2010–CE–033–AD is hereby extended to July 3, 2011.

Since no portion of the NPRM or other regulatory information has been changed, the entire NPRM is not being republished.

Issued in Kansas City, Missouri, on April 22, 2011.

John Colomy,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–10383 Filed 4–28–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0436; Directorate Identifier 2011–CE–009–AD]

RIN 2120–AA64

Airworthiness Directives; Hawker Beechcraft Corporation Models B300 and B300C (C–12W) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD would require inserting an update to the performance charts in the FAA-approved airplane flight manual and the pilot's operating handbook, part number (P/N) 130–590031–245. This proposed AD was prompted by an error found in the take-off speeds and field lengths published in the FAA-approved airplane flight manual. We are proposing this AD to correct the published data in the airplane flight manual and the pilot's operating handbook and ensure it corresponds with the published data in the pilot's checklist. This condition, if not corrected, could result in a pilot taking off from shorter runways than required by the airplane if the airplane loses an engine after takeoff decision speed (V_1). This could result in the airplane running out of runway before take-off can be accomplished.

DATES: We must receive comments on this proposed AD by June 13, 2011.

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

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

For service information identified in this proposed AD, contact Hawker Beechcraft Corporation, 9709 East Central, Wichita, Kansas 67201; *telephone:* (316) 676–5034; *fax:* (316) 676–6614; *Internet: https://www.hawkerbeechcraft.com/service_support/pubs/.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Jason Brys, Flight Test Engineer, FAA, Wichita Aircraft Certification Office (ACO), 1801 S. Airport Road, Room 100, Wichita, Kansas 67209; *telephone:* (316) 946–4100; *fax:* (316) 946–4107.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2011–0436; Directorate Identifier 2011–CE–009–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

We were notified by Hawker Beechcraft Corporation of an error found in the take-off speeds and field lengths published in the FAA-approved airplane flight manual. The required runway distances published in the current manual could be up to 320 feet shorter than what is necessary. Hawker Beechcraft Corporation determined data in the pilot's checklist (P/N 130–590031–273) was correct. This condition, if not corrected, could result in taking off from shorter runways than required by the airplane if the airplane loses an engine after takeoff decision speed (V_1). This could result in the airplane running out of runway before take-off can be accomplished.

Relevant Service Information

We reviewed Hawker Beechcraft Corporation Temporary Change to the Pilot's Operating Handbook and FAA–Approved Airplane Flight Manual, P/N 130–590031–245TC5, dated February 2011. The temporary change corrects the published data in the FAA-approved airplane flight manual and the pilot's operating handbook.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require inserting an update to the performance charts in the FAA-approved airplane flight manual and the pilot's operating handbook.

Costs of Compliance

We estimate that this proposed AD affects 46 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
AFM page replacement	.5 work-hour × $85 per hour = $42.50.	Not applicable	$42.50	$1,955

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

(1) Is not a "significant regulatory action" under Executive Order 12866,

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

(3) Will not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

Hawker Beechcraft Corporation: Docket No. FAA–2011–0436; Directorate Identifier 2011–CE–009–AD.

Comments Due Date

(a) We must receive comments by June 13, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Hawker Beechcraft Corporation Model B300 and B300C (C–12W) airplanes, all serial numbers, that:

(1) Are certificated in any category; and

(2) Are modified per Hawker Beechcraft Drawing 130M000030 or Kit Drawing 130–4014 that incorporate Aircraft Flight Manual P/N 130–590031–245.

Subject

(d) Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 91, Charts.

Unsafe Condition

(e) This AD was prompted by an error that was discovered in the take-off speeds and field lengths published in the FAA-approved flight manual. We are proposing this AD to correct the published data in the airplane flight manual and the pilot's operating handbook and ensure it corresponds with the published data in the pilot's checklist. This condition, if not corrected, could result in taking off from shorter runways than required by the airplane if the airplane loses an engine after takeoff decision speed (V_1). This could result in the airplane running out of runway before take-off can be accomplished.

Compliance

(f) Comply with this AD within the compliance times specified, unless already done.

Action

(g) Within 14 days after the effective date of this AD, insert Hawker Beechcraft Corporation Log of Temporary Changes, dated February 2011; and Hawker Beechcraft Corporation Temporary Change to the Pilot's Operating Handbook and FAA Approved Airplane Flight Manual, Part Number (P/N) 130–590031–245TC5, dated February 2011; into the airplanes Pilot's Operating Handbook and FAA Approved Flight Manual, P/N 130–590031–245. The actions required by this paragraph may be performed by the owner/operator (pilot) holding at least a private pilot certificate and must be entered into the aircraft records showing compliance with this AD in accordance with 14 CFR 43.9 (a)(1)–(4) and 14 CFR 91.417(a)(2)(v). The record must be maintained as required by 14 CFR 91.417, 121.380, or 135.439.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, Wichita Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

Related Information

(i) For more information about this AD, contact Jason Brys, Flight Test Engineer, FAA, Wichita ACO, 1801 S. Airport Road, Room 100, Wichita, Kansas 67209; *telephone:* (316) 946–4100; *fax:* (316) 946–4107.

(j) For service information identified in this AD, contact Hawker Beechcraft Corporation, 9709 East Central, Wichita, Kansas 67201; *telephone:* (316) 676–5034; *fax:* (316) 676–6614; *Internet: https://www.hawkerbeechcraft.com/service_support/pubs/*. You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Issued in Kansas City, Missouri, on April 22, 2011.

John Colomy,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–10387 Filed 4–28–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 177

[Docket No. PHMSA–2010–0227 (HM–256A)]

RIN 2137–AE65

Hazardous Materials: Restricting the Use of Cellular Phones by Drivers of Commercial Motor Vehicles in Intrastate Commerce

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The Pipeline and Hazardous Materials Safety Administration (PHMSA) proposes to restrict the use of hand-held mobile telephones, including hand-held cell phones, by drivers during the operation of a motor vehicle containing a quantity of hazardous materials requiring placarding under Part 172 of the 49 CFR or any quantity of a select agent or toxin listed in 42 CFR Part 73. Additionally, in accordance with requirements proposed by the Federal Motor Carrier Safety Administration (FMCSA), motor carriers are prohibited from requiring or allowing drivers of covered motor vehicles to engage in the use of hand-held mobile telephones while driving. This rulemaking would improve health and safety on the Nation's highways by reducing the prevalence of distracted driving-related crashes, fatalities, and injuries involving drivers of commercial motor vehicles.

DATES: Comments must be received by June 28, 2011.

ADDRESSES: You may submit comments identified by the docket number PHMSA–2010–0227 by any of the following methods:

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

Instructions: All submissions must include the agency name and docket number for this rule. Note that all comments received will be posted without change, including any personal information provided. Please see the discussion of the Privacy Act below.

Docket: For access to the docket to read background documents and comments received, go to *http://www.regulations.gov* at any time or DOT's Docket Operations Office (*see* **ADDRESSES**).

FOR FURTHER INFORMATION CONTACT: Delmer Billings, Office of Hazardous Materials Safety, (202) 366–8553, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

I. Background

A. US DOT Strategy

The United States Department of Transportation (US DOT) is leading the effort to end the dangerous practice of distracted driving on our nation's roadways and in other modes of transportation. Driver distraction can be defined as the voluntary or involuntary diversion of attention from the primary driving tasks due to an object, event, or person that shifts the attention away from the fundamental driving task. The US DOT has identified three main types of distraction that occur while operating a motor vehicle:

1. Visual—taking your eyes off of the road;
2. Manual—taking your hands off of the wheel; and
3. Cognitive—taking your mind off of driving.

The US DOT is working across the spectrum with private and public entities to tackle distracted driving, and will lead by example. The individual agencies of the US DOT are working together to share knowledge, promote a

greater understanding of the issue, and identify additional strategies to end distracted driving. Additionally, several states have forbidden the operation of many types of electronic devices, including cellular phones, while driving any motor vehicle. *See* US DOT Distracted Driving Web site, *http://www.distraction.gov*; see also Insurance Institute for Highway Safety Web site, *http://www.iihs.org/*.

B. PHMSA Distracted Driving Safety Advisory Notice and Texting Restriction

In support of the US DOT strategy to end distracted driving PHMSA issued "Safety Advisory Notice: Personal Electronic Device Related Distractions (Safety Advisory Notice No.10–5)" on August 3, 2010 (75 FR 45697) to alert the hazardous materials community to the dangers associated with the use of cellular (mobile) phones and electronic devices while operating a commercial motor vehicle (CMV; 49 CFR 383.5).

On February 28, 2011 PHMSA issued a final rule (HM–256; PHMSA–2010–0221 (76 FR 10771)) to prohibit texting on electronic devices by drivers during the operation of a motor vehicle containing a quantity of hazardous materials requiring placarding or any quantity of a select agent or toxin listed in the Department of Health and Human Services "Select Agents and Toxins" regulations. The final rule stresses the heightened risk of transportation incidents involving hazardous materials when CMV drivers are distracted by electronic devices. Accordingly, both the February 28, 2011 final rule and this notice of proposed rulemaking (NPRM) urge motor carriers that transport hazardous materials to institute policies and provide awareness training to discourage the use of mobile telephones and electronic devices by CMV drivers.

C. FMCSA Rulemaking and Definitions

1. FMCSA Rulemaking

On December 21, 2010 (Docket FMCSA–2010–0096 (75 FR 80014)) FMCSA published an NPRM proposed to restrict the use of hand-held mobile telephone use, including cell phone use, by CMV drivers as a necessary component of an overall strategy to reduce the number of crashes caused by distracted driving. The FMCSA NPRM focuses on all interstate CMV drivers, including those drivers of CMVs that do not require a CDL. In general, the FMCSA proposal would cover all CMV drivers subject to FMCSA's safe driving rules under 49 CFR part 392.

Additionally, on September 27, 2010, the Federal Motor Carrier Safety Administration (FMCSA) published a final rule limiting the use of wireless communication devices by CMV drivers (Docket FMCSA–2009–0370 (75 FR 59118)). The FMCSA final rule prohibits texting by CMV drivers operating in interstate commerce and imposes sanctions for drivers that fail to comply. In the final rule FMCSA cites numerous studies evaluating the dangers of various forms of distracted driving.

2. Definitions

In existing Federal Motor Carrier Safety Regulations (FMCSRs; 49 CFR Parts 350–399) FMCSA defines a "CMV" in § 383.5 of the 49 CFR as follows:

Commercial motor vehicle means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle—

(a) Has a gross combination weight rating of 11,794 kilograms or more (26,001 pounds or more) inclusive of a towed unit(s) with a gross vehicle weight rating of more than 4,536 kilograms (10,000 pounds);

(b) Has a gross vehicle weight rating of 11,794 or more kilograms (26,001 pounds or more);

(c) Is designed to transport 16 or more passengers, including the driver; or

(d) Is of any size and is used in the transportation of hazardous materials as defined in this section.

In its December 21, 2010 NPRM addressing the use of hand-held mobile telephones by CMV drivers, FMCSA proposed to define the terms "mobile telephone" and "using a hand-held mobile telephone" in § 390.5 as follows:

Mobile telephone means a mobile communication device that falls under or uses any commercial mobile radio service, as defined in regulations of the Federal Communications Commission, 47 CFR 20.3. It does not include twoway or Citizens Band Radio services.

Using a hand-held mobile telephone means using at least one hand to hold a mobile telephone to conduct a voice communication or to reach for or dial a mobile telephone.

In addition, in its NPRM FMCSA proposes to define the term "driving" in § 392.82 as follows:

Driving means operating a commercial motor vehicle, with the motor running, including while temporarily stationary because of traffic, a traffic control device, or other momentary delays. Driving does not include operating a commercial motor vehicle, with or without the motor running, when the driver has moved the vehicle to the side of, or off, a highway and has halted in a location where the vehicle can safely remain stationary.

D. Studies, Data, and Analysis on Driver Distractions

Distracted driving reduces a driver's situational awareness, decision making, or performance; and it may result in a crash, near-crash, or unintended lane departure by the driver. In an effort to understand and mitigate crashes associated with driver distraction, the US DOT has been studying the distracted driving issue with respect to both behavioral and vehicle safety countermeasures. Researchers and writers classify distraction into various categories, depending on the nature of their work. In its NPRM, FMCSA states:

> FMCSA is aware of several recent CMV crashes in which the use of a mobile telephone may have contributed to the crash. In one case, according to media reports, a truck driver from Arkansas told police she was talking on her cell phone when she became involved in a crash that killed two boys on May 9, 2010. In another media report, on March 26, 2010, a tractor trailer crossed the median strip of Interstate 65 in central Kentucky and collided with a van transporting 9 adults, two children, and an infant. All the adults and the infant in the van and the truck driver were killed. The NTSB is conducting an investigation into the crash, including attempting to determine if a mobile telephone was a factor in the crash. According to media reports, in February 2010, a Montgomery County, Pennsylvania, school bus driver was allegedly talking on his cell phone before a deadly crash.[1]

Below we summarize studies, data, and analysis that provide the foundation for this NPRM.

1. NTSB Safety Recommendation H–06–27

On November 14, 2004, a motor coach crashed into a bridge overpass on the George Washington Memorial Parkway in Alexandria, Virginia. This crash was the impetus for a National Transportation Safety Board (NTSB) investigation and subsequent recommendation (Safety Recommendation H–06–27) to FMCSA regarding cell phone use by passenger-carrying CMVs. The NTSB determined that one probable cause of the crash was the use of a hands-free cell phone, resulting in cognitive distraction; therefore, the driver did not "see" the low bridge warning signs.

In a letter to NTSB dated March 5, 2007, FMCSA agreed to initiate a study to assess:

- The potential safety benefits of restricting cell phone use by drivers of passenger-carrying CMVs;

[1] *Driver To Stand Trial In Fatal School Bus Crash.* (April 20, 2010) Philadelphia, PA: KYW–TV. Retrieved from the CBS3 Web site, July 21, 2010, from: *http://cbs3.com/local/montgomery.county.school.2.1645628.html.*

• The applicability of an NTSB recommendation to property-carrying CMV drivers;
• Whether adequate data existed to warrant a rulemaking; and
• The availability of statistically meaningful data regarding cell phone distraction.

Subsequently, the report "Driver Distraction in Commercial Vehicle Operations" was published on October 1, 2009.

2. FMCSA's Motor Carrier Safety Advisory Committee's Recommendation

Section 4144 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–59, 119 Stat. 1144, 1748 (Aug. 10, 2005), required the Secretary to establish a Motor Carrier Safety Advisory Committee (MCSAC). The committee provides advice and recommendations to the FMCSA Administrator on motor carrier safety programs and regulations and operates in accordance with the Federal Advisory Committee Act (5 U.S.C. App. 2).

In MCSAC's March 27, 2009, report to FMCSA titled "Developing a National Agenda for Motor Carrier Safety," MCSAC recommended that FMCSA adopt new Federal rules concerning distracted driving.[2] MCSAC believed that the available research shows that cognitive distractions pose a safety risk and that there will be increases in crashes from cell phone use and texting unless the problems are addressed. Therefore, one of MCSAC's recommendations for the National Agenda for Motor Carrier Safety was that FMCSA initiate a rulemaking to ban the use of hand-held and hands-free mobile telephones while driving.

3. Driver Distraction in Commercial Vehicle Operations ("the VTTI Study")—Olson *et al.,* 2009[3]

Under contract with FMCSA, the Virginia Tech Transportation Institute (VTTI) completed its "Driver Distraction in Commercial Vehicle Operations" study[4] and released the final report on October 1, 2009. The purpose of the study was to investigate the prevalence of driver distraction in CMV safety-critical events (i.e., crashes, near-crashes, lane departures, as explained in the VTTI study) recorded in a naturalistic data set that included over 200 truck drivers and 3 million miles of data. The dataset was obtained by placing monitoring instruments on vehicles and recording the behavior of drivers conducting real-world revenue-producing operations. The study found that drivers were engaged in non-driving related tasks in 71 percent of crashes, 46 percent of near-crashes, and 60 percent of all safety-critical events. Tasks that significantly increased risk included texting, looking at a map, writing on a notepad, or reading.

Odds ratios (OR) were calculated to identify tasks that were high risk. For a given task, an odds ratio of "1.0" indicated the task or activity was equally likely to result in a safety-critical event as it was a non-event or baseline driving scenario. An odds ratio greater than "1.0" indicated a safety-critical event was more likely to occur, and odds ratios of less than "1.0" indicated a safety-critical event was less likely to occur. According to this research, drivers dialing a cell phone took their eyes off the forward roadway for an average of 3.8 seconds and for 1.3 seconds when talking/listening to a hand-held phone. Drivers took their eyes off the forward roadway a combined total of 5.1 seconds. At 55 mph (or 80.7 feet per second), this equates to a driver traveling 411 feet. At 65 mph (or 95.3 feet per second), the driver would have traveled 486 feet without looking at the roadway. This clearly creates a significant risk to the safe operation of the CMV.

The study further analyzed population attributable risk (PAR), which incorporates the frequency of engaging in a task. If a task is done more frequently by a driver or a group of drivers, it will have a greater PAR percentage. Safety could be improved the most if a driver or group of drivers were to stop performing a task with a high PAR. The PAR percentage for dialing a cell phone is 2.5 and for talking/listening to a hand-held phone is 0.2, which means that a combined 2.7 percent of the incidence of safety-critical events is attributable to dialing and talking/listening to a hand-held phone, and thus, could be avoided by not performing these activities.

TABLE 1—ODDS RATIO AND POPULATION ATTRIBUTABLE RISK PERCENTAGE BY SELECTED TASK

Task	Odds ratio	Population attributable risk percentage *
Complex Tertiary ** Task		
Text message on cell phone	23.2	0.7
Other—Complex (e.g., clean side mirror)	10.1	0.2
Interact with/look at dispatching device	9.9	3.1
Write on pad, notebook, etc.	9.0	0.6
Use calculator	8.2	0.2
Look at map	7.0	1.1
Dial cell phone	5.9	2.5
Read book, newspaper, paperwork, etc.	4.0	1.7
Moderate Tertiary ** Task		
Use/reach for other electronic device	6.7	0.2
Other—Moderate (e.g., open medicine bottle)	5.9	0.3
Personal grooming	4.5	0.2
Reach for object in vehicle	3.1	7.6

[2] Parker, David R., Chair, Motor Carrier Safety Advisory Committee (March 27, 2009). Letter to Rose A. McMurray, Acting Deputy Administrator, FMCSA, on MCSAC National Agenda for Motor Vehicle Safety. Retrieved July 23, 2010, from: *http://mcsac.fmcsa.dot.gov/documents/MCSACTask09-01FinalReportandLettertoAdministrator090428.pdf.*

[3] Olson, R. L., Hanowski, R.J., Hickman, J.S., & Bocanegra, J. (2009) Driver distraction in commercial vehicle operations. (Document No. FMCSA–RRR–09–042) Washington, DC: Federal Motor Carrier Safety Administration, July 2009. Retrieved October 20, 2009, from *http://www.fmcsa.dot.gov/facts-research/art-public-reports.aspx?*

[4] The formal peer review of the "Driver Distraction in Commercial Vehicle Operations Draft Final Report" was completed by a team of three technically qualified peer reviewers who are qualified (via their experience and educational background) to critically review driver distraction-related research.

TABLE 1—ODDS RATIO AND POPULATION ATTRIBUTABLE RISK PERCENTAGE BY SELECTED TASK—Continued

Task	Odds ratio	Population attributable risk percentage *
Look back in sleeper berth	2.3	0.2
Talk or listen to hand-held phone	1.0	0.2
Eating	1.0	0
Talk or listen to CB radio	0.6	*
Talk or listen to hands-free phone	0.4	*

* Calculated for tasks where the odds ratio is greater than one.
** Non-driving related tasks.

A complete copy of the final report for this study is included in FMCSA Docket FMCSA–2009–0370, available at *http://www.regulations.gov.*

4. Cell Phone Distraction in Commercial Trucks and Buses: Assessing Prevalence in Conjunction With Crashes and Near-Crashes—Hickman [5]

The purpose of this research was to conduct an analysis of naturalistic data collected by DriveCam®. The introduction of naturalistic driving studies that record drivers (through video and kinematic vehicle sensors) in actual driving situations created a scientific method to study driver behavior under the daily pressures of real-world driving conditions. The research documented the prevalence of distractions while driving a CMV, including both trucks and buses, using an existing naturalistic data set. This data set came from 183 truck and bus fleets comprising a total of 13,306 vehicles captured during a 90-day period. There were 8,509 buses and 4,797 trucks. The data sets in the current study did not include continuous data; it only included recorded events that met or exceeded a kinematic threshold (a minimum g-force setting that triggers the event recorder). These recorded events included safety-critical events (e.g., hard braking in response to another vehicle) and baseline events (i.e., an event that was not related to a safety-critical event, such as a vehicle that traveled over train tracks and exceeded the kinematic threshold). A total of 1,085 crashes, 8,375 near-crashes, 30,661 crash-relevant conflicts, and 211,171 baselines were captured in the dataset.

Odds ratios were calculated to show a measure of association between involvement in a safety-critical event and performing non-driving related tasks, such as dialing or texting. The odds ratios show the odds of being involved in a safety-critical event when a non-driving related task is present compared to situations when there is no non-driving related task. The odds ratios for text/e-mail/accessing the Internet tasks were very high, indicating a strong relationship between text/e-mail/accessing the Internet while driving and involvement in a safety-critical event. Very few instances of this behavior were observed during safety-critical events in the current study and even fewer during control events. Although truck and bus drivers do not use cell phones frequently, the data suggest that truck and bus drivers who use their cell phone to make calls, text, e-mail, or access the Internet are very likely to be involved in a safety-critical event.

Additional research and data are specifically identified in FMCSA's NPRM on restricting cell phone use by CMV drivers.

E. Existing Prohibitions and Restrictions by Federal, State, and Local Governments

1. Executive Order 13513

The President immediately used the feedback from the DOT Summit on Distracted Driving and issued Executive Order 13513, which ordered that:

> Federal employees shall not engage in text messaging (a) when driving a Government Owned Vehicle, or when driving a Privately Owned Vehicle while on official Government business, or (b) when using electronic equipment supplied by the Government while driving.

2. The Executive Order is applicable to the operation of CMVs by Federal government employees carrying out their duties and responsibilities, or using electronic equipment supplied by the government. This order also encourages contractors to comply while operating CMVs on behalf of the Federal government. FMCSA

In light of the available studies, the NTSB recommendation, and MCSAC's recommendations, FMCSA has proposed a restriction on the use of mobile (cellular) telephones by CMV drivers operating in interstate commerce. The proposed rule would include definitions related to the restriction. It also would add a driver disqualification provision for interstate CMV drivers. A driver disqualification provision would also be included for CDL holders convicted of two or more violations of State or local traffic laws or ordinances on motor vehicle traffic control concerning mobile telephone use.

FMCSA's NPRM would amend regulations in 49 CFR parts 383 and 384 concerning the Agency's CDL regulations, part 390 concerning general applicability of the FMCSRs, part 391 concerning driver qualifications and disqualifications, and part 392 concerning driving rules. In general, the proposed requirements are intended to reduce the risks of distracted driving by restricting mobile telephone use by a driver who is operating a CMV in interstate commerce.

The proposed rule would also require interstate motor carriers to ensure compliance by their drivers with the restrictions on use of a mobile telephone while driving a CMV. Motor carriers would be prohibited from requiring or allowing drivers of CMVs to use a mobile telephone while operating in interstate commerce.

3. Federal Railroad Administration

On October 7, 2008, FRA published Emergency Order 26 (73 FR 58702). Pursuant to FRA's authority under 49 U.S.C. 20102 and 20103, the order, which took effect on October 1, 2008, restricts railroad operating employees from using distracting electronic and electrical devices while on duty. Among other things, the order prohibits both the use of cell phones and texting. FRA cited numerous examples of the adverse impact that electronic devices can have on safe operations. These examples included fatal accidents that involved operators who were distracted while texting or talking on a cell phone. In light of these incidents, FRA is imposing restrictions on the use of such electronic devices, both through its

[5] Hickman, J., Hanowski, R., & Bocanegra, J. (2010). Distraction in Commercial Trucks and Buses: Assessing Prevalence and Risk in Conjunction with Crashes and Near-Crashes. Washington, DC: Federal Motor Carrier Safety Administration. (Final Report due Spring 2010).

order and a rulemaking that seeks to codify the order. In a NPRM published May 18, 2010, FRA proposed to amend its railroad communications regulations by restricting the use of mobile telephones and other distracting electronic devices by railroad operating employees (75 FR 27672).

4. State Restrictions

Nine States and the District of Columbia have traffic laws prohibiting all motor vehicle drivers from using a hand-held mobile telephone while driving. School bus drivers are currently prohibited from any mobile telephone use in 19 States and the District of Columbia. A list of these States can be found at the following Web site: *http://www.iihs.org/laws/cellphonelaws.aspx.* Generally, the State traffic laws are applicable to all drivers operating motor vehicles within those jurisdictions, including CMV operators. Some States are already tracking enforcement. For example, since March of 2008, when New Jersey's wireless hand-held telephone and electronic communication device ban became effective, more than 224,000 citations—an average of almost 10,000 a month—were issued to motorists violating this cell phone law.

Additionally, as part of its continuing effort to combat distracted driving, DOT kicked off pilot programs in Hartford, Connecticut, and Syracuse, New York, to test whether increased law enforcement efforts can get distracted drivers to put down their mobile telephones and focus on the road. During one week of the pilot program in Hartford, police cited more than 2,000 drivers for talking on mobile telephones and 200 more for texting while driving.

II. Applicability of this NPRM

PHMSA's Office of Hazardous Materials Safety is the Federal safety authority for the transportation of hazardous materials by air, rail, highway, and water. Under the Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*), the Secretary of Transportation is charged with protecting the nation against the risks to life, property, and the environment that are inherent in the commercial transportation of hazardous materials. The Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180) are promulgated under the mandate in § 5103(b) of Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*) that the Secretary of Transportation "prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce." Section 5103(b)(1)(B) provides that the HMR "shall govern safety aspects, including security, of the transportation of hazardous material the Secretary considers appropriate." As such, PHMSA strives to reduce the risks inherent to the transportation of hazardous materials in both intrastate and interstate commerce.[6]

The texting restrictions adopted by FMCSA in under Docket FMCSA–2009–0370 have been incorporated into § 392.80 of the FMCSRs and apply to CMV motor carriers and drivers in interstate commerce. During the coordination process for PHMSA's August 3, 2010 safety advisory notice on distracted driving, PHMSA and FMCSA representatives expressed concern that changes to the FMCSRs regarding distracted driving would only apply to motor carriers and drivers of CMVs that operate in interstate commerce.[7] As such, any requirements adopted by FMCSA regarding distracted driving would not apply to motor carriers and drivers that transport covered hazardous materials in intrastate commerce.

PHMSA developed this NPRM to expand the limitations on the use of hand-held mobile telephones proposed by FMCSA's NPRM to the transportation of a quantity of hazardous materials requiring placarding under Part 172 of the 49 CFR or any quantity of a material listed as a select agent or toxin in 42 CFR Part 73 in intrastate commerce. The safety benefits associated with limiting the distractions caused by electronic devices, including cell phones, are equally applicable to drivers transporting covered hazardous materials via intrastate as they are to interstate commerce. The use of a hand-held mobile telephone while driving constitutes a safety risk to the motor vehicle driver, other motorists, and bystanders. As proposed in the FMCSA NPRM, the consequences of using hand-held mobile telephones while driving can include state and local sanctions, fines, and possible revocation of commercial driver's licenses.

PHMSA has determined that the use of hand-held mobile phones presents a hazard equally, whether the motor carrier is involved in interstate or intrastate commerce. PHMSA estimates that there are approximately 1,490 intrastate motor carriers that could be affected by this rulemaking. Studies performed on behalf FMCSA have estimated that the cost of a property damage only crash is $17,000. Crashes involving a fatality are estimated to be approximately $6 million. Based on estimates outlined in the Preliminary Regulatory Impact Assessment PHMSA estimates the costs as follows:

SUMMARY OF COSTS AND THRESHOLD ANALYSIS

Cost of Lost Carrier Productivity	$5,148
Cost of Increased Fuel Consumption	$9,535
Cost of Parking, Entering and Exiting Roadway Crashes	$10,335
Total Costs	$25,018
Benefit of Eliminating One Fatality	[1] $6
Break-even Number of Lives Saved	< 1
Benefit of Eliminating One Crash	$17,000
Break-even of Number of Crashes Prevented	< 2

[1] In millions.

III. Summary of Changes

In accordance with the comments received and public meeting discussion this NPRM proposes the following changes by section:

Section 177.804. We propose to add a new paragraph (b) to prohibit the use of hand-held mobile telephones by any CMV driver transporting a quantity of hazardous materials requiring placarding under Part 172 of the 49 CFR or any quantity of a material listed as a select agent or toxin in 42 CFR Part 73. As such, motor carriers and drivers who engage in the transportation of covered materials must comply with the distracted driving requirements in § 392.82 of the FMCSR.

IV. Regulatory Analysis and Notices

A. Statutory/Legal Authority for This Rulemaking

This rulemaking is issued under authority of the Federal hazardous materials transportation law (49 U.S.C. 5101 *et seq.*), which authorizes the

[6] The term "intrastate commerce" is trade, traffic, or transportation within a single state. The term "interstate commerce" is trade, traffic, or transportation involving the crossing of a state boundary. Additionally, "interstate commerce" includes transportation originating or terminating outside the state of United States. (*See* 49 CFR 390.5)

[7] In accordance with § 390.3(a) the rules in Subchapter B, including Parts 350–399, of the 49 CFR are applicable to all employers, employees, and commercial motor vehicles, which transport property or passengers in interstate commerce. The only FMCSA regulations that are applicable to intrastate operations are: The commercial driver's license (CDL) requirement, for drivers operating commercial motor vehicles as defined in 49 CFR 383.5; controlled substances and alcohol testing for all persons required to possess a CDL; and minimum levels of financial responsibility for the intrastate transportation of certain quantities of hazardous materials and substances.

Secretary of Transportation to prescribe regulations for the safe transportation, including security, of hazardous materials in interstate, intrastate, and foreign commerce.

B. Executive Order 12866 and DOT Regulatory Policies and Procedures

PHMSA has determined that this rulemaking action is a significant regulatory action under Executive Order 12866, Regulatory Planning and Review, and significant under DOT regulatory policies and procedures because of the substantial Congressional and public interest concerning the crash risks associated with distracted driving, even though the economic costs of the proposed rule do not exceed the $100 million annual threshold.

Executive Order 12866 requires agencies to regulate in the "most cost-effective manner," to make a "reasoned determination that the benefits of the intended regulation justify its costs," and to develop regulations that "impose the least burden on society." As discussed throughout this rulemaking, the intent of this NPRM is to expand upon the applicability of the FMCSA NPRM to prohibit use of cell phones by drivers of motor vehicles that contain a quantity of hazardous materials requiring placarding under Part 172 of the 49 CFR or any quantity of a material listed as a select agent or toxin in 42 CFR Part 73. As a result, the population of motor carriers covered by this proposed rule is comprised of a very small portion of motor carriers operating in intrastate commerce.

PHMSA calculated its affected population by assessing hazmat registration data from the 2010–2011 registration year. This data is collected on DOT form F 5800.2 in accordance with § 107.608(a) of the 49 CFR. Generally, the registration requirements apply to any person who offers for transportation or transports a quantity of hazardous materials requiring placarding under Part 172 of the 49 CFR. Additional data collected on form F 5800.2 verify that the registrant is indeed a carrier, the mode of transportation used, and the US DOT Number.[8] Using this key data from the registration form submissions we can make some assumptions to estimate the number of motor carriers subject to this NPRM. Based on our analysis of form 5800.2–18,841 persons have registered as motor carriers of hazardous materials. Of those 18,841 registrants 17,599 included a US DOT Number. Therefore, based on the registration data 1,242 motor carriers are considered intrastate carriers. We compared these numbers with the FMCSA Motor Carrier Management Information System (MCMIS).[9] Based on MCMIS data we verified that the 1,242 carriers identified through registration data have not been issued a US DOT Number by FMCSA.

To better define the population of intrastate carriers subject to this rulemaking we assessed the data further. Generally, registration data is limited to persons that offer or transport placarded quantities of hazardous materials. Registration data does not include persons that transport a material listed as a select agent or toxin in 42 CFR Part 73. In addition, the data includes those carriers that are required to obtain a US DOT Number through their state even if they operate solely in intrastate commerce. In select states, all registrants of commercial motor vehicles, even intrastate and non-motor carrier registrants, are required to obtain a US DOT Number as a necessary condition for commercial vehicle registration. FMCSA indicates that 28 states currently require motor carriers to obtain a US DOT Number, regardless if they operate in interstate or intrastate commerce.[10] Based on these assumptions, the number of intrastate carriers identified through hazmat registration data may be under estimated by up to 60% to 70%.

Based on the assumptions outlined above and PHMSA's desire to take a conservative approach to the affected population we will multiply the number of intrastate carriers identified through registration data by a 20% under reporting factor. This will result in a total population affected by this rulemaking of 1,490 intrastate carriers ($1,242 \times 1.20 = 1,490$). This conservative estimate ensures that PHMSA is fully considering the impacts of expanding applicability of the FMCSA NPRM to prohibit cell phone by drivers of motor vehicles that contain a quantity of hazardous materials requiring placarding under Part 172 of the 49 CFR or any quantity of a material listed as a select agent or toxin in 42 CFR Part 73.

The regulatory evaluation prepared in support of this rulemaking considers the following potential costs: (a) Loss in carrier productivity due to time spent while parking or pulling over to the side of the roadway to make cell phone calls; (b) increased fuel usage due to idling as well as exiting and entering the travel lanes of the roadway; and (c) increased crash risk due to covered CMVs that are parked on the side of the roadway and exiting and entering the travel lanes of the roadway. The regulatory evaluation also considers potential costs to the states. However, since the analysis does not yield appreciable costs to the states, further analysis pursuant to the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532) was deemed unnecessary.

PHMSA estimates that this proposed rule will cost $ 25,018 annually. Additionally, PHMSA has not identified a significant increase in crash risk associated with drivers' strategies for complying with this proposed rule. As indicated in the regulatory evaluation, a crash resulting in property damage only (PDO) averages approximately $17,000 in damages. Consequently, the cell phone use restriction would have to eliminate just two PDO crash every year for the benefits of this proposed rule to exceed the costs. A summary of the costs and threshold analysis is provided in the following table:

SUMMARY OF COSTS AND THRESHOLD ANALYSIS

Cost of Lost Carrier Productivity	$5,148
Cost of Increased Fuel Consumption	$9,535
Cost of Parking, Entering and Exiting Roadway Crashes	$10,335
Total Costs	$25,018
Benefit of Eliminating One Fatality	[1] $6
Break-even Number of Lives Saved	< 1

[1] In millions.

C. Executive Order 13132

Executive Order 13132 requires agencies to assure meaningful and timely input by state and local officials in the development of regulatory policies that may have a substantial, direct effect on the states, on the relationship between the national

[8] The FMCSRs require certain commercial carriers to obtain a US DOT number. Companies that operate commercial vehicles transporting passengers or hauling cargo in interstate commerce must be registered with the FMCSA and must have a US DOT Number. The US DOT Number serves as a unique identifier when collecting and monitoring a company's safety information acquired during audits, compliance reviews, crash investigations, and inspections. FMCSA provides two services for people who need to obtain a U.S. DOT number. The MC–150 form can be downloaded from the FMCSA Web site in PDF form and mailed in; or, they may file electronically via the web site. Both options are found at the following URL: *http://www.fmcsa.dot.gov/factsfigs/formspubs.htm.*

[9] MCMIS contains information on the safety fitness of commercial motor carriers (truck & bus) and hazardous material shippers subject to both the FMCSRs and the HMR. This information is available to the general public through the MCMIS Data Dissemination Program.

[10] "What is a USDOT Number?" *See: http://www.fmcsa.dot.gov/registration-licensing/registration-USDOT.htm.*

government and the states, or on the distribution of power and responsibilities among the various levels of government. 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 invite state and local governments to comment on the effect that the adoption of this rule may have on state or local safety or environmental protection programs.

D. Executive Order 13175

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this proposed rule does not significantly or uniquely affect the communities of the Indian tribal governments and does not impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612) requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term "small entities" comprises small businesses and 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. Accordingly, DOT policy requires an analysis of the impact of all regulations on small entities, and mandates that agencies strive to lessen any adverse effects on these businesses.

PHMSA has conducted an economic analysis of the impact of this proposed rule on small entities and certifies that a Regulatory Flexibility Analysis is not necessary because the rule will not have a significant economic impact on a substantial number of small entities subject to the requirements of this proposed rule. We assume that all of the 1,490 motor carriers identified by this proposed rule are small entities. However, the direct costs of this rule that small entities may incur are only expected to be minimal. They consist of the costs of lost productivity from foregoing cell phone use while on-duty and fuel usage costs for pulling to the side of the road to idle the truck or passenger-carrying vehicle and making a cell phone call. The majority of motor carriers are small entities. Therefore, PHMSA will use the total cost of this proposed rule ($25,018) applied to the number of small entities (1,490) as a worse case evaluation which would average $16.79 annually per carrier.

F. Executive Order 13272 and DOT Regulatory Policies and Procedures

This notice has been developed in accordance with Executive Order 13272 ("Proper Consideration of Small Entities in Agency Rulemaking") and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts of draft rules on small entities are properly considered.

G. Paperwork Reduction Act

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

H. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

I. Unfunded Mandates Reform Act of 1995

This proposed rule does not impose unfunded mandates, under the Unfunded Mandates Reform Act of 1995. It does not result in costs of $141.3 million or more to either state, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of the rule.

J. Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://www.dot.gov.* This proposed rule is not a privacy-sensitive rulemaking because the rule will not require any collection, maintenance, or dissemination of Personally Identifiable Information (PII) from or about members of the public.

K. National Environmental Policy Act

The National Environmental Policy Act of 1969 (NEPA) requires Federal agencies to consider the consequences of major Federal actions and that they prepare a detailed statement on actions significantly affecting the quality of the human environment. PHMSA assessment did not reveal any significant positive or negative impacts on the environment expected to result from the rulemaking action. There could be minor impacts on emissions, hazardous materials spills, solid waste, socioeconomics, and public health and safety. Interested parties are invited to address the potential environmental impacts of regulations applicable to the storage of explosives transported in commerce. We are particularly interested in comments about safety and security measures that would provide greater benefit to the human environment or on alternative actions the agency could take that would provide beneficial impacts.

List of Subjects in 49 CFR Part 177

Hazardous materials transportation, Motor carriers, Radioactive materials, Reporting and recordkeeping requirements.

In consideration of the foregoing, 49 CFR Chapters I and III are proposed to be amended as follows:

PART 177—CARRIAGE BY PUBLIC HIGHWAY

1. The authority citation for part 177 would continue to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

2. Section 177.804 is amended by adding a new paragraph (c) to read as follows:

§ 177.804 Compliance with Federal Motor Carrier Safety Regulations.

* * * * *

(c) *Prohibition against hand-held mobile telephones.* In accordance with § 392.82 of the FMCSRs a person transporting a quantity of hazardous materials requiring placarding under Part 172 of the 49 CFR or any quantity of a material listed as a select agent or toxin in 42 CFR Part 73 may not engage in, allow, or require use of a hand-held mobile telephone while driving.

Issued in Washington, DC, on April 21, 2011, under authority delegated in 49 CFR Part 106.

Magdy El-Sibaie,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 2011–10140 Filed 4–28–11; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 600 and 622

[Docket No. 110422261–1261–01]

RIN 0648–BA70

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

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues this proposed rule to implement actions identified in a regulatory amendment (Regulatory Amendment 9) to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP) prepared by the South Atlantic Fishery Management Council (Council). This proposed rule would reduce the recreational bag limit for black sea bass, establish a split season for the black sea bass commercial quota, increase the commercial trip limit for greater amberjack, and establish commercial trip limits for vermilion snapper and gag. This rule also proposes a minor revision to the mailing address for the NMFS Southeast Regional Administrator (RA). The intended effect of this proposed rule is to help prevent overfishing of black sea bass, gag, and vermilion snapper while achieving optimum yield (OY) by reducing the rate of harvest of these three species, to achieve OY for greater amberjack, and to implement a technical correction to the regulations.

DATES: Written comments must be received on or before May 16, 2011.

ADDRESSES: You may submit comments on the proposed rule identified by 0648–BA07 by any of the following methods:

- *Electronic submissions:* Submit electronic comments via the Federal e-Rulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Kate Michie, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

To submit comments through the Federal e-rulemaking portal: *http://www.regulations.gov,* enter " NOAA–NMFS–2011–0107 " in the keyword search, then check the box labeled "Select to find documents accepting comments or submissions", the select "Send a comment or submission". NMFS will accept anonymous comments (enter N/A in the required field if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Comments received through means not specified in this rule will not be considered.

Copies of the regulatory amendment, which includes an environmental assessment and a regulatory impact review, may be obtained from the South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; telephone 843–571–4366; fax 843–769–4520; e-mail *safmc@safmc.net;* or may be downloaded from the Council's Web site at *http://www.safmc.net/.*

FOR FURTHER INFORMATION CONTACT: Kate Michie, 727–824–5305.

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

Background

The Magnuson-Stevens Act requires NMFS and regional fishery management councils to prevent overfishing and achieve, on a continuing basis, the OY from federally managed fish stocks. These mandates are intended to ensure fishery resources are managed for the greatest overall benefit to the nation, particularly with respect to providing food production and recreational opportunities, and protecting marine ecosystems. To further this goal, the Magnuson-Stevens Act requires fishery managers to end overfishing of stocks while achieving OY from the fishery, and to minimize bycatch and bycatch mortality to the extent practicable.

The snapper-grouper fishery in the South Atlantic is managed through a variety of measures to achieve OY for many species, including black sea bass, gag, and vermilion snapper. These measures include restrictions on the total harvest, recreational and commercial allocations, recreational and commercial annual catch limits (ACLs), and accountability measures (AMs). As overfishing is ended for an overfished stock, and biomass increases, a species specific ACL is likely to be met earlier each fishing season as a result of the increased availability of the stock for harvest. This can lead to an increased likelihood of derby-style harvesting, which is undesirable from economic, vessel safety, and social perspectives. Derby-style harvesting, also termed as "the race for fish", consists of a short duration of increased effort where harvest is maximized prior to reaching an ACL. Additionally, since the commercial quota for greater amberjack is not being met on an annual basis, OY for this species is not being achieved. To address these issues, the Council requested the development of Regulatory Amendment 9, at its March 2010 meeting.

An increasingly restrictive regulatory environment has resulted in a shift of fishing effort from other more restricted snapper-grouper species to the commercial and recreational sectors for black sea bass and vermilion snapper, which results in reaching their respective quotas relatively early in their fishing seasons. In order to prevent the progressive shortening of fishing seasons for black sea bass, gag, and vermilion snapper, and to maximize the probability of achieving OY for greater amberjack, the Council voted to approve Regulatory Amendment 9 at its March 2011 meeting.

Management Measures Contained in this Proposed Rule

This proposed rule would reduce the black sea bass recreational bag limit; establish a split season commercial quota for black sea bass; revise the commercial trip limit for greater amberjack; and establish commercial trip limits for vermilion snapper and gag. Additionally, this proposed rule would make a minor revision to the codified text to correct an address for the RA.

Black Sea Bass Recreational Bag Limit

Black sea bass is overfished and undergoing overfishing and is managed under a rebuilding plan. Recreational management measures to rebuild the stock are currently in place and include a recreational ACL of 409,000 lb (185,519 kg), a 15-fish per person daily bag limit, and a size limit. The recreational sector for black sea bass

also has AMs in place to monitor the ACL with respect to average landings, to prohibit recreational harvest if the ACL is exceeded, and to require an ACL reduction the fishing year following an ACL overage. The Council voted to address the progressive shortening of the black sea bass recreational fishing season by implementing management measures intended to slow the rate of harvest to allow for a longer fishing season. For the recreational sector, this proposed rule would reduce the bag limit from 15-fish per person per day to 5-fish per person per day. This bag limit reduction is projected to lengthen the recreational fishing season by approximately 1 month or more.

Black Sea Bass Commercial Quota

In an effort to end overfishing, the black sea bass commercial quota has been reduced in recent years. Effort shifts from other snapper-grouper species to the black sea bass component of the snapper-grouper fishery, as well as the reduced commercial quota of 309,000 lb (140,160 kg), have resulted in the commercial quota being met earlier in the fishing year. For example, during the June 2009 through May 2010 fishing year, the commercial sector was closed on December 20, 2009. For the June 2010 through May 2011 fishing year, the commercial sector was closed on October 7, 2010, but reopened for 14 days beginning on December 1, 2010, when subsequent landings data indicated that the quota had not been reached by October 7, 2010.

To address the progressive shortening of the black sea bass commercial fishing season, the Council voted to implement management measures that are intended to slow the rate of harvest to lengthen the fishing season. This proposed rule would split the commercial quota into two 6-month seasons, from June–November and from December–May each year. The commercial quota for the June–November season would be 128,547 lb (58,308 kg), and the commercial quota for the December–May season would be 180,453 lb (81,852 kg). These split season quotas are based on average commercial landings for June through November and December though May for the 2006 through 2009 fishing years. If a portion of the June–November commercial quota remains unharvested by the end of November each year, the unharvested commercial quota will be added to the quota for the December–May season. If a portion of the December–May seasonal commercial quota remains unharvested, the unharvested amount will not be added to either split season commercial quotas for the following fishing year.

Greater Amberjack Commercial Trip Limit

Greater amberjack is not overfished and is not undergoing overfishing. The annual commercial quota for greater amberjack has never been met under the trip limit of 1,000 lb (454 kg) which has been in effect since October of 2000. To increase the probability of achieving OY while maintaining commercial restrictions to prevent quota overages, this proposed rule would increase the current commercial trip limit for greater amberjack from 1,000 lb (454 kg) to 1,200 lb (544 kg). It is expected that increasing the commercial trip limit by 200 lb (91 kg) will increase harvest opportunities within the commercial sector without resulting in significantly reduced market prices.

Vermilion Snapper and Gag Commercial Trip Limits

Amendment 17B to the FMP (75 FR 82280, December 30, 2010), recently implemented management measures for eight South Atlantic snapper-grouper species and is expected to result in fishing effort shifts from other species within the snapper-grouper complex to the black sea bass, vermilion snapper, and gag commercial components of the snapper-grouper fishery. In order to reduce the likelihood of the commercial quotas for vermilion snapper and gag being met early in the fishing year, this proposed rule would establish a trip limit of 1,500 lb (680 kg) for vermilion snapper, and a trip limit of 1,000 lb (454 kg) for gag. These trip limits are expected to slow the rate of harvest of these species, and therefore extend commercial harvest opportunities during the fishing year for vermilion snapper and gag while reducing the risk of commercial quota closures early in the fishing year.

Revision To Update Address for NMFS Regional Administrator

The mailing address for the RA, as listed in Table 1 in § 600.502, is outdated. This rule proposes to revise that section to reflect the current address. This additional measure is unrelated to the actions contained in Regulatory Amendment 9.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the regulatory amendment, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

NMFS prepared an Initial Regulatory Flexibility Analysis (IRFA), as required by section 603 of the Regulatory Flexibility Act, for this proposed rule. The IRFA describes the economic impact that this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the objectives of, and legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A copy of the full analysis is available from the Council (*see* **ADDRESSES**). A summary of the IRFA follows.

The Magnuson-Stevens Act provides the statutory basis for the proposed rule. No duplicative, overlapping, or conflicting Federal rules have been identified. The proposed rule would not establish any new reporting, record-keeping, or other compliance requirements.

The proposed rule is expected to directly affect commercial harvesting and for-hire fishing operations. The Small Business Administration has established size criteria for all major industry sectors in the U.S. including fish harvesters and for-hire operations. A business involved in fish harvesting is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $4.0 million (NAICS code 114111, finfish fishing) for all its affiliated operations worldwide. For for-hire vessels, the same qualifiers that apply to fish harvesting would apply, but the annual receipts threshold is $7.0 million (NAICS code 713990, recreational industries).

From 2007–2009, an average of 895 vessels-per-year had valid permits to operate in the commercial sector of the snapper-grouper fishery. Of these 895 vessels, 751 held transferable permits and 144 held non-transferable permits. On average, 797 vessels landed snapper-grouper species, generating dockside revenues of approximately $14.514 million (2008 dollars). Each vessel, therefore, generated an average of approximately $18,000 annually in gross revenues from snapper-grouper commercial landings. Gross dockside revenues by state are distributed as follows: $4.054 million in North Carolina, $2.563 million in South Carolina, $1.738 million in Georgia/Northeast Florida, $3.461 million in central and southeast Florida, and $2.695 million in the Florida Keys.

Vessels that operate in the snapper-grouper commercial sector may also operate in other fisheries; the revenues from the other fisheries cannot be determined with available data and thus are not reflected in these totals.

Based on revenue information, all commercial vessels affected by the proposed rule can be considered small entities.

From 2007–2009, an average of 1,797 vessels had valid permits to operate in the for-hire component of the snapper-grouper fishery. Of the 1,797 vessels, 82 are estimated to have operated as headboats. The for-hire fleet is comprised of charterboats, which charge a fee on a vessel basis, and headboats, which charge a fee on an individual angler (head) basis. The charterboat annual average gross revenue is estimated to range from approximately $62,000–$84,000 for Florida vessels, $73,000–$89,000 for North Carolina vessels, $68,000–$83,000 for Georgia vessels, and $32,000–$39,000 for South Carolina vessels. For headboats, the corresponding estimates are $170,000–$362,000 for Florida vessels, and $149,000–$317,000 for vessels in the other states.

Based on these average revenue figures, all for-hire operations that would be affected by the proposed rule can be considered small entities.

Some fleet activity, i.e., multiple vessels owned by a single entity, may exist in both the commercial and for-hire snapper-grouper sectors but its extent is unknown, and therefore all vessels are treated as independent entities in this analysis.

The proposed rule is expected to directly affect all federally permitted commercial and for-hire vessels that operate in the South Atlantic snapper-grouper fishery. All directly affected entities have been determined, for the purpose of this analysis, to be small entities. Therefore, it is determined that the proposed action would affect a substantial number of small entities.

Because all entities that are expected to be affected by the proposed rule are considered small entities, the issue of disproportional effects on small versus large entities does not arise in the present case.

A qualitative discussion of the effects of splitting the black sea bass commercial quota between the June–November and December–May sub-seasons indicates that profits to the commercial fishing fleet would not deteriorate, as would occur under the no action alternative of maintaining a single quota for the entire fishing year, because the split season quota would break up any derby-style harvesting and thus potentially maintain relatively higher dockside prices via a longer fishing season.

Relative to the no action alternative, the proposed action to reduce the recreational bag limit to five black sea bass per person-per-day is expected to increase short-term for-hire vessel profits (net operating revenues (NOR)) annually from approximately $78,000 to $164,000 assuming no trip cancellation during the open season, or from approximately $45,000 to $131,000 assuming some trip cancellations during the open season. This expected increase in short-term profits would come from a reduced recreational quota closure duration relative to the no action alternative.

The proposed action to establish a 1,500-lb (680-kg) commercial trip limit for vermilion snapper is expected to reduce the gross revenues of commercial vessels by approximately $306,000 annually. Profits would be reduced accordingly. Among the trip limit alternatives, however, the proposed action is expected to result in the lowest revenue losses. Commercial fishing vessels in North Carolina and Georgia/Northeast Florida would experience the largest revenue losses compared to those of other states/areas in the South Atlantic.

The proposed action to establish a 1,000-lb (454-kg) commercial trip limit for gag is expected to reduce the short-term gross revenues of the commercial fishing fleet by approximately $102,000 annually. Short-term fleet profits are also expected to decrease. However, relative to the no action alternative, the proposed action is expected to lengthen the commercial season so that revenues and profits could increase over time. The largest short-term revenue (and profit) reductions would fall on vessels in South Carolina and Georgia/Northeast Florida.

The proposed action to increase the commercial trip limit for greater amberjack to 1,200 lb (544 kg) is expected to increase short-term gross revenues of commercial vessels. Short-term profits are also expected to increase. Over time, the net result on vessel revenues and profits would depend on the resulting fishing season length under the higher trip limit.

Thirteen alternatives, including two alternatives for the proposed action, were considered for the harvest management of black sea bass. The first alternative to the proposed action is the no action alternative. This alternative would not address the derby concern in the commercial sector of the black sea bass segment of the snapper-grouper fishery. The second alternative to the proposed action would establish a commercial trip limit, with 8 sub-alternatives. The first sub-alternative would be a 500-lb (227-kg) trip limit; the second, a 750-lb (340-kg) trip limit; the third, a 1,000-lb (454-kg) trip limit; the fourth, a 1,250-lb (567-kg) trip limit; the fifth, a 1,000-lb (454-kg) trip limit but reduced to 500-lb (227-kg) when 75 percent of the quota is met; the sixth, a 2,000-lb (907-kg) trip limit; the seventh, a 2,500-lb (1,134-kg) trip limit; and, the eighth, a 340-lb (154-kg) trip limit. Based on the input received during public hearings, from the Council's Advisory Panel, from the Council's Scientific and Statistical Committee, and the fact that the stock is undergoing an assessment through the Southeast Data, Assessment, and Review (SEDAR 25), the results of which will be available by the end of 2011, the Council chose not to implement trip limits for the black sea bass commercial sector at this time. The Council concluded the preferred alternative best meets the purpose and need to prevent the progressive shortening of the fishing season while ensuring equity in harvest opportunities, promoting safety at sea, and minimizing adverse socioeconomic impacts.

The third alternative to the proposed action would retain the fishing year (June 1 through May 31) and specify separate commercial quotas for the June–December and the January–May sub-seasons based on 2006–2009 landings. This is similar to the proposed action, except that the first sub-season ends in December, with January being the starting month of the second sub-season. The effects of this alternative on small entities are comparatively the same as those of the proposed action, except that the proposed action would allow the second sub-season to start, with available quota, at the time when the traditional winter pot component of the commercial sector takes place in December.

The fourth alternative to the proposed action would change the black sea bass fishing year to November-October and specify separate commercial quotas for November-April and May-October. The Council recognized the distributional effects of changing the fishing year, and decided to address this issue, together with a regional approach to management of black sea bass, after the SEDAR 25 assessment is completed in late 2011.

The fifth alternative to the proposed action would change the black sea bass fishing year to January-December and specify separate commercial quotas for January-June and July-December. This alternative raises the same issue as the

fourth alternative to the proposed action for which the Council decided to consider the fishing year issue, together with regional approach to management, in the future.

The sixth alternative would add to alternatives two through five of the proposed action, a measure that would allow a carry-over of unused portion of the quota from the second part of the fishing year to the next fishing year. This alternative has the potential to result in exceeding the commercial quota for the next year that would trigger application of AMs, resulting in revenue and profit losses to the commercial fishing fleet. In addition, this alternative could result in exceeding other fishery benchmarks and the stock could be considered to experience overfishing. More restrictive regulations could result that would only increase revenue and profit losses to the fishing fleet.

The seventh alternative to the proposed action would add to alternatives two through five a measure that would close the black sea bass commercial pot gear component, but not other allowable gear types, when all but 100,000 lb (45,359 kg) of the commercial quota for the sub-season is harvested and would allow all allowable gear types to operate in the next sub-season. The Council decided not to impose specific gear restriction at this time partly due to the problem of monitoring catches by gear type on a timely basis.

The eighth alternative to the proposed action is similar to the seventh alternative to the proposed action, except that 50,000 lb (22,680 kg) would be the amount of quota remaining to trigger the closure of the black sea bass commercial pot component. The Council decided not to impose specific gear restriction at this time partly due to the problem of monitoring catches by gear type on a timely basis.

The ninth alternative to the proposed action would close the black sea bass commercial pot component when 90 percent of the commercial quota is met. The Council decided not to impose specific gear restrictions at this time partly due to the problem of monitoring catches by gear type on a timely basis.

The tenth alternative to the proposed action would establish a spawning season closure, with four sub-alternatives. The first sub-alternative would implement a March-April closure applicable to both the commercial and recreational sectors; the second, an April-May closure; the third, a March-May closure; and, the fourth, a May closure. A spawning season closure for black sea bass that would affect both the commercial and recreational sectors was considered as a possible tool to extend the fishing season and benefit the stock. However, there was strong opposition from the public toward such a measure given other additional proposed measures within Regulatory Amendment 9. While many fishermen are in favor of curbing harvest during the spawning season, they stated that curbing harvest would be best accomplished with a modification to the fishing year. Moreover, the black sea bass stock is under a rebuilding schedule, there are indications that the stock is rebuilding, and a stock assessment is currently underway.

The eleventh alternative to the proposed action for black sea bass management would modify the current recreational bag limit of 15-fish per person per day for black sea bass, with 5 sub-alternatives, one of which is the proposed action. The first sub-alternative would reduce the bag limit to 7-fish per person per day; the second, 5-fish per person per day; the third, 3-fish per person per day; the fourth, 2-fish per person per day; and the fifth, 1-fish per person per day. Relative to the 15-fish bag limit and depending on the baseline year used, the bag limit alternatives would have varying effects on the annual NOR of the for-hire fleet. The first sub-alternative would result in increased NOR from approximately $19,000 to $129,000 annually; the second sub-alternative would increase NOR from negative $62,000 to positive $48,000 annually; the third sub-alternative would result in a decreased NOR of $97,000 annually; and, the fourth sub-alternative would result in a decreased NOR of $226,000 annually. These effects are less than the positive effects of the proposed action. The Council's decision to recommend the proposed action of a 5-fish bag limit per person per day was based on public support and the fact that a large percentage of recreational trips result in approximately 5 black sea bass landed per person. Moreover, the Council considered this proposed action as an interim measure until results of SEDAR 25 are available.

Seven alternatives, including the proposed action, were considered for commercial vermilion snapper trip limit. The first alternative to the proposed action is the no action alternative. This alternative would not address concerns regarding derby fishing practices in the commercial sector of the vermilion snapper segment of the snapper-grouper fishery. The second alternative to the proposed action would establish a 1,000-lb (454-kg) commercial trip limit, with one sub-alternative that would reduce the trip limit to 500 lb (227 kg) when 75 percent of the commercial quota is met. This alternative would lengthen the commercial fishing season relative to the no action alternative, but it would bring about a reduction in short-term revenues of approximately $611,000 annually without the sub-alternative, or $752,000 annually with the sub-alternative. These reductions are larger than those that would occur under the proposed action. The third alternative to the proposed action would establish a 1,500-lb (680-kg) trip limit, and reduce the trip limit to 500 lb (227 kg) when 75 percent of the commercial quota is met. This alternative would bring about a reduction in short-term revenues of approximately $505,000. This revenue reduction is larger than what would occur under the proposed action. The fourth alternative to the proposed action would establish a 750-lb (340-kg) commercial trip limit, with one sub-alternative that would reduce the commercial trip limit to 400 lb (181 kg) when 75 percent of the commercial quota is met. Compared to the proposed action, this alternative would result in short-term revenue reductions of approximately $880,000 annually without the sub-alternative, or $1,013,000 annually with the sub-alternative. The fifth alternative to the proposed action would establish a 500-lb (227-kg) commercial trip limit. This alternative would result in short-term revenue reductions of approximately $1,302,000 annually, which is much larger than those resulting under the proposed action. The sixth alternative to the proposed action would establish a 400-lb (181-kg) commercial trip limit. Compared to the proposed action, this alternative would result in larger revenue reductions of approximately $1,528,000 annually.

Five alternatives, including the proposed action, were considered for gag commercial trip limit. The first alternative to the proposed action is the no action alternative. This alternative would not address the derby concern in the gag commercial sector the snapper-grouper fishery. The second alternative to the proposed action would establish a 1,000-lb (454-kg) commercial trip limit that would be reduced to a 100-lb (45-kg) trip limit when 75 percent of the commercial quota is projected to be met. This alternative would result in short-term revenue reductions of approximately $392,000 annually when based on 2007 landings, or $204,000 annually when based on 2009 landings.

The third alternative to the proposed action would establish a 750-lb (340-kg) commercial trip limit, with one sub-alternative that would reduce the

commercial trip limit to 100 lb (45 kg) when 75 percent of the commercial quota is projected to be met. This alternative would result in short-term revenue reductions of approximately $194,000 annually without the sub-alternative, or from $467,000 annually (based on 2007 landings) to $228,000 (based on 2009 landings) with the sub-alternative. The fourth alternative to the proposed action would establish a 1,000-lb (454-kg) commercial trip limit, with a season starting on May 1, and reduce the trip limit to 100 lb (45 kg) when 90 percent of the gag commercial quota is projected to be met. This alternative would result in revenue reductions greater than $102,000 annually but less than $392,000 annually. All of these alternatives to the proposed action are expected to result in larger short-term revenue reductions than the proposed action.

Two alternatives, including the proposed action, were considered for the greater amberjack commercial trip limit. The first alternative to the proposed action is the no action alternative, which specifies a 1,000-lb (454-kg) commercial trip limit. Under this trip limit alternative, it was considered that the commercial quota for greater amberjack has not been fully taken. A trip limit increase was considered to allow the fishing fleet to harvest the entire commercial quota for greater amberjack in order to mitigate the adverse effects of increased restrictions applied in other fisheries prosecuted by the same fishermen. The second alternative consists of three sub-alternatives, one of which is the proposed action. The first sub-alternative would increase the greater amberjack commercial trip limit to 2,000 lb (907 kg) while the second sub-alternative would increase the greater amberjack commercial trip limit to 1,500 lb (680 kg). Each of these two trip limit alternatives would result in larger short-term revenue increases than the proposed action. However, they pose a higher risk that the commercial quota for greater amberjack would be met prior to the end of the fishing season, resulting in potentially larger revenue and profit reductions to the fishing fleet.

List of Subjects

50 CFR Part 600

Fisheries and Fishing vessels.

50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: April 26, 2011.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR parts 600 and 622 are proposed to be amended as follows:

PART 600—MAGNUSON-STEVENS ACT PROVISIONS

1. The authority citation for part 600 continues to read as follows:

Authority: 5 U.S.C. 561 and 16 U.S.C. *et seq.*

2. In § 600.502, revise Table 1 entry "Administrator, Southeast Region" to read as follows:

§ 600.502 Vessel reports.

* * * * *

TABLE 1 TO § 600.502—ADDRESSES

NMFS regional administrators	NMFS science and research directors	U.S. Coast Guard commanders
* *	* * *	* *
Administrator, Southeast Region, National Marine Fisheries Service, 263 13th Ave., South, St. Petersburg, FL 33701.	Director, Southeast Fisheries Science Center, National Marine Fisheries Service, NOAA, 75 Virginia Beach Drive, Miami, FL 33701.	Commander, Atlantic Area, U.S. Coast Guard, Governor's Island, New York 10004.
* *	* * *	* *

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PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

3. The authority citation for part 622 continues to read as follows:

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

4. In § 622.39, paragraph (d)(1)(vii) is revised to read as follows:

§ 622.39 Bag and possession limits.

* * * * *

(d) * * *

(1) * * *

(vii) Black sea bass—5.

* * * * *

5. In § 622.42, paragraph (e)(5) is revised to read as follows:

§ 622.42 Quotas.

* * * * *

(e) * * *

(5) *Black sea bass.* (i) For the period June through November each year—128,547 lb (58,308 kg).

(ii) For the period December through May each year—180,453 lb (81,852 kg).

(iii) Any unused portion of the quota specified in paragraph (e)(5)(i) of this section will be added to the quota specified in paragraph (e)(5)(ii) of this section. Any unused portion of the quota specified in paragraph (e)(5)(ii) of this section, including any addition of quota specified in paragraph (e)(5)(i) of this section that was unused, will become void and will not be added to any subsequent quota.

* * * * *

6. In § 622.44, the first sentence of paragraph (c)(5) is revised and paragraphs (c)(6) and (c)(7) are added to read as follows:

§ 622.44 Commercial trip limits.

* * * * *

(c) * * *

(5) *Greater amberjack.* Until the quota specified in § 622.42(e)(3) is reached—1,200 lb (544 kg). * * *

(6) *Vermilion snapper.* Until either quota specified in § 622.42(e)(4)(i) or (ii) is reached—1,500 lb (680 kg). See § 622.43(a)(5) for the limitations regarding vermilion snapper after either quota is reached.

(7) *Gag.* Until the quota specified in § 622.42(e)(7) is reached—1,000 lb (454 kg). See § 622.43(a)(5) for the limitations regarding gag after the quota is reached.

* * * * *

[FR Doc. 2011–10488 Filed 4–28–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 110120049–1144–01]

RIN 0648–BA69

Atlantic Highly Migratory Species; Atlantic Shark Management Measures

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

ACTION: Proposed rule; request for comments.

SUMMARY: This rule would implement the International Commission for the Conservation of Atlantic Tunas (ICCAT) recommendations 10–07 and 10–08, which prohibit the retention, transshipping, landing, storing, or selling of hammerhead sharks in the family *Sphyrnidae* (except for *Sphyrna tiburo*) and oceanic whitetip sharks (*Carcharhinus longimanus*) caught in association with ICCAT fisheries. This rule would affect the commercial HMS pelagic longline (PLL) fishery and recreational fisheries for tunas, swordfish, and billfish in the Atlantic Ocean, including the Caribbean Sea and Gulf of Mexico. This action implements ICCAT recommendations, consistent with the Atlantic Tunas Convention Act (ATCA) and furthers domestic management objectives under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

DATES: Written comments must be received by 5 p.m., local time, on May 31, 2011.

ADDRESSES: You may submit comments, identified by 0648–BA69, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal: *http://www.regulations.gov*.
- *Fax:* 301–713–1917, Attn: Peter Cooper.
- *Mail:* 1315 East-West Highway, Silver Spring, MD 20910.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

The public hearing dates and locations are:

1. May 16, 2011, 6–8 p.m.: Manteo Town Hall, 407 Budleigh Street, Manteo, NC 27954.
2. May 19, 2011, 6–8 p.m.: Fort Pierce Library, 101 Melody Lane, Ft. Pierce, FL 34950.
3. May 24, 2011, 2–4 p.m.: NOAA Building III, Room 1311B, 1315 East-West Highway, Silver Spring, MD 20910.

Copies of the supporting documents—including the draft Environmental Assessment (EA), Regulatory Impact Review (RIR), Initial Regulatory Flexibility Analysis (IRFA), and the 2006 Consolidated Atlantic Highly Migratory Species (HMS) Fishery Management Plan (FMP)—are available from the HMS Web site at *http://www.nmfs.noaa.gov/sfa/hms/*.

FOR FURTHER INFORMATION CONTACT: Peter Cooper, Michael Clark, or Karyl Brewster-Geisz by phone: 301–713–2347 or by fax: 301–713–1917.

SUPPLEMENTARY INFORMATION: The U.S. Atlantic shark fisheries are managed under the authority of the Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.* The U.S. Atlantic tuna and tuna-like species fisheries are managed under the dual authority of the Magnuson-Stevens Act, and ATCA, 16 U.S.C. 971 *et seq.* ATCA authorizes the Secretary of Commerce (Secretary) to promulgate regulations, as may be necessary and appropriate, to implement ICCAT recommendations. The authority to issue regulations under the Magnuson-Stevens Act and ATCA has been delegated from the Secretary to the Assistant Administrator for Fisheries (AA), NOAA.

On October 2, 2006, NMFS published in the **Federal Register** (71 FR 58058) final regulations, effective November 1, 2006 that implemented the Consolidated Atlantic Highly Migratory Species (HMS) Fishery Management Plan (FMP). This FMP consolidated management of all Atlantic HMS (i.e., sharks, swordfish, tunas, and billfish) into one comprehensive FMP. The implementing regulations for Atlantic HMS are at 50 CFR part 635.

ICCAT is responsible for the conservation of tuna and tuna-like species in the Atlantic Ocean and adjacent seas. ICCAT recommendations are binding on Contracting Parties, unless Parties object pursuant to the treaty. All ICCAT recommendations are available on the ICCAT Web site at *http://www.iccat.int/en/*.

Two shark measures adopted at the 17th Annual Meeting of ICCAT in November of 2010 are the subject of this proposed rulemaking. Recommendation 10–07, "Conservation of Oceanic Whitetip Sharks Caught in Association with Fisheries in the ICCAT Convention Area," prohibits the retention, transshipping, landing, storing, or selling of oceanic whitetip sharks (*Carcharhinus longimanus*). The recommendation cites the fact that oceanic whitetip sharks are one of five species with the highest degree of risk based on an ICCAT ecological risk assessment, their high at-vessel survival rates and ease of identification, and the high proportion of juvenile fish that are caught as justification for adopting the recommendation.

Recommendation 10–08 "Hammerhead Sharks (Family *Sphyrnidae*) Caught in Association with Fisheries Managed by ICCAT," prohibits the retention, transshipping, landing, storing, or selling of hammerhead sharks in the family *Sphyrnidae,* except for bonnethead sharks (*Sphyrna tiburo*), taken in the Convention area in association with ICCAT fisheries. The recommendation cites sustainability concerns for scalloped and smooth hammerhead sharks, difficulty in identifying the three species (scalloped, smooth, and great) without bringing them onboard, and issues with Contracting Parties' obligations to report Task I and Task II data as justification for adopting the recommendation.

These recommendations were adopted by ICCAT to reduce fishing mortality of oceanic whitetip and hammerhead sharks caught in association with ICCAT fisheries. In this proposed rule, NMFS considers changes to the HMS regulations at 50 CFR Part 635 consistent with the ICCAT recommendations. Specifically, NMFS proposes regulatory changes that would affect HMS vessels that catch sharks in association with tuna and tuna-like species, including commercial vessels that deploy PLL gear or hold an HMS Angling/Charter Headboat permit and are fishing for and retaining billfish, swordfish, and tunas. This proposed action is necessary to implement ICCAT recommendations and to reduce the mortality of oceanic whitetip and hammerhead sharks. NMFS is not proposing to prohibit retention in all HMS recreational fisheries because there is a recreational fishery targeting sharks that is not associated with ICCAT fisheries. NMFS is not proposing to prohibit the retention of oceanic whitetip and hammerhead sharks from bottom longline, gillnet, or handgear because these gears also target sharks

and are not used in association with ICCAT fisheries.

NMFS prepared a draft Environmental Assessment (EA), Regulatory Impact Review (RIR), and an Initial Regulatory Flexibility Analysis (IRFA), which present and analyze anticipated environmental, social, and economic impacts of each alternative contained in this proposed rule. The complete list of alternatives and related analyses is provided in the draft EA/RIR/IRFA, and is not repeated here in its entirety. A copy of the draft EA/RIR/IRFA prepared for this proposed rule is available from NMFS (see **DATES** and **ADDRESSES**).

In this action, NMFS proposes to prohibit the retention of oceanic whitetip sharks and scalloped, smooth, and great hammerhead sharks on Atlantic HMS commercially-permitted vessels that have PLL gear on board. Regarding oceanic whitetip sharks, this species has not been assessed domestically; therefore, their stock status is currently unknown. However, in 2010, the United States formally submitted a proposal at the Convention on International Trade in Endangered Species of Wild Fauna and Flora's (CITES) Fifteenth meeting of the Conference of Parties for the inclusion of oceanic whitetip on Appendix II. The United States determined that globally, the oceanic whitetip shark qualified for listing in Appendix II under criterion A in Annex 2a, which states that it is known, or can be inferred or projected, that the regulation of trade in the species is necessary to avoid it becoming eligible for inclusion in Appendix I, and that oceanic whitetip shark would be banned from international trade. Depending on the area and study, oceanic whitetip shark populations have experienced declines of 60–70% in the northwest and central Atlantic Ocean. Abundance trend analyses of catch-rate data have reported large declines in abundance for some populations. In the northwest and western central Atlantic regions, analysis of logbook data indicated declines of 60–70% since 1992. While the U.S. CITES proposal covered scientific information on the oceanic whitetip in the Atlantic and Pacific Oceans, there have been no formal NMFS or peer-reviewed stock assessments for Atlantic oceanic whitetip sharks that have been determined to be appropriate for management action under the Magnuson-Stevens Act.

Given the declining abundance of oceanic whitetip sharks globally and the unknown status of the stock, the implementation of the ICCAT oceanic whitetip recommendation could benefit the status of this stock by reducing mortality in the Atlantic Ocean.

An analysis of the 2005 through 2009 HMS logbook data covering the HMS PLL fishery indicates that, on average, a total of 50 oceanic whitetip sharks were kept per year by fishermen using PLL gear. This proposed action would require oceanic whitetip sharks to be released by those fishermen. According to the NMFS PLL observer program data from 2005–2009, 77 percent of oceanic whitetip sharks caught were alive when brought to the vessel. Therefore, of the 50 oceanic whitetip sharks kept annually that would have to be released under this proposed action, 39 would likely be released alive. Although oceanic whitetip sharks are not caught in large numbers in the PLL fishery (*i.e.,* less than 2 percent of PLL trips between 2005–2009 caught oceanic whitetip sharks), this proposed action could have minor, beneficial ecological impacts for oceanic whitetip sharks because mortality would be reduced in the PLL fishery. A fishing mortality reduction for oceanic whitetip sharks could also have beneficial impacts due to declining abundances of this stock as described in the 2009 U.S. CoP 15 CITES Appendix II listing proposal for oceanic whitetip (CITES 2009).

Regarding hammerhead sharks, NMFS has not conducted a stock assessment for smooth or great hammerhead sharks; therefore, the status of these species of hammerhead sharks is unknown. In a recent notice published in the **Federal Register**, NMFS declared scalloped hammerhead sharks overfished with overfishing occurring consistent with the Hayes *et al.* (2009) peer-reviewed stock assessment.[1] The stock is estimated to be depleted by approximately 83 percent of virgin stock size (*i.e.,* the current population is only 17 percent of the virgin stock size). Based on this stock status determination, NMFS will be initiating an amendment to the 2006 Consolidated HMS FMP in order to implement regulations to end overfishing and rebuild the scalloped hammerhead shark stock within two years as mandated under the Magnuson-Stevens Act. Therefore, implementation of the ICCAT hammerhead recommendation could help to reduce mortality of scalloped hammerhead and contribute to the rebuilding of this species.

In addition, an analysis of HMS logbook data from 2005 through 2009 indicated that, on average, a total of 181 hammerhead sharks of any species are landed per year. Furthermore, it is difficult for most fishermen to distinguish among the hammerhead species. According to the NMFS PLL observer program data from 2005 through 2009, 55 percent of hammerhead sharks caught are alive when brought to the vessel. Therefore, of the 181 sharks kept annually that would have to be released under this proposed action, 100 of those hammerhead sharks would be released alive. Although hammerhead sharks are caught incidentally to tuna and tuna-like species and constitute a small portion of the non-target species catch (*i.e.,* less than 2 percent of PLL trips between 2005 through 2009 caught hammerhead sharks), this proposed action would likely have minor, beneficial ecological impacts to hammerhead sharks due to the reduction of mortality from the retention prohibition and the overfished status of scalloped hammerhead sharks.

Atlantic HMS commercial permit holders with PLL gear on board would no longer be allowed to retain oceanic whitetip sharks and scalloped, smooth, or great hammerhead sharks and could experience minor, adverse socioeconomic impacts. On average, from 2005 to 2009, approximately 12 PLL vessels kept oceanic whitetip sharks each year. For oceanic whitetip sharks, on average a total of 1,462 lb per year were landed annually by those 12 PLL vessels combined from 2005 through 2009. Therefore, approximately $497 in revenues from the meat and $813 in revenues from the fins or a total of $1,310 in average annual gross revenues from landings of oceanic whitetip sharks across those PLL vessels, or $109 per year for each vessel that landed oceanic whitetip sharks, could be lost if PLL vessels had to discard all oceanic whitetip sharks that are caught. However, it is unlikely these PLL vessels would experience significant impacts due to the low proportion of oceanic whitetip sharks relative to total landings from PLL vessels. Other pelagic sharks, including common thresher, shortfin mako, porbeagle, and blue sharks, could still be landed and may offset any lost revenues experienced as a result of not being able to land oceanic whitetip sharks.

Scalloped, smooth, and great hammerhead sharks, are caught more frequently on PLL gear than oceanic whitetip sharks. On average, from 2005 through 2009, approximately 25 vessels kept hammerhead sharks each year. On average, 9,493 lb per year were landed by those 25 vessels from 2005 through

[1] Hayes, C., Y. Jiao, and E. Cortéz. 2009. Stock Assessment of Scalloped Hammerheads in the Western Atlantic Ocean and Gulf of Mexico. North American Journal of Fisheries Management 29:1406–1417.

2009. Pelagic longline fishermen could lose approximately $2,563 in revenues from meat and $5,282 in revenues from fins or a total of $7,845 per year in average annual gross revenues of hammerhead sharks, or $314 per year for each PLL vessel that landed hammerhead sharks because those vessels would no longer be authorized to retain scalloped, smooth, or great hammerhead sharks.

When considering oceanic whitetip and hammerhead sharks together, this proposed action could have an overall impact of $9,155 per year to those PLL fishermen that landed oceanic whitetip and hammerhead sharks or an average of $247 per vessel per year as a result of this action. However, it is not likely that commercial PLL fishermen would alter commercial fishing practices for tuna and tuna-like species because oceanic whitetip and hammerhead sharks constitute a small portion of the PLL landings compared to the tuna and tuna-like species. Therefore, NMFS anticipates that this proposed action would have minor, adverse socioeconomic impacts to PLL fishermen.

NMFS is also proposing to prohibit retention of oceanic whitetip and hammerhead sharks by recreational fishermen fishing with a General Category permit participating in a HMS tournament or those fishing under an HMS Angling or Charter/Headboat permit when tuna or tuna-like species are also retained. NMFS recreational survey data, which includes HMS Angling and Charter/Headboat permit holders, from 2005 through 2009 indicates that recreational landings of either oceanic whitetip or hammerhead sharks along with tunas, swordfish, and billfish are rare events. The Large Pelagics Intercept Survey (LPIS), which covers the areas from Virginia to Maine, only intercepted three trips that landed either an oceanic whitetip or hammerhead shark out of 18,626 intercepted trips over the time period. Of those three trips, no other HMS species were reported caught. Over the same time period, the Marine Recreational Fisheries Statistics Survey (MRFSS), which covers the entire Atlantic and Gulf of Mexico (except for Texas), for HMS Angling and Charter/Headboat permit holders intercepted 29 angler trips that landed either an oceanic whitetip or hammerhead shark. Of those 29 trips, only three landed additional HMS, although all of the additional HMS retained were sharks, not tuna or tuna-like species. Therefore, NMFS concluded that because there are limited reported occurrences of oceanic whitetip or hammerhead sharks landed along with tuna or tuna-like HMS on the same recreational fishing trip, this scenario rarely occurs in the recreational HMS fishery.

This proposed action would prohibit fishermen holding a HMS Angling, a Charter/Headboat permit, or a General Category permit when fishing in a HMS tournament, from retaining oceanic whitetip or hammerhead sharks when tuna or tuna-like species are also retained on board. Data suggests that this practice is a rare event for these permit holders; therefore reducing current recreational fishing mortality and limiting future fishing effort on oceanic whitetip and hammerhead sharks by these permit holders would have minor, beneficial ecological impacts.

Prohibiting HMS Angling and Charter/Headboat permit holders from retaining oceanic whitetip and/or hammerhead sharks is anticipated to have minor, adverse socioeconomic impacts, due to limiting fishing opportunities for oceanic whitetip and hammerhead sharks while retaining tuna or tuna-like HMS. NMFS analyzed LPIS and MRFSS data from 2005 through 2009 to determine the frequency of recreational fishing trips that retained either an oceanic whitetip or hammerhead shark along with a tuna or tuna-like HMS. However, because this was such a rare occurrence during the time period, no reliable estimate could be made. Although there are no instances of oceanic whitetip or hammerhead sharks retained along with tuna or tuna-like species in the LPIS or MRFSS data from 2005 through 2009, prohibiting retention of these sharks along with tuna or tuna-like species would limit fishing opportunities, and could lead to fewer recreational trips. Charter/Headboats could experience a decrease in trips, as much of their business is based on providing recreational anglers the opportunity to catch hammerheads or oceanic whitetip sharks. The average price for a full day charter in 2004 was $1,053. Creating an annual estimate of recreational trips with oceanic whitetip and/or hammerhead landings from the limited number of intercepts from the LPIS (3) and MRFFS (29) over the time period, would result in an estimate with extremely low precision. Using only the actual intercepts over the time period (32) and assuming that all of those intercepts were for-hire Charter/Headboat trips, the total economic impact from 2005 through 2009 would be $33,936 ($6,788/year), but because none of those trips landed an oceanic whitetip or hammerhead shark along with a tuna or tuna-like species, NMFS anticipates that adverse socioeconomic impacts to Charter/Headboat operations would be minor.

This proposed action could have minor, adverse socioeconomic impacts on HMS fishing tournaments. According to HMS tournament registration data from 2005 through 2009, approximately 13 percent of all registered HMS tournaments awarded points for Large Coastal Non-ridgeback and/or Pelagic sharks along with at least one tuna or tuna-like HMS. The HMS tournament data does not specify sharks to the species level; therefore, it is unknown how many of these tournaments awarded points for hammerhead sharks and oceanic whitetip sharks, which fall into the Large Coastal Non-ridgeback and Pelagic shark categories, respectively. Assuming that points were awarded for hammerhead and oceanic whitetip sharks in all of these instances, the adverse socioeconomic impact to tournaments is expected to be minor when both sharks and tuna or tuna-like species are retained on board, as it only encompasses a small percentage (13.1 percent) of all HMS tournaments over the time period. Recreational fishermen would still be able to retain other pelagic and large coastal shark species and tunas, swordfish, and billfish on the same fishing trip which may offset lost revenues as a result of this proposed rule.

Minor, adverse socioeconomic impacts are anticipated for vessels that hold both Charter/Headboat and limited access shark permits that would commercially retain oceanic whitetip and/or hammerhead sharks along with tuna or tuna-like HMS, because of the infrequent landings of these species by this specific permit combination. In 2009, less than one percent of limited access shark permit holders also held a Charter/Headboat permit, and none of those vessels reported any commercial landings of oceanic whitetip or hammerhead sharks in the Coastal Fisheries Logbook. Currently, there is no commercial oceanic whitetip or hammerhead revenue being generated by vessels with this permit combination, but because this action would limit this fishing practice, minor, adverse socioeconomic impacts could result.

In conclusion, the proposed action of prohibiting the retention of oceanic whitetip sharks and scalloped, smooth, and great hammerhead sharks in the PLL, HMS Angling and Charter/Headboat fisheries for tuna and tuna-like species is likely to have minor beneficial ecological impacts because of the potential reduction in mortality, and minor adverse socioeconomic impacts because these species constitute a low

percentage of the total PLL landings and the low occurrence of these shark species being caught in the HMS recreational fisheries along with billfish, swordfish and tunas.

Public Hearings

Comments on this proposed rule may be submitted via *http://www.regulations.gov*, mail, or fax and comments may also be submitted at a public hearing (see **DATES** and **ADDRESSES**). NMFS solicits comments on this proposed rule by May 31, 2011. NMFS will hold three public hearings for this proposed rule. The hearing locations are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Peter Cooper at 301–713–2347, at least 7 days prior to the meeting. The public is reminded that NMFS expects participants at the public hearings to conduct themselves appropriately. At the beginning of each public hearing, a representative of NMFS will explain the ground rules (*e.g.,* alcohol is prohibited from the hearing room; attendees will be called to give their comments in the order in which they registered to speak; each attendee will have an equal amount of time to speak; and attendees should not interrupt one another). The NMFS representative will attempt to structure the meeting so that all attending members of the public will be able to comment, if they so choose, regardless of the controversial nature of the subject(s). Attendees are expected to respect the ground rules, and, if they do not, they will be asked to leave the hearing.

Classification

Pursuant to the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that the proposed rule is consistent with the 2006 Consolidated HMS FMP and its amendments, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

NMFS prepared an environmental assessment for this rule that discusses the impact on the environment as a result of this rule. In this proposed action, NMFS is considering a prohibition against retaining oceanic whitetip sharks and scalloped, smooth, and great hammerhead sharks in the Atlantic PLL, HMS Angling and HMS Charter/Headboat fisheries for tuna and tuna-like species consistent with ICCAT Recommendations 10–07 and 10–08. A copy of the environmental assessment is available from NMFS (see **ADDRESSES**).

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

An Initial Regulatory Flexibility Analysis (IRFA) was prepared, as required by section 603 of the RFA (RFA). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A summary of the analysis follows. A copy of this analysis is available from NMFS (see **ADDRESSES**).

In compliance with section 603(b)(1) of the Regulatory Flexibility Act, the purpose of this proposed rulemaking is, consistent with the Magnuson-Stevens Act and the 2006 Consolidated HMS FMP and its amendments to implement recommendations of ICCAT pursuant to ATCA and to achieve domestic management objectives under the Magnuson-Stevens Act.

In compliance with section 603(b)(2) of the Regulatory Flexibility Act, the objectives of this proposed rulemaking are to consider changes to the HMS regulations at 50 CFR part 635 consistent with ICCAT recommendations. NMFS proposes to implement the ICCAT shark recommendations in the Atlantic HMS fisheries that target tuna and tuna-like species because NMFS considers these fisheries to be the ICCAT managed fisheries. The regulatory changes would affect HMS vessels that catch sharks in association with tuna and tuna-like species, including commercial vessels that deploy PLL gear and HMS Angling/Charter Headboat vessels fishing for billfish, swordfish, and tunas. This proposed action is necessary to implement ICCAT recommendations pursuant to ATCA. In compliance with the ATCA, NMFS is required to implement domestic regulations consistent with recommendations adopted by ICCAT as necessary and appropriate.

Section 603(b)(3) requires Federal agencies to provide an estimate of the number of small entities to which the rule would apply. In accordance with the Small Business Administration (SBA) size standards, NMFS used the following thresholds to determine if an entity regulated under this action would be considered a small entity: average annual receipts less than $4.0 million for fish-harvesting, average annual receipts less than $6.5 million for charter/party boats, 100 or fewer employees for wholesale dealers, or 500 or fewer employees for seafood processors. Using these thresholds, NMFS determined that all HMS permit holders are small entities. Specifically, this proposed action would apply to all participants in the Atlantic HMS commercial and recreational fisheries that target tuna and tuna-like species. As of October 2010, 248 vessels held a Tuna Longline permit and can be reasonably assumed to use PLL gear, 24,479 held an Atlantic HMS Angling permit, and 4,174 vessels held an Atlantic HMS Charter/Headboat permit. These permitted vessels consist of commercial, recreational, and charter vessels as well as headboats. Vessels holding these permits could be affected by this action.

This proposed rule does not contain any new reporting, recordkeeping, or other compliance requirements (5 U.S.C. 603(b)(4)). Similarly, this proposed rule would not conflict, duplicate, or overlap with other relevant Federal rules (5 U.S.C. 603(b)(5)). Fishermen, dealers, and other participants in these fisheries must comply with a number of international agreements, domestic laws, and other FMPs. These include, but are not limited to, the Magnuson-Stevens Act, ATCA, the High Seas Fishing Compliance Act, the Marine Mammal Protection Act, the Endangered Species Act, the National Environmental Policy Act, the Paperwork Reduction Act, and the Coastal Zone Management Act. NMFS does not believe that the proposed regulations would duplicate, overlap, or conflict with any relevant regulations, Federal or otherwise.

Under section 603(c), agencies are required to describe any alternatives to the proposed rule which accomplish the stated objectives and which minimize any significant economic impacts. These impacts are discussed below and in the draft Environmental Assessment for the proposed action. Additionally, the Regulatory Flexibility Act (5 U.S.C. 603(c)(1)–(4)) lists four general categories of significant alternatives that would assist an agency in the development of significant alternatives. These categories of alternatives are: (1) Establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) use of performance rather than design standards; and, (4) exemptions from coverage of the rule for small entities.

In order to meet the objectives of this proposed rule, consistent with

Magnuson-Stevens Act, NMFS cannot exempt small entities or change the reporting requirements only for small entities because all the entities affected are considered small entities. Thus, there are no alternatives discussed that fall under the first, second, and fourth categories described above. NMFS does not know of any performance or design standards that would satisfy the aforementioned objectives of this rulemaking while, concurrently, complying with the Magnuson-Stevens Act. Thus, there are no alternatives considered under the third category. As described below, NMFS analyzed several different alternatives in this proposed rulemaking and provides rationale for identifying the preferred alternatives to achieve the desired objective.

NMFS has prepared this IRFA to analyze the impacts on small entities of the alternatives for establishing ICCAT shark recommendations for all domestic fishing categories that target tuna and tuna-like species. The IRFA assesses the impacts of the various alternatives on the vessels that participate in the Atlantic HMS commercial and recreational fisheries that target tuna and tuna-like species, all of which are considered small entities. Three alternatives were considered and analyzed and include (A1) no action; (A2) implementing the ICCAT shark recommendations in the commercial PLL fishery for tuna and tuna-like species; and (A3) implementing the ICCAT shark recommendations in the HMS Angling and Charter/Headboat fisheries for tuna and tuna-like species.

Under the No Action Alternative, A1, there would be no additional economic impacts to HMS vessels fishing for tuna and tuna-like species. Commercial vessels that fish for tuna and tuna-like species that are also currently authorized to land oceanic whitetip and hammerhead sharks would be able to continue that practice. Total gross average annual revenues from oceanic whitetip and hammerhead shark meat and fins from all vessels that fished for tuna or tuna-like species from 2005 through 2009 was $9,155. Vessels fishing recreationally for tuna or tuna-like species would continue to have the ability to retain an oceanic whitetip or hammerhead shark along with a tuna or tuna-like species on the same recreational trip under the no action alternative.

Under Alternative A2, a preferred alternative, ICCAT shark recommendations would be applied to PLL vessels fishing commercially for tuna and tuna-like species. This alternative would prohibit retention of oceanic whitetip and hammerhead sharks by PLL vessels. On average, from 2005 through 2009, less than 2 percent of the total PLL trips kept oceanic whitetip sharks, which equates to an average of 12 PLL vessels per year that kept caught oceanic whitetip sharks. On average, a total of 1,462 lb of oceanic whitetip sharks were landed annually by 12 PLL vessels on average from 2005 through 2009. From 2005 through 2009, on average, 2 percent of the total PLL trips kept hammerhead sharks, which equates to an average of 25 vessels that kept hammerheads on an annual basis. On average, 9,493 lb in total were landed from 25 PLL vessels per year from 2005 through 2009. Gross average annual revenues from oceanic whitetip and hammerhead shark meat and fins from the 25 PLL vessels that fished for tuna or tuna-like species and kept oceanic whitetip or hammerhead sharks from 2005 through 2009 were $9,155 or $366 per vessel. NMFS prefers Alternative 2 at this time, because it would implement ICCAT shark recommendations and would have minor adverse socioeconomic impacts on the PLL fishery.

Under Alternative A3, a preferred alternative, ICCAT shark recommendations would be applied to vessels holding a General Category permit when fishing in an HMS tournament or holding either an HMS Angling or Charter/Headboat permit fishing either recreationally or commercially for tuna and tuna-like species. This alternative would prohibit retention of oceanic whitetip and hammerhead sharks along with tuna and tuna-like species by vessels fishing recreationally and by Charter/Headboat permit holders fishing commercially. Although there are no instances of oceanic whitetip or hammerhead sharks retained along with tuna or tuna-like species in the LPIS or MRFS data from 2005 through 2009, this alternative could limit fishing opportunities and lead to fewer fishing trips. Charter/Headboats could experience a decrease in trips as much of their business is based on providing recreational anglers the opportunity to catch hammerhead and oceanic whitetip sharks. However, because none of the intercepted Charter/Headboat trips landed oceanic whitetip and hammerhead sharks along with tuna or tuna-like species, NMFS anticipates the impacts to Charter/Headboats to be minor. NMFS prefers this alternative at this time, because it would implement ICCAT shark recommendations and would have minor, adverse socioeconomic impacts on the HMS Angling and Charter/Headboat fisheries.

List of Subjects in 50 CFR Part 635

Fisheries, Fishing, Fishing vessels, Foreign relations, Imports, Penalties, Reporting and recordkeeping requirements, Treaties.

Dated: April 26, 2011.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For reasons set out in the preamble, 50 CFR part 635 is proposed to be amended as follows:

PART 635—ATLANTIC HIGHLY MIGRATORY SPECIES

1. The authority citation for part 635 continues to read as follows:

Authority: 16 U.S.C. 971 *et seq.;* 16 U.S.C. 1801 *et seq.*

2. In § 635.21, paragraph (c)(1) is revised to read as follows:

§ 635.21 Gear operation and deployment restrictions.

* * * * *

(c) * * *

(1)(i) If a vessel issued or required to be issued a permit under this part is in a closed area designated under paragraph (c)(2) of this section and has bottom longline gear onboard, the vessel may not, at any time, possess or land any pelagic species listed in Table 2 of Appendix A to this part in excess of 5 percent, by weight, of the total weight of pelagic and demersal species possessed or landed, that are listed in Tables 2 and 3 of Appendix A to this part.

(ii) If pelagic longline gear is on board a vessel issued a permit under this part, persons aboard that vessel may not retain, transship, land, sell, store oceanic whitetip sharks or scalloped, smooth, or great hammerhead sharks.

* * * * *

3. In § 635.22, paragraph (a) is revised to read as follows:

§ 635.22 Recreational retention limits.

(a) *General.* (1) Atlantic HMS caught, possessed, retained, or landed under these recreational limits may not be sold or transferred to any person for a commercial purpose. Recreational retention limits apply to a longbill spearfish taken or possessed shoreward of the outer boundary of the Atlantic EEZ, to a shark taken from or possessed in the Atlantic Ocean including the Gulf of Mexico and Caribbean Sea, to a North Atlantic swordfish taken from or possessed in the Atlantic Ocean, and to bluefin and yellowfin tuna taken from

or possessed in the Atlantic Ocean. The operator of a vessel for which a retention limit applies is responsible for the vessel retention limit and for the cumulative retention limit based on the number of persons aboard. Federal recreational retention limits may not be combined with any recreational retention limit applicable in state waters.

(2) Vessels issued a HMS General Category permit under § 635.4(d) that are participating in a HMS registered tournament, vessels issued a HMS Angling category permit under § 635.4(c), or vessels issued a HMS Charter/Headboat permit under § 635.4(b) may not retain oceanic whitetip sharks or scalloped, smooth, or great hammerhead sharks if swordfish, tuna, or billfish are retained or possessed on board the vessel. Those vessels also may not retain swordfish, tuna, or billfish if oceanic whitetip sharks, or scalloped, smooth or great hammerheads are retained or possessed on board the vessel.

* * * * *

4. In § 635.24, paragraphs (a)(2) and (a)(4)(i) are revised to read as follows:

§ 635.24 Commercial retention limits for sharks and swordfish.

* * * * *

(a) * * *

(2) From July 24, 2008 through December 31, 2012, a person who owns or operates a vessel that has been issued a directed LAP for sharks and does not have a valid shark research permit, or a person who owns or operates a vessel that has been issued a directed LAP for sharks and that has been issued a valid shark research permit but does not have a NMFS-approved observer on board, may retain, possess, or land no more than 33 non-sandbar LCS per vessel per trip if the fishery is open per §§ 635.27 and 635.28. Such persons may not retain, possess, or land sandbar sharks or, as specified at § 635.21(c)(1)(ii), scalloped, smooth or great hammerhead sharks. As of January 1, 2013, a person who owns or operates a vessel that has been issued a directed LAP for sharks and does not have a valid shark research permit, or a person who owns or operates a vessel that has been issued a directed LAP for sharks and that has been issued a shark research permit but does not have a NMFS-approved observer on board, may retain, possess, or land no more than 36 non-sandbar LCS per vessel per trip if the fishery is open per § 635.27 and § 635.28. Such persons may not retain, possess, or land sandbar sharks or, as specified at § 635.21(c)(1)(ii), scalloped, smooth or great hammerhead sharks.

* * * * *

(4)(i) A person who owns or operates a vessel that has been issued a directed shark LAP may retain, possess, or land pelagic sharks, except as specified at § 635.21(c)(1)(ii), if the pelagic shark fishery is open per §§ 635.27 and 635.28.

* * * * *

5. In § 635. 31, paragraph (c)(6) is added to read as follows:

§ 635.31 Restrictions on sale and purchase.

* * * * *

(c) * * *

(6) A dealer issued a permit under this part may not purchase oceanic whitetip sharks or scalloped, smooth, or great hammerhead sharks from an owner or operator of a fishing vessel with pelagic longline gear on board, or from the owner of a fishing vessel issued both a HMS Charter/Headboat permit and a commercial shark permit when tuna, swordfish or billfish are on board the vessel, offloaded from the vessel, or being offloaded from the vessel.

* * * * *

6. In § 635.71, paragraph (d)(18) is added to read as follows:

§ 635.71 Prohibitions.

* * * * *

(d) * * *

(18) Retain, transship, land, store, sell or purchase oceanic whitetip sharks or scalloped, smooth, or great hammerhead sharks as specified in § 635.21 (c)(1)(ii), § 635.31(c)(6) and § 635.22(a)(2).

[FR Doc. 2011–10452 Filed 4–28–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 110118038–1236–01]

RIN 0648–BA72

Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Framework Adjustment 22

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to implement Framework Adjustment 22 (Framework 22) to the Atlantic Sea Scallop Fishery Management Plan (FMP), which was developed and adopted by the New England Fishery Management Council (Council) and submitted to NMFS for approval. The specifications proposed in Framework 22 are based on, and being proposed in conjunction with, the management measures proposed in Amendment 15 to the FMP (Amendment 15) that establish the process for setting annual catch limits (ACLs) and accountability measures (AMs) to bring the FMP into compliance with the requirements of the re-authorized Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The purpose of Framework 22 is to specify the following scallop management measures for the 2011 through 2012 fishing years (FYs): The overfishing limit (OFL), acceptable biological catches (ABC), ACLs, and annual catch targets (ACTs) for both the limited access (LA) and limited access general category (LAGC) fleets; open area days-at-sea (DAS) and Sea Scallop Access Area (access area) trip allocations; DAS adjustments if an access area yellowtail flounder (YTF) total allowable catch (TAC) is caught; LAGC-specific allocations, including access area trip allocations for vessels with individual fishing quotas (IFQs), the Northern Gulf of Maine (NGOM) TAC, and the incidental target TAC; management measures to minimize impacts of incidental take of sea turtles as required by the March 14, 2008, Atlantic Sea Scallop Biological Opinion (Biological Opinion); and the elimination of the default Georges Bank (GB) access area rotation schedule.

Framework 22 also proposes, consistent with proposed measures in Amendment 15, precautionary default management measures for FY 2013 to be applied if a new biennial framework adjustment is not implemented by the start of FY 2013.

DATES: Comments must be received by 5 p.m., local time, on May 31, 2011.

ADDRESSES: An environmental assessment (EA) was prepared for Framework 22 that describes the proposed action and other considered alternatives and provides a thorough analysis of the impacts of the proposed measures and alternatives. Copies of Framework 22, the EA, and the Initial Regulatory Flexibility Analysis (IRFA), are available upon request from Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Newburyport, MA 01950.

You may submit comments, identified by 0648–BA72, by any one of the following methods:

• *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*.

• *Fax:* (978) 281–9135, Attn: Emily Gilbert.

• *Mail:* Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, "Comments on Scallop Framework 22 Proposed Rule."

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, *etc.*) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Emily Gilbert, Fishery Policy Analyst, 978–281–9244; fax 978–281–9135.

SUPPLEMENTARY INFORMATION:

Background

The Council adopted Framework 22 on November 17, 2010, and submitted it to NMFS on March 23, 2011, for review and approval. Framework 22 was developed and adopted by the Council, partially in conjunction with and based on Amendment 15 proposed measures, in order to comply with requirements of the Magnuson-Stevens Act enacted in 2007 to meet the FMP's objectives to prevent overfishing and improve yield-per-recruit from the fishery. Consequently, the authority to implement Framework 22, in part, is based on approval by NMFS of Amendment 15. Framework 22 specifies measures for FYs 2011 through 2012, but includes FY 2013 measures that will go into place as a default should the biennial framework required by proposed Amendment 15 to specify FY 2013 and FY 2014 measures be delayed beyond the start of FY 2013. Framework 22, if approved, will be implemented after the start of FY 2011. Some of the measures proposed by this action are not explicitly proposed in Framework 22, but are being proposed by NMFS under the authority of Section 305(d) of the Magnuson-Stevens Act, which provides that the Secretary may promulgate regulations necessary to ensure that amendments to an FMP are carried out in accordance with the FMP and the MSA. These measures, which are identified and described below, are necessary to address unintended consequences of the projected late implementation of this action, as well as to clarify implied measures which may not have been explicitly included in Framework 22. The Council has reviewed the Framework 22 proposed rule regulations as drafted by NMFS and deemed them to be necessary and appropriate as specified in section 303(c) of the Magnuson-Stevens Act.

Default Management Measures for FY 2013

The specifications proposed in this action also include default measures for FY 2013, because Amendment 15 proposes that framework adjustments setting biennial scallop specifications should also include an additional year of allocations to be used as default measures. Final Council action on scallop frameworks has routinely occurred at the November Council meeting, which has resulted in management measures being approved and implemented by NMFS after the March 1 start of the first FY for which the measures apply. Under the current regulations, the prior year's management measures roll over to the subsequent FY until they are superseded by a subsequent framework adjustment. Amendment 15 proposes instead to develop specific third-year default measures to account for any possible delays in the implementation of the subsequent biennial framework adjustment. Therefore, this action proposes default FY 2013 measures that would be implemented on March 1, 2013, if the next biennial adjustment is delayed beyond the start of FY 2013. The proposed FY 2013 measures will be replaced by a subsequent framework adjustment that would set FYs 2013 through 2015 measures based on updated scallop biomass projections. The proposed FY 2013 DAS allocations would be set at a precautionary level (*i.e.,* 75 percent of what current biomass levels project would be the DAS allocation for the entire FY). In addition, this action proposes the following default management measures for FY 2013: Access area trip allocations; DAS adjustments if an access area YTF TAC is caught; LAGC access area trip allocations; and management measures to minimize impacts of incidental take of sea turtles that are based on the proposed FY 2013 allocations. These management measures are described in greater detail throughout the preamble of this action.

Specification of Scallop OFL, ABC, ACL, and ACTs for FYs 2011 and 2012 and defaults specifications for FY 2013

These specifications are being proposed in accordance with measures and criteria set out in proposed Amendment 15. The OFL is set based on a fishing mortality rate (F) of 0.38, equivalent to the F threshold updated through the most recent scallop stock assessment. The ABC and equivalent total ACL for each FY are based on an F of 0.32, the F associated with a 25-percent probability of exceeding the OFL. The Council's Scientific and Statistical Committee (SSC) recommended ABCs for the FY 2011 and 2012 scallop fisheries of 60.1 M lb (27,269 mt) and 63.8 M lb (28,961 mt), respectively, after accounting for discards and incidental mortality. The Scallop Plan Development Team (PDT) estimated the FY 2013 ABC of 28,700 mt using the same approach that was reviewed and approved by the SSC to set the ABC for FYs 2011 and 2012. The decision to include third-year default measures occurred after the SSC made ABC recommendations for this action. The SSC will recommend an ABC in conjunction with the next biennial framework adjustment for FY 2013 and FY 2014, as well as a default ABC for FY 2015.

Table 1 outlines the various scallop fishery catch limits that are derived from these ABC values. After deducting the incidental target TAC and the research and observer set-asides, the remaining ACL available to the fishery is proportioned out according to Amendment 11 fleet allocations, with 94.5 percent allocated to the LA scallop fleet, 5 percent allocated to the LAGC IFQ fleet, and the remaining 0.5 percent allocated to LA scallop vessels that also have LAGC IFQ permits. These separate ACLs and their corresponding ACTs are referred to as sub-ACLs and sub-ACTs, respectively, throughout this action. Amendment 15 proposes that no buffers to account for management uncertainty are necessary in setting the LAGC sub-ACLs, meaning that the LAGC sub-ACL would equal the LAGC sub-ACT. As a result, the LAGC sub-ACL values in Table 1, based on an F of 0.32, represent the amount of catch from which IFQ percent shares will be applied to calculate each vessel's IFQ for a given FY. For the LA fleet, Amendment 15 proposes a management uncertainty buffer based on the F associated with a 75-percent probability of remaining

below the F associated with ABC/ACL, which results in an F of 0.28.

TABLE 1—SCALLOP CATCH LIMITS FOR FYS 2011 THROUGH 2013 FOR BOTH THE LA AND LAGC IFQ FLEETS (MT)

	2011	2012	2013
OFL	32,387	34,382	34,081
ABC/ACL	27,269	28,961	28,700
Incidental TAC	23	23	23
Research Set-Aside (RSA)	567	567	567
Observer Set-aside (1 percent of ABC/ACL)	273	290	287
LA sub-ACL(94.5 percent of total ACL, after deducting set-asides and incidental catch)	24,954	26,537	26,293
LA sub-ACT (adjusted for management uncertainty)	21,431	23,546	19,688
LAGC IFQ sub-ACL (5.0 percent of total ACL, after deducting set-asides and incidental catch)	1,320	1,404	1,391
LAGC IFQ sub-ACL for vessels with LA scallop permits (0.5 percent of total ACL, after deducting set-asides and incidental catch)	132	140	139

These allocations do not account for any adjustments that would be made year-to-year if the AMs proposed in Amendment 15 are triggered due to annual landings exceeding the ACL.

Open Area DAS Allocations

This action would implement vessel-specific DAS allocations for each of the three limited access scallop DAS permit categories (*i.e.,* full-time, part-time, and occasional) for FYs 2011 through 2013 (Table 2). While the Council specified full-time DAS allocations and provided the formula for calculating DAS allocations for part-time and occasional vessels based on Amendment 4 to the Scallop FMP (Amendment 4), Framework 22 did not explicitly state the specific DAS allocations for part-time and occasional vessels. Amendment 4 sets the DAS allocations for part-time and occasional vessel at 40 percent and 8.33 percent, respectively, of the DAS allocations assigned to full-time vessels. NMFS has applied these percentages to the full-time vessel DAS allocations for FYs 2011 through FY 2013 to clearly specify the part-time and occasional DAS for those FYs in Table 2. FY 2013 DAS allocations are precautionary, and are set at 75 percent of what current biomass projections indicate could be allocated to each LA scallop vessel for the entire FY so as to avoid over-allocating DAS to the fleet in the event that the framework that would set those allocations, if delayed past the start of FY 2013, estimates that DAS should be less than currently projected.

TABLE 2—SCALLOP OPEN AREA DAS ALLOCATIONS FOR FYS 2011 THROUGH 2013

Scallop open area DAS allocations			
Permit category	FY 2011	FY 2012	FY 2013
Full-Time	32	34	26
Part-Time	13	14	11
Occasional	3	3	3

Because Framework 22 would not go into effect until after the March 1 start of FY 2011, the current DAS allocations, which are higher than those proposed in Framework 22, will roll over until Framework 22 is implemented. It is possible that scallop vessels could exceed their Framework 22 DAS allocations during the interim period between March 1, 2011, and the implementation of the proposed DAS allocations in Framework 22. Therefore, Framework 22 specifies that the number of LA open area DAS used in FY 2011 by a vessel (excluding carryover DAS) that exceed the final FY 2011 open area DAS allocation for that vessel would be deducted from the vessel's FY 2012 open area DAS allocation.

Open Area DAS Adjustment if Access Area YTF TAC Is Attained

Under the Northeast Multispecies FMP, 10 percent of the GB YTF TAC is allocated to scallop vessels fishing in the Closed Area 1 (CAI) and Closed Area II (CAII) Access Areas, combined; and 10 percent of the Southern New England/Mid-Atlantic (SNE/MA) YTF TAC is allocated to scallop vessels fishing in the Nantucket Lightship (NLS) Access Area. Under the Northeast Multispecies regulations, if the GB or SNE/MA YTF TAC is caught, CAI and CAII, and/or NLS would close to further scallop fishing for the remainder of the FY. If a vessel has unutilized trip(s) after an access area is closed due to reaching the YTF TAC, it would be allocated additional open area DAS at a reduced rate. Unused access area trip(s) would be converted to open area DAS so that scallop fishing mortality that would have resulted from the access area trip(s) would be equivalent to the scallop fishing mortality resulting from the open area DAS allocation. The conversion used to allocate additional DAS from a YTF access area closure is based on Framework 22's proposed FYs 2011–2013 LA scallop possession limits for access area trips of 18,000 lb (8,165 kg) for full-time vessels, 14,400 lb (6,532 kg) for part-time vessels, and 6,000 lb (2,723 kg) for occasional vessels, and are as follows: For a given FY, the pounds remaining from an access area trip(s) (*i.e.,* from a fully unused trip(s) and/or unused compensation trip(s)) would first be multiplied by the average meat count (*i.e.,* number of shucked scallop abductor muscles per lb) from that area and then subsequently divided by both the open area average meat count and by the open area landings per unit effort (LPUE), resulting in a DAS allocation comparable to the unused access area pounds. For example, in FY 2011, based on a catch limit of 18,000 lb, the average meat count for scallops in CAI is estimated to be 10.6 meats/lb, assuming that 190,800 scallops are removed per full-time trip (18,000 lb (8,165 kg) × 10.6

meats/lb = 190,800 meats (equivalent to 1 scallop per meat)). The open area meat count and LPUE for open areas in FY 2011 are estimated to be 18.4 meats/lb and 2,441 lb/DAS, respectively. The estimated number of open area DAS a full-time vessel would use to catch the same number of scallops as it would in CAI with an 18,000-lb possession limit would be 4.3 DAS (190,800 scallops/(18.4 meats/lb × 2,441 lb/DAS = 4.3 DAS). Therefore, if a full-time vessel had an unused CAI trip at the time of a CAI YTF TAC closure, the vessel would be allocated 4.3 DAS in open areas. Table 3 outlines the DAS/trip conversion for unused full-time, part-time, and occasional vessels access area trips. This trip/DAS conversion would apply to all full-time vessels, but only to occasional or part-time vessels that have no other available access areas in which to take their access area trip(s). Although Framework 22 did not explicitly outline the DAS conversion factors for part-time and occasional vessels, NMFS has listed those values in Table 3 using the possession limits, LPUE estimates, and meat weight estimates provided in the Framework 22 document. Additionally, Framework 22 did not explicitly provide how the DAS/trip conversion would be applied to compensation trips that could no longer be used in the access area to which they apply. NMFS clarifies in this proposed rule that if a vessel has an unused compensation trip in an access area that closes due to YTF, the same calculation outlined above would apply, resulting in a proportional DAS increase to that of a fully unused trip allocation. For example, in FY 2011, if a full-time vessel had an unused 9,000-lb (4,082-kg) CAI compensation trip (*i.e.,* half of the full-time vessel's 18,000-lb (8,165-kg) possession limit) at the time of a CAI YTF TAC closure, the vessel would be allocated 2.15 DAS (*i.e.,* half of the 4.3 DAS that would be allocated for a full CAI trip).

TABLE 3—SCALLOP ACCESS AREA TRIP/DAS CONVERSIONS IF CAI, CAII, AND/OR NLS CLOSE DUE TO FULL HARVEST OF GB AND/OR SNE/MA YTF TAC

Access area trip conversion to open area DAS				
Permit category	FY	CAI	CAII	NLS
Full-Time	2011	4.3	5.7	
	2012	4.4	5.4	4.3
	2013	.....	5.4	4.9
Part-Time	2011	3.4	4.5	
	2012	3.6	4.3	3.4
	2013	.....	4.3	3.9
Occasional	2011	1.4	1.9	
	2012	1.5	1.8	1.4
	2013	.....	1.8	1.6

LA Trip Allocations, the Random Allocation Process, and Possession Limits for Scallop Access Areas

This action proposes a new access area allocation scheme for full-time vessels fishing in scallop access areas. In terms of allocations to the fleet, full-time LA scallop vessels would receive four access area trips in FYs 2011 through 2013. In order to avoid allocating trips into access areas with scallop biomass levels not large enough to support a full trip by all 313 LA full-time vessels, Framework 22 proposes to allocate "split-fleet" trips into certain access areas. Framework 22 would randomly allocate half of the full-time vessels a full trip into a specific area(s), and half of the full-time vessels a full trip into a different area(s). Ultimately, all vessels would receive the same number of total access area trips, although the specific areas to which they have access may differ (Table 4). The Framework 22 document refers to this process as a "lottery," but NMFS refers to this allocation scheme as the "random allocation process."

The Council specified that the full-time vessels' access area trip allocations should be set as randomly as possible. Therefore, the Scallop PDT developed an allocation system where permit numbers are selected based on a simple random number generator in Microsoft Excel and the vessels associated with a permit number would be allocated the access area(s) where it can fish. For FYs 2011 and 2013, this process is relatively simple because there are only two access areas in which to split trip allocations in each FY: Half of the full-time vessels would be randomly allocated a trip into one area, resulting in the rest of the vessels being allocated a trip into the other area. The random allocation process is more complicated if there are more than two applicable access areas. Section 2.4.2 of the Framework 22 document includes a full description of the random allocation process in cases involving more than two access area trips. In FY 2012, because full-time vessels would receive two access area trip allocations randomly from a selection of four access areas, the random allocation process would be modified by computing a number of random iterations to allow for vessels to receive two trips from two distinct access areas (rather than only a single iteration, as in FYs 2011 and 2013), while distributing fishing effort equally across the four access areas. In order to facilitate trading trips between vessels, the proposed allocations for full-time vessels for FY 2011 have already been identified, and can be found in Section 2.4.2 of the Framework 22 document (See **ADDRESSES**), as well as NMFS's Web site. These preliminary allocations, subject to NMFS approval of Framework 22 and permit renewal requirements, would be updated with any changes in vessel ownership and/or vessel replacements. The split-fleet trip assignments would also be made publically available through NMFS's Web site and in permit holder letters prior to the start of FYs 2012 and 2013. The decision to use a random allocation process to allocate access area trips to full-time vessels will be re-evaluated in a future framework adjustment.

In FY 2011, all full-time scallop vessels would be allocated one trip in the Delmarva Access Area (Delmarva), one trip into the Hudson Canyon Access Area (HC), and one trip into CAI (Table 4). In addition, 157 full-time vessels would be allocated one trip into CAII, and the other 156 full-time vessels would be allocated an additional trip into CAI, for a total of four access area trips per full-time vessel. A part-time scallop vessel would be allocated two trips, which could be taken in one of the following combinations: Two trips in CAI; one trip in the CAI and one trip in

CAII; one trip in CAI and one trip in HC; one trip in CAI and one trip in Delmarva; one trip in CAII and one trip in HC; one trip in CAII and one trip in Delmarva; or one trip in HC and one trip in Delmarva. An occasional vessel would be allocated one trip, which could be taken in any one open access area.

Because the proposed measures would be implemented after March 1, 2011, and the current regulations that would roll over into FY 2011 are inconsistent with the proposed specifications, it is possible that during the interim between the start of FY 2011 and the implementation of the proposed measures a scallop vessel would take a trip in an area not open under the proposed measures. For example, under the current roll-over provisions, at the start of FY 2011, the Elephant Trunk Access Area (ETAA), is an open access area, and full-time vessels have received the same allocation as they received in FY 2010 (*i.e.,* two ETAA trips, one Delmarva trip, and one NLS trip). However, Framework 22 proposes to close NLS in FY 2011 and change the ETAA into an open area to be fished under DAS allocations. Framework 22 has accounted for the ETAA changing from an access area to an open area by including the calculated biomass in this and other areas in the proposed overall open area DAS allocations for FY 2011.

If during FY 2011 a vessel fishes on an ETAA trip allocated during the interim period between the start of FY 2011 and the implementation of Framework 22, under this rule's framework any pounds landed from a declared ETAA trip would be converted to the equivalent DAS and deducted from that vessel's open area DAS allocations in FY 2012. The conversion would be calculated as follows: The pounds a vessel lands from the ETAA would first be multiplied by the estimated ETAA average meat count (18.4 meats/lb) and then divided by the product of the estimated open area average meat count (also 18.4 meats/lb) multiplied by the estimated open area LPUE for FY 2011 (2,441 lb/DAS). For example, if a full-time vessel lands the full 18,000-lb (8,165-kg) possession limit on an ETAA trip in FY 2011, that vessel would incur a DAS deduction of 7.4 DAS in FY 2012 ((18,000 lb × 18.4 meats/lb)/(18.4 meats/lb × 2,441 lb/DAS)), to account for those landings, resulting in a total FY 2012 DAS allocation of 26.8 DAS (*i.e.,* 34 DAS minus 7.4 DAS). Part-time and occasional vessels would receive deductions of 5.9 DAS and 2.5 DAS, respectively, for landing their full trip possession limits from the ETAA in FY 2011. If a vessel only lands a portion of its full possession limit, the applicable DAS reduction would be proportional to those landings. For example, if a full-time vessel lands 9,000 lb (4,082 kg) during a declared ETAA trip in FY 2011, that vessel's FY 2012 DAS allocation would be reduced by 3.7 DAS (i.e., half of the DAS that would be deducted for a full trip).

Framework 22 includes a provision that this DAS deduction would not apply to vessels that are fishing compensation trips in the ETAA from trips broken during the last 60 days of FY 2010. The regulations would allow for these compensation trips to be taken within the first 60 days of the subsequent FY if the access area from where the trip was broken remains open. Because the ETAA would still be considered an access area under the roll-over regulations at the start of FY 2011, any FY 2010 compensation trips taken prior to April 29, 2011would not be counted against FY 2011 DAS.

Framework 22 also proposes that NLS will close in FY 2011 but, under the roll-over FY 2010 measures in effect at the start of FY 2011, trips are currently allocated into NLS. In the event that Framework 22 is not approved prior to the opening of NLS (June 15, 2011), Framework 22 also proposes a pay-back measure to account for scallops that could be landed from vessels that declare NLS trips: If a vessel declares a trip into and lands scallops from the NLS in FY 2011, any pounds landed from this area would be deducted from that vessel's FY 2012 NLS allocation. NMFS would send a notification letter to the vessel regarding the incurred overage following the end of FY 2011. If the vessel is not allocated an NLS trip in FY 2012 under the "split fleet" random allocation process, the vessel owner would be given the opportunity to select the area from which the trip overage would be deducted, with NMFS determining the area if the vessel owner fails to respond.

Framework 22 does not account for the effects of delays in implementation of Framework 22 on trip exchanges that occurred during the interim period between the start of FY 2011 and the implementation of Framework 22. Currently, Delmarva is the only access area which would remain open under measures in place at the start of FY 2011 and proposed in the Framework 22 measures. Because the regulations allow for allocated access area trip exchanges between vessels of the same permit category, and due to the mid-year implementation of Framework 22, there would likely be complications for vessels that exchanged a Delmarva trip for a trip in either the ETAA or NLS prior to the implementation of Framework 22. For example, if a vessel gave up its Delmarva trip through an exchange with another vessel, and gained an additional NLS as a result, both its NLS trips would disappear after Framework 22 is implemented, assuming the vessel did not declare into and land scallops from the NLS. With the loss of its two NLS trips, two ETAA trips, and one traded Delmarva trip, the vessel would end up with a total FY 2011 access area allocation of three trips (*e.g.,* one in HC, and either two in CAI or one in CAI and one in CAII). Conversely, the vessel that gained the additional Delmarva trip through the exchange would ultimately have a total FY 2011 access area trip allocation of five trips (*e.g.,* two in Delmarva, one in HC, and either two in CAI or one in CAI and one in CAII). The identical outcome would occur if a vessel traded its Delmarva trip for another vessel's ETAA trip. Although the total number of trips between two vessels trading a Delmarva trip for either an ETAA or NLS trip would still equal eight trips (*i.e.,* no additional landings result from the trip exchange that were not already accounted for in Framework 22's biological projections), the distribution of trips between these vessels would not be the identical for FY 2011 (*i.e.,* one vessel would have a total of three trips and the other would have a total of five, rather than each vessel having a total of four). Similarly, if a part-time vessel trades its Delmarva trip for a trip into either the NLS or ETAA, that vessel would be locked into taking the trip in either of those areas. This trip, regardless of whether it's an NLS trip or an ETAA trip, would also disappear after the implementation of Framework 22, resulting in that part-time vessel having a total of only one access area trip to fish in any open access area.

To avoid these and other potential inequitable consequences of trip exchanges due to the late implementation of Framework 22 to the extent practicable, NMFS proposes the following measure, under section 305(d) authority of the Magnuson-Stevens Act: If a vessel acquires an additional ETAA trip through a trip exchange, it will be credited for that trip with additional DAS, equivalent to the trip's possession limit, as soon as possible if and when Framework 22 is implemented. Under this proposal, a full-time vessel that had exchanged for an ETAA trip would receive a DAS credit of 7.4 DAS if that vessel did not declare into and fish that ETAA trip. That vessel would then have a total FY 2011 DAS allocation of 39.4

DAS (32 DAS plus 7.4 DAS). Similarly, part-time vessels would receive a credit of 5.9 DAS, if they initially receive an additional ETAA trip through a trip exchange that is later removed upon implementation of Framework 22. In order to apply this trip exchange DAS conversion consistently, NMFS proposes that if the vessel fishes any part of an ETAA trip it gained through a trip exchange, those landings would be converted to DAS, using the same calculation described previously, and deducted from any DAS credit applied to FY 2011, rather than deducted in FY 2012. Although the Council has generally applied pay-back measures due to late framework implementation in the subsequent FY, this DAS credit, if applied to the subsequent FY, could have unintended ACL implications in FY 2012 by increasing the risk that the LA fleet could exceed the ACL for that FY. Because Framework 22 proposes that NLS is closed in FY 2011, there is not a viable way to account for the loss of a traded NLS trip. By proposing a DAS credit applicable to ETAA trip exchanges, NMFS is providing a level of flexibility in trip exchanges during the interim period between the start of FY 2011 and implementation of Framework 22.

No access area trips are currently allocated for CAI and CAII, and HC is currently closed, so no trips into those areas could be taken until Framework 22 is effective.

Under Framework 22, during FY 2012 all full-time scallop vessels would be allocated a total of four access area trips (Table 4). Each full-time vessel would receive one trip into CAII, and one trip into HC. The remaining two access area trips would be allocated in the following combinations: One trip in CAI and one trip in NLS; one trip in CAI and one additional trip in HC; one trip in CAI and one trip in Delmarva; one trip in NLS and an additional trip in HC; one trip in NLS and one trip in Delmarva; or an additional trip in HC and one in Delmarva. Information on trip assignments would be available prior to the start of FY 2012. A part-time scallop vessel would be allocated two trips in FY 2012, which could be taken in one of the following combinations: Two trips in HC; one trip in the CAI and one trip in NLS; one trip in CAI and one trip in HC; one trip in CAI and one trip in Delmarva; one trip in NLS and one trip in HC; one trip in NLS and one trip in Delmarva; or one trip in HC and one trip in Delmarva. An occasional vessel would be allocated one trip, which could be taken in any one open access area.

Also under Framework 22, at the start of FY 2013, all full-time scallop vessels would be allocated one trip in CAII, one trip in NLS, and one trip in HC (Table 4). In addition, half the fleet would be allocated a trip in Delmarva and the other half of the fleet would be allocated another trip in HC, for a total of four access area trips for each full-time vessel. These allocations would be assigned and made publically available prior to the start of FY 2013. A part-time scallop vessel would be allocated two trips, which could be taken in one of the following combinations: Two trips in HC; one trip in CAII and one trip in NLS; one trip in CAII and one trip in HC; one trip in CAII and one trip in Delmarva; one trip in NLS and one trip in HC; one trip in NLS and one trip in Delmarva; or one trip in HC and one trip in Delmarva. An occasional vessel would be allocated one trip, which could be taken in any one open access area.

TABLE 4—SCALLOP ACCESS AREA TRIP ALLOCATIONS FOR FULL-TIME LA SCALLOP VESSELS DURING FY 2011–2013 *

	CAI	CAII	NLAA	HC	Delmarva
2011	1.5	0.5	.....	1	1
2012	0.5	1	0.5	1.5	0.5
2013	.....	1	1	1.5	0.5

* Split-fleet trips are identified by "0.5" and "1.5": The "0.5" indicates that half the fleet would be allocated one full trip into a specific access area and the "1.5" indicates that all full-time vessels would be allocated one full trip into a specific access area and half of the vessels would be allocated an additional full trip into that area.

LAGC Measures

1. *Sub-ACL for LAGC vessels with IFQ permits.* For LAGC vessels with IFQ permits, this action proposes a 2,910,800-lb (1,320-mt) ACL for FY 2011, a 3,095,450-lb (1,404-mt) ACL for FY 2012, and an initial ACL of 3,067,000 lb (1,391 mt) for FY 2013 (Table 1). IFQ allocations would be calculated by applying each vessel's IFQ contribution percentage to these ACLs. These allocations assume that no LAGC IFQ AMs are triggered. If a vessel exceeds its IFQ in a given FY, its IFQ for the subsequent FY would be deducted by the amount of the overage.

2. *Sub-ACL for LA Scallop Vessels with IFQ Permits.* For LA scallop vessels with IFQ permits, this action proposes a 291,080-lb (132-mt) ACL for FY 2011, a 309,550-lb (140-mt) ACL for FY 2012, and an initial ACL of 306,700 lb (139 mt) for FY 2013 (Table 1). IFQ allocations would be calculated by applying each vessel's IFQ contribution percentage to these ACLs. These allocations assume that no LAGC IFQ AMs are triggered. If a vessel exceeds its IFQ in a given FY, its IFQ for the subsequent FY would be reduced by the amount of the overage.

3. *LAGC IFQ Trip Allocations and Possession Limits for Scallop Access Areas.* The LAGC IFQ fishery would be allocated 5.5 percent of the overall TAC in each open access area for FYs 2011 through 2013. LAGC IFQ vessels would not be allocated trips into CAII, because these vessels are not expected to fish in that area due to its distance from shore. These percentages would result in a specific number of fleet-wide trips for LAGC vessels fishing in access areas (Table 5). The areas would close to LAGC vessels when the Regional Administrator determines that the allocated number of trips have been taken in the applicable area.

TABLE 5—LAGC FLEET-WIDE ACCESS AREA TRIP ALLOCATIONS FOR FYS 2011 THROUGH 2013

Access area	FY 2011	FY 2012	FY 2013
CAI	890	296	.....
CAII	0	0	0
NLS	.....	296	595
HC	593	887	893
Delmarva	593	296	298

Because this action would be implemented mid-year, and the current regulations, which have rolled over into FY 2011, are inconsistent with the proposed specifications, it is possible that LAGC scallop vessels could exceed the final FY 2011 fleet-wide trip allocation in Delmarva under Framework 22. Additionally, LAGC vessels could declare and fish trips in NLS, proposed to be closed in FY 2011 under Framework 22, should Framework 22 be approved and

implemented after that area is currently scheduled to open on June 15, 2011. Although the Council did not discuss this LAGC trip-overage scenario for Delmarva, NLS, and the ETAA in their Framework 22 document, to make measures consistent with other Framework 22 measures applicable to the LA scallop fleet and with previous framework adjustments, NMFS proposes, under its section 305(d) authority, the following measures: The current regulations allocate 714 trips each into Delmarva and NLS. If LAGC vessels exceed the final number of allocated trips from Delmarva in FY 2011, the number of excess trips would be deducted from the LAGC IFQ fleet Delmarva trip allocation in FY 2012. Because NLS would close in FY 2011 under Framework 22, any LAGC trips declared into NLS will be in excess of that area's FY 2011 fleet-wide trip allocation. As a result, if Framework 22 is implemented, LAGC vessels that declare into and land scallops from NLS would have the number of trips declared deducted from the LAGC IFQ fleet-wide NLS trip allocation in FY 2012. Although there will be fleet-wide LAGC trips into the ETAA at the start of FY 2011, this area would change to an open area under the proposed action. Because any landings from trips taken in the ETAA will be deducted from each vessel's IFQ allocations, and because there are no specific fleet-wide trips allocated to LAGC vessels fishing in open areas, there would be no pay-back measure associated with LAGC vessels that fish in the ETAA prior to the implementation of the proposed action.

4. *NGOM TAC.* This action proposes a 70,000-lb (31,751-kg) annual NGOM TAC for FYs 2011 through 2013. These allocations for FY 2012 and FY 2013 assume that in a given FY there are no overages, which would trigger a pound-for-pound deduction in the subsequent FY to account for the overage based on measures proposed in Amendment 15.

5. *Scallop Incidental Catch Target TAC.* This action proposes a 50,000-lb (22,680-kg) scallop incidental catch target TAC for FYs 2011 through 2013 to account for mortality from this component of the fishery, and to ensure that F-targets are not exceeded.

Research Set-Aside (RSA) Allocations

As proposed in Amendment 15, this action would deduct 1.25 M lb (567 mt) of scallops annually for FYs 2011 through 2013 from the ABC and set it aside as the Scallop RSA to fund scallop research and to compensate participating vessels through the sale of scallops harvested under RSA projects. Upon final approval of Amendment 15 measures, this set-aside would be available for harvest in open areas. Framework 22 would set the access area rotation schedule, and vessels would be able to harvest RSA from access areas upon implementation of Framework 22. Unlike previous scallop framework adjustments, Framework 22 does not propose specific RSA quota allocations within specific access areas. Projects would be assigned specific harvest allocations within access areas through the RSA application review and approval process, and a vessel with available RSA could harvest allotted RSA from an access area until the RSA allocated to that vessel and/or project is fully harvested.

Observer Set-Aside Allocations

This action would remove 1 percent from the ABC and set it aside for the industry-funded observer program to help defray the cost of carrying an observer. This observer set-aside would be further divided proportionally into access areas and open areas. Scallop vessels on an observed DAS trip are charged a reduced DAS rate, and scallop vessels on an observed access area trip are authorized an increased possession limit. The Regional Administrator has specified the following compensation rate for the start of FY 2011: Vessels carrying an observer will receive 180 lb (82 kg) of scallops per day, or part of a day, when fishing in an access area, and LA DAS vessels will be compensated 0.08 DAS per DAS fished during observed open area trips (*i.e.,* vessels will be charged 0.92 DAS per DAS fished with an observer onboard). The Regional Administrator shall periodically review, but at least once prior to each fishing year, all available fishery information to determine if these rates should be adjusted. The FY 2011 through 2013 observer set-aside allocations for open and access areas are outlined in Table 6.

TABLE 6—OPEN AREA, ACCESS AREA, AND TOTAL OBSERVER SET-ASIDE TACS FOR FYS 2011 THROUGH 2013

[mt, unless otherwise specified]

Area	FY 2011	FY 2012	FY 2013
Open areas	139	161	136
Open (in DAS)	137	133	112
CAI	51	16	N/A
CAII	16	31	36
NLS	N/A	16	38
HC	34	49	57
Delmarva	34	16	19
Total	273	290	287

Measures to Minimize the Impacts of Incidental Take of Sea Turtles

Under the Endangered Species Act, each Federal agency is required to ensure its actions are not likely to jeopardize the continued existence of any listed species or critical habitat. If a Federal action is likely to adversely affect a listed species, formal consultation is necessary. To date, five formal Section 7 consultations, with resulting Biological Opinions, have been completed on the Atlantic sea scallop fishery. All five have had the same conclusion: The continued authorization of the scallop fishery may adversely affect, but is not likely to jeopardize, the continued existence of four sea turtles species (Kemp's ridley, loggerhead, green, and leatherback). In the accompanying Incidental Take Statements of the Biological Opinions, NMFS is required to identify and implement non-discretionary reasonable and prudent measures (RPMs) necessary or appropriate to minimize the impacts of any incidental take, as well as Terms and Conditions (T/C) for implementing each RPM. RPMs and T/C cannot alter the basic design, location, scope, duration, or timing of the action, and may involve only minor changes.

Five RPMs and T/Cs were identified in the most recent Biological Opinion, as amended on February 5, 2009. Framework 22 includes management measures to comply with the first of these RPMs, which required a limit of fishing effort in the Mid-Atlantic during times when sea turtle distribution is expected to overlap with scallop fishing activity. The Biological Opinion required that this restriction be limited to a level that will not result in more than a minor impact on the scallop fishery.

For FYs 2011 through 2013, Framework 22 defines "more than a minor impact" on the fishery as one that would result in a 10-percent or greater shift in baseline effort from the Mid-Atlantic during June 15 through October 31 into other areas and times of year when sea turtle interactions are less likely. This definition, as well as management measures to comply with the Biological Opinion and any future Biological Opinions, will be re-evaluated for FY 2013 and future fishing years in subsequent framework actions. An informal consultation under the Endangered Species Act is being prepared to analyze the impact of the Framework 22 on threatened and endangered sea turtles. That informal consultation will be completed prior to the decision to approve or disapprove all or part of Framework 22, but NMFS

has preliminarily determined that fishing activities pursuant to Framework 22 will not affect endangered and threatened species or critical habitat in any manner not considered in prior consultations on this fishery.

For FYs 2011 through 2013, Framework 22 proposes that each full-time and part-time vessel would be restricted to taking one access area trip to areas located in the Mid-Atlantic (i.e., HC and Delmarva) during the period June 15 through October 31 of each specified FY. Although Framework 22 does not specifically outline which LA permit categories would be affected by this one-trip restriction, NMFS clarifies that this specific trip restriction is applicable to both part-time and full-time vessels because vessels in both permit categories would both be able to take up to two trips in the Mid-Atlantic. However, Framework 22 does include an additional measure specific measure intended for full-time vessels: If a vessel has traded access area trips with another vessel so that it has a total allocation of four trips in the Mid-Atlantic access areas, the vessel would be able to fish up to two of the four trips during the period June 15 through October 31. This measure is only applicable to full-time vessels because part-time vessels are only allocated a total of two access area trips to be fished in any open access area. Occasional vessels would not be affected by this measure because they would only be allocated a single access area trip. This provision is included in order to minimize any distributional impacts that may result from the proposed "split fleet" trip random allocation assignment and allows for more flexibility in access area trip exchanges. LAGC vessels fishing in the Mid-Atlantic access areas under the fleet-wide IFQ trips would also not be affected by this trip restriction.

As with similar measures implemented through Framework 21 (75 FR 36559; June 28, 2010), the Council proposed this trip restriction measure with the intention that there would be no change in the possession limit for trips taken during June 15 through October 31 of each year, and that the broken trip provision would apply to all trips. In order to be consistent with the Council's intention while also taking into account the fact that vessels can end a "full-trip" early and declare an additional trip as a compensation trip (thus declaring two trips to land the possession limit of a single full-trip), and to be consistent with how this measure was implemented and enforced in FY 2010, NMFS proposes, under the authority of section 305(d) of the Magnuson-Stevens Act, to monitor compliance with the trip restriction using pounds landed during June 15 through October 31, rather than trip declarations, which could result in landings that are less than the allowable trip possession limit. For example, full-time and part-time LA vessels would be restricted to landing a maximum of 18,000 lb (8,165 kg) for full-time vessels and 14,400 lb (6,532 kg) for part-time vessels from those areas (i.e., the equivalent of one full access area trip, depending on the permit category's possession limit). Additionally, if a full-time vessel has acquired four Mid-Atlantic access trips due to a trip exchange(s), that vessel would be restricted to landing a combined maximum of 36,000 lb (16,329 kg) from HC and Delmarva (*i.e.,* the equivalent of two full access area trips). Compensation trips may not be combined during this time period in a way that would allow more than 14,400 lb (6,532 kg) for part-time vessels, 18,000 lb (8,165 kg) for full-time vessels, or 36,000 lb (16,329 kg) for full-time vessels with a total allocation of four Mid-Atlantic access area trips, to be landed from HC and Delmarva, combined, from June 15 through October 31 of FYs 2011 through 2013. For example, if a full-time vessel is allocated two total trips into the Mid-Atlantic access areas and that vessel declared and subsequently broke one of the two trips into Mid-Atlantic access areas prior to June 15, it would have one full trip (*i.e.,* 18,000 lb, 8,165 kg) available for use during the trip-restriction window. In that case, the vessel could only harvest up to 18,000 lb (8,165 kg) total from June 15 through October 31, in the Mid-Atlantic access areas, either by fishing its compensation trip and part of its full access area trip or by fishing only one full access area trip and waiting to declare the compensation trip on or after November 1. If a vessel fishes any part of an access area trip in HC or Delmarva during this time period (i.e., starts a trip on June 13 and ends the trip on June 15), landings from that trip would count towards the one- or two-trip limit. The additional pounds allocated to vessels with on-board observers during trips taken within this time period would not count towards the aforementioned possession and landing restrictions.

Because this action would be implemented mid-year, and the current regulations are inconsistent with the proposed specifications, it is possible that full-time and part-time vessels could exceed their final FY 2011 access area trip restrictions. Framework 22 did not address this possible inconsistency. To address this possibility of exceeding the trip-restriction measure outlined in Framework 22, NMFS proposes the measure described below under the authority of section 305(d) of the Magnuson-Stevens Act. If the proposed measure is implemented after June 15, 2011, a full-time or part-time vessel that landed more than 18,000 lb (8,165 kg) or 14,400 lb (6,532 kg), respectively (*i.e.,* more than the equivalent of one full access area trip), between June 15, 2011, and the implementation of Framework 22, that vessel would be prevented from taking an access area trip in FY 2012 in the Mid-Atlantic during June 15 through October. Alternatively, a full-time vessel could make up for the overage by trading in trips so that it had a total of four trips allocated into the Mid-Atlantic access areas and continue to fish up to a maximum of 36,000 lb (16,329 kg) through October 31, 2011 (*i.e.,* the equivalent of two full access area trips).

Framework 22 did not include a measure that would continue the Delmarva seasonal closure in September and October. Thus, if Framework 22 is approved, this closure, implemented through Framework 21 and currently included in the regulations, would cease to exist.

Elimination of the GB Access Area Rotational Schedule

This action proposes to eliminate the default GB access area schedule that was implemented through Framework 16 to the FMP (69 FR 63460; November 2, 2004). The Council intended that this default cycle would be in place until the Council modified it through a future action. The schedule has based access area openings on the premise that an area would be open for 1 year, followed by a 2-year closure. However, the schedule has been consistently revised in framework actions based on area-specific scallop biomass projections. The pre-defined schedule has led to inconsistencies between roll-over measures at the start of a FY when a framework is delayed and unnecessary confusion. This proposed measure would remove the schedule from the regulations, allowing for the GB access area scheduled openings to be based on updated resource information. Third-year default measures (*e.g.,* FY 2013) would provide the access area schedule for a subsequent FY if the subsequent framework action is delayed past the start of the FY.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined

that the proposed rule is consistent with the FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment. The regulatory language proposed in this action has incorporated, where applicable, the regulatory language proposed by Amendment 15.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

An IRFA has been prepared, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA consists of Framework 22 analyses, its draft IRFA, and the preamble to this action. To some degree, this IRFA overlaps, and should be considered in conjunction, with the IRFA for Amendment 15, which provides the basis and authority for many measures in Framework 22. A summary of the analysis follows.

Statement of Objective and Need

This action proposes the management measures and specifications for the Atlantic sea scallop fishery for FY 2011 and FY 2012, with FY 2013 default measures. A description of the action, why it is being considered, and the legal basis for this action are contained in Framework 22 and the preamble of this proposed rule and are not repeated here.

Description and Estimate of Number of Small Entities to Which the Rule Would Apply

The RFA defines a small business entity in any fish-harvesting or hatchery business as a firm that is independently owned and operated and not dominant in its field of operation (including its affiliates), with receipts of up to $4 million annually. The vessels in the Atlantic sea scallop fishery are considered small business entities because all of them grossed less than $3 million according to the dealer's data for FYs 1994 to 2009. In FY 2009, total average revenue per full-time scallop vessel was just over $1 million, and total average scallop revenue per general category vessel was just under $80,000. The IRFA for this and prior Scallop FMP actions does not consider individual entity ownership of multiple vessels. More information about common ownership is being gathered, but the effects of common ownership relative to small versus large entities under the RFA is still unclear and will be addressed in future analyses.

The Office of Advocacy at the Small Business Association (SBA) suggests two criteria to consider in determining the significance of regulatory impacts; namely, disproportionality and profitability. The disproportionality criterion compares the effects of the regulatory action on small versus large entities (using the SBA-approved size definition of "small entity"), not the difference between segments of small entities. Framework 22 is not expected to have significant regulatory impacts on the basis of the disproportionality criterion, because all entities are considered to be small entities in the scallop fishery and, therefore, the proposed action would not place a substantial number of small entities at a significant competitive disadvantage relative to large entities. A summary of the economic impacts relative to the profitability criterion is provided below under "Economic Impacts of Proposed Measures and Alternatives." The proposed regulations would affect vessels with LA and LAGC scallop permits. The Framework 22 document provides extensive information on the number and size of vessels and small businesses that would be affected by the proposed regulations, by port and state. There were 313 vessels that obtained full-time LA permits in 2010, including 250 dredge, 52 small-dredge and 11 scallop trawl permits. In the same year, there were also 34 part-time LA permits in the sea scallop fishery. No vessels were issued occasional scallop permits. By the start of FY 2010, the first year of the LAGC IFQ program, 362 IFQ permits (including 40 IFQ permits issued to vessels with a LA scallop permit), 127 NGOM, and 294 incidental catch permits were issued. Since all scallop permits are limited access, vessel owners would only cancel permits if they decide to stop fishing for scallops on the permitted vessel permanently or if they transfer IFQ to another IFQ vessel and permanently relinquish the vessel's scallop permit. This is likely to be infrequent due to the value of retaining the permit. As such, the number of scallop permits could decline over time, but would likely be less than 10 permits per year.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

This action contains no new collection-of-information, reporting, and recordkeeping requirements. It does not duplicate, overlap, or conflict with any other Federal law.

Economic Impacts of Proposed Measures and Alternatives

Summary of the Aggregate Economic Impacts

A detailed analysis of the economic impacts of the proposed actions may be found in Section 5.4 of the Framework 22 document. All economic values are presented in terms of 2010 dollars and projected economic values presented below use a 7-percent discount rate to compare results to current values.

Framework 22 would be implemented after the start of FY 2011 (March 1, 2011) and the FY 2010 management measures and allocations are extended into FY 2011 until the proposed action is implemented. These current roll-over measures include open area LA allocation that are higher than proposed under Framework 22 (*i.e.,* 38 DAS per full-time LA vessel, 15 DAS per part-time vessel, and 3 DAS per occasional vessel). Additionally, although the total number of access area trips allocated to LA vessels would remain the same under Framework 22 as what is currently allocated for the start of FY 2011 (*i.e.,* four trips), the access areas from where these trips can be taken will differ. Framework 22 included a number of provisions to account for the inconsistencies between allocations in effect at the start of FY 2011 and those that would be implemented under Framework 22. Generally, any overages incurred in FY 2011 will result in a pound-for-pound (or DAS-for-DAS) deduction in FY 2012 to account for the excess landings and fishing effort not accounted for in the Framework 22 biomass projections and resulting annual allocations. As a result, vessels that choose to exceed the FY 2011 allocations proposed in Framework 22 would have slightly higher revenues than the estimated fleet average in FY 2011, resulting in positive short-term impact on those individual vessels in FY 2011. Subsequently, those vessels receive reduced individual allocations in FY 2012 to account for the FY 2011 overage incurred by the vessel. This reduction would result in slightly lower revenues than the estimated average in FY 2012, resulting in a negative short-term impact on those vessels in FY 2012. However, over the long-term, the overage provisions proposed in Framework 22 are expected to reduce the negative impacts of overfishing in FY 2011 on the scallop resource. Therefore, these measures will have positive fleet-wide impacts on landings and revenues over the long term.

The aggregate economic impacts of the proposed measures, including the open area DAS and access area allocations for LA vessels and ACLs for the LAGC fishery, are expected to be positive in both in the short-term (FYs 2011–2012) and the long-term (FYs 2011–2022) compared to the No Action alternative and all other alternatives considered. Estimated fleet revenues

under the proposed action in FY 2011 are slightly lower than the average fleet revenues in FYs 2009 and 2010. In FY 2012, revenues are expected to exceed the average revenues in FYs 2009 and 2010. The proposed action is not expected to have short-term adverse impacts on the revenues and profits of the scallop vessels compared to recent levels. The impact of four allocation alternatives were evaluated in Framework 22: One alternative proposing a new closure in the Great South Channel (GSC; the "GSC closure" alternative); one alternative with full-time "split fleet" allocations and no new closure (the proposed action); one alternative with identical access area allocations (*i.e.,* all full-time vessels are allocated access into the same areas) (the "identical fleet allocation" alternative) and the No Action alternative. With the exception of the No Action alternative, the total number of access area trips allocated to LA vessels remains the same for all alternatives.

The definition of "No Action" refers to the continuation of the allocations that are specified in the current regulations. However, because of the restrictions set forth by the current GB rotational area schedules, which determine outside of annual allocations when an access area will be opened or closed to fishing in a given FY, the No Action alternative does not result in the same allocations or revenues as in FY 2010. Rather, No Action would result in one less access area trip in FY 2012 compared to FY 2010 due to the closure of NLS. In addition, No Action would allocate two trips to a less productive area (*i.e.,* the ETAA). Due to these restrictions associated with No Action, the fishing effort in the access areas and landings overall are expected to be significantly lower compared to actual levels in FYs 2009 and 2010. As a result, The No Action alternative would result in significantly lower revenues ($364.5 M in FY 2011 and $290.2 M in FY 2012) compared to the actual revenues in FY 2009 ($379.5 M) and in FY 2010 ($431 M). From the perspective of the impacts on the economy and of the participants in the fishery, a baseline that would reflect potential economic impacts relative to the recent levels of allocations would be a more useful comparison. For this purpose, a Status Quo scenario was also incorporated into the economic analysis. This scenario allocated vessels exactly the same amount of access area trips and DAS in FYs 2011 and 2012 as they had the opportunity to take in FY 2010, resulting in projected revenues ($433.1 M in FY 2011) that are very similar to the estimated revenues for FY 2010. Note that the Status Quo alternative is used here for analytical purposes in the economic impact analysis of Framework 22's allocations alternatives but was not actually considered by the Council, because it is based on an infeasible scenario that would increase the scallop fishing mortality above sustainable levels, resulting in reduced scallop yield and revenues in the long-term.

Economic Impacts of the Proposed Measures and Alternatives

1. Allocations for the LA and LAGC Scallop Fleets—Aggregate Impacts

The proposed open area DAS allocations are expected to prevent overfishing in open areas. The proposed action would implement the following vessel-specific DAS allocations for FYs 2011 and 2012: Full-time vessels would be allocated 32 and 34 DAS, respectively; part-time vessels would be allocated 13 and 14 DAS, respectively; and occasional vessels would receive 3 DAS for each FY. Additionally, full-time vessels would receive a total of four access area trips, part-time vessels would receive two access area trips, and occasional vessels would receive one access area trip.

The Framework 22 analysis of the fleet-wide aggregate economic impacts indicate that the proposed action and all other alternatives would have positive economic impacts on the revenues and profits of the scallop vessels in the short-term (FYs 2011 and 2012), compared with the No Action alternative. Total fleet revenue under the proposed action is estimated at $399.1 million in FY 2011 and $428.4 million in FY 2012. Additionally, net revenues per vessel (i.e., gross revenues minus trip costs, used as a proxy for profits) are estimated to be $1,014,659 and $1,089,108 in FY 2011 and FY 2012, respectively. Compared with No Action fleet revenues ($364.5 M in FY 2011 and $290.1 M in FY 2012), the proposed action would result in increases in fleet revenues of 9.6 percent and 47.6 percent in FYs 2011 and 2012, respectively; the "GSC closure" alternative would result in increases in revenues by 2.2 percent and 44.9 percent in FYs 2011 and 2012, respectively; and the "identical fleet allocation" alternative would result in increases in revenues by 10.3 percent and 44.3 percent in FYs 2011 and 2012, respectively. In terms of net revenues per vessel ($917,452 in FY 2011 and $732,848 M in FY 2012 for No Action), the proposed action would result in higher vessel net revenues (10.6 percent in FY 2011 and 48.6 percent in FY 2012). Vessel net revenues would also be higher under the "GSC closure" and "identical fleet allocation" alternatives as well, ranging between 3.1–11.3 percent higher in FY 2011 and 45.2–45.5 percent higher in FY 2012. In both the short- and long-term, the proposed action would result in larger cumulative fleet and vessel net revenues than both the "GSC closure" alternative and the "identical fleet allocation." The proposed action fleet revenues are estimated to exceed the revenues for the "identical fleet allocation" alternative by $6.5 M and $53 M in the short-term and long-term, respectively. The proposed action revenues are expected to exceed those for the "GSC closure" alternative by an even greater amount: $33.5 M and $98.9 M more in the short-term and long-term, respectively. Furthermore, the proposed action would result in a more constant stream of landings compared to the other two alternatives, providing stability in business operations.

Compared to the Status Quo alternative, the proposed action would result in gross fleet revenues about $47.9 M lower in the short-term, resulting in estimates of gross revenue per vessel to be 7.9 percent and 4.1 percent, less than those under Status Quo in FY 2011 and FY 2012, respectively. These decreases in fleet and vessel revenues compared to those estimated under Status Quo are due to the fact that the Status Quo alternative does not take projected scallop biomass levels into account: Although landings and revenues are higher in the short-term under the Status Quo scenario, by setting future allocations based on a fishing mortality that exceeds sustainable levels, the Status Quo reduces yield and revenues in the long-term. From FYs 2011–2022, the proposed action would have positive economic impacts compared to Status Quo, exceeding Status Quo fleet revenues by $19.8 M. Over the medium term (FYs 2011–2015) the proposed action would result in higher revenues per vessel compared to the Status Quo—5.8 percent in FY 2013 and 3.7 percent in FYs 2014 and 2015—thus offsetting the decreases in FYs 2011 and 2012. Because the cumulative value of the scallop net revenue per vessel will be only marginally lower (0.1 percent) in the medium-term compared to the Status Quo values, the proposed action will not have significant impacts for the scallop vessels compared to Status Quo levels.

The proposed action would have positive economic benefits in both the short- and long-term for the LAGC

fishery starting in FY 2011, as the LAGC ACL would increase compared to No Action allocations. Under the proposal, LAGC vessels would be allocated 5 percent of the total ACL and the LA vessels with the IFQ permits would be allocated 0.5-percent of the ACL. The positive short- and long-term economic impacts of the proposed measures for the LAGC vessels, compared to the No Action alternative, result from the higher allocation of fish to the LAGC fleets (1.3 percent higher in FY 2011 and 2.9 percent higher in FY 2012) than those allocated under No Action. In addition, compared to FY 2010 revenues, which was the first year that the LAGC IFQ Program was implemented, the revenues of LAGC vessels will be higher under the proposed action. There are no alternatives that would generate higher economic benefits for the participants of the scallop fishery. In fact, because the LAGC allocations are derived from the ACL, the values are identical across all alternatives considered, with the exception of No Action.

In summary, the proposed action will not have a considerable adverse impact on the net revenues and profits on the LA and LAGC scallop fleets. Therefore, the proposed action is not expected to have significant economic impacts on the viability of these vessels, especially in a highly profitable industry like the scallop fishery.

2. Default Management Measures for FY 2013

The proposed action to set precautionary default measures for FY 2013 is also expected to have potentially positive economic impacts. If resource conditions turn out to be less favorable in FY 2013 than suggested by the current biological projections, and the next framework is delayed, this measure would allocate only 26 DAS, rather than 35 DAS, to prevent potentially negative impacts on the resource, including impacts on scallop yield and subsequent impacts on scallop prices. There are no alternatives that would generate higher economic benefits for the participants of the scallop fishery.

3. Access Area Trip Allocations and Use of Split-Fleet Trips Allocated Through a Lottery System

The proposed action to allocate split-fleet trips into access areas with biomass levels not large enough to support a full trip would increase landings, revenues, and total economic benefits to the fishery. The administration of the random allocation process is expected to have positive economic impacts on the fishermen by providing flexibility for the vessels to trade access area trips. With the exception of the No Action alternative, all alternatives considered the same number of access area trips. There were no other alternatives considered that would generate higher economic benefits for the participants of the scallop fishery.

4. Open Area DAS Adjustment if Access Area YTF TAC is Attained

The proposed action maintains provisions that allocate additional open area DAS if an access area closes due to the attainment of the scallop YTF TAC for unused access area trips (*i.e.,* fully unused trips and compensation trips). This allocation is a continuation of current measures and would have the same impacts as the No Action alternative. This conversion helps to minimize lost catch and revenue for affected vessels if CAI and CAII and/or NLS close due to the full harvest of YTF quota. As a result, this measure would have positive economic impacts on scallop vessels, although the scallop pounds per trip could be lower than the allocated pounds for GB and/or SNE/MA access area trips due to proration to assure that the measure is conservation neutral. There were no alternatives considered that would generate higher economic benefits for the participants of the scallop fishery.

5. RSA and Observer Set-Aside TACs

The proposed action would set aside 1 percent of the ABC for the industry-funded observer set-aside program, and would set aside 1.25 M lb (567 mt) from the ABC for the RSA program, based on measures proposed in Amendment 15. These set-asides are expected to have indirect economic benefits for the scallop fishery by improving scallop information and data made possible by research and the observer program. Although allocating a higher observer set-aside percentage or higher RSA allocation could result in higher indirect benefits to the scallop fleet by increasing available funds for research and the observer program, these set-aside increases could also decrease direct economic benefits to the fishery by reducing revenues, and no such alternatives were considered.

6. NGOM TAC

The proposed action specifies a 70,000-lb (31,751-kg) TAC for the NGOM. This is the same TAC as the No Action alternative. Thus, the proposed action would not have additional economic impacts on the participants of the NGOM fishery. The NGOM TAC has been specified at this level since FY 2008, and the fishery has harvested less than 15 percent of the TAC in each FY; therefore, the TAC has no negative economic impacts. There are no alternatives that would generate higher benefits for NGOM scallop vessels. The alternative for setting the NGOM TAC at 31,100 lb (14,107 kg) is expected to reduce the chance of excess fishing in Federal waters in the NGOM management area, but could result in negative impacts on the participants of the NGOM fishery if landings from NGOM-permitted vessels fishing in state waters lead to the closure of the NGOM management area.

7. Measures To Minimize the Impacts of Incidental Take of Sea Turtles

The proposed action would limit the maximum number of trips that can be taken in the Mid-Atlantic areas from June 15 to October 31. Because fishing effort is shifted to a relatively less productive season, total fleet trip costs are expected to increase slightly (*i.e.,* less than 0.1 percent) due to reduced scallop catch rates. Since there is no change in the scallop possession limit, the trips that are shifted from this season are expected to be taken outside of this time period without a loss in total revenue, as long as this measure does not, as expected, have a negative impact on prices. No other alternatives considered would generate higher benefits for the scallop vessels, other than the No Action alternative, which would continue the FY 2010 measures implemented by Framework 21 (an access area trip-restriction of 2 trips (or 36,000 lb; 16,329 kg) between June 15 and August 31 in the ETAA and Delmarva, as well as seasonal closures in Delmarva and ETAA during September and October). Because the basis for No Action is the regulations that match the FY 2010 allocations implemented through Framework 21, the No Action alternative would not account for the opening of HC and would not take the ETAA into account if it were to revert to an open area, thus only reducing effort in Delmarva. As a result, the No Action alternative would likely not comply with the relevant RPM and T/Cs of the Biological Opinion and thus, was not considered by the Council. The proposed action is expected to minimize the effort shift from the given time period compared to the other action alternatives considered by the Council; thus, there are no other alternatives that would generate higher benefits for the scallop vessels.

8. Elimination of the GB Closed Area Rotation Schedule

The elimination of the GB rotation schedule that indicates the opening and

closing of access areas in the regulations would reduce the public's confusion and administrative burden. Instead, access area schedules would be based solely on survey results and available exploitable biomass as assessed by the Scallop PDT and the SSC. These schedules would be approved by the Council and implemented biannually through the framework adjustment process. The proposed action would improve the management of the scallop resource, with positive impacts on the scallop yield and on economic benefits from the scallop fishery. There are no alternatives that would generate higher benefits for the scallop vessels.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: April 25, 2011.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, 50 CFR part 648 is proposed to be amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

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

2. In § 648.14, paragraphs (i)(2)(vi)(F) and (G) are revised to read as follows:

§ 648.14 Prohibitions.

* * * * *

(i) * * *

(2) * * *

(vi) * * *

(F) Unless specified in paragraph (i)(2)(vi)(F)(*1*) of this section, a full-time vessel shall not fish for, possess, or retain more than a combined total of 18,000 lb (8,165 kg; the equivalent of one full-time access area trip) of scallops from the Delmarva and Hudson Canyon Access Areas specified in § 648.59(a) and (e) during the period June 15 through October 31. Any scallops fished for, possessed, or retained during this time period from either Delmarva and Hudson Canyon Access Areas, regardless of whether or not they were harvested on a single access area trip or on multiple trips by taking compensation trips, as specified in § 648.60(c), will be applied to this possession and landing limit. This restriction does not include the additional possession allowance to defray the cost of carrying an observer, as specified in § 648.60(d), that occur during observed trips between June 15 through October 31.

(*1*) If the owner of a full-time vessel has exchanged a trip(s) with another full-time vessel owner(s), as specified in § 648.60(a)(3)(ii), so that the vessel has a total access area trip allocation of four combined trips into the Delmarva and Hudson Canyon Access Areas (e.g., two Hudson Canyon trip and two Delmarva trips; one Hudson Canyon trip and three Delmarva trips, three Hudson Canyon trips and one Delmarva trip; no Hudson Canyon trips and four Delmarva trips; or four Hudson Canyon trips and no Delmarva trips) that vessel must not fish for, possess, or retain more than a combined total of 36,000 lb (16,329 kg; the equivalent of two full-time access area trips) of scallops from the Delmarva and Hudson Canyon Access Areas specified in § 648.59(a) and (e) during the period June 15 through October 31. Any scallops fished for, possessed, or retained during this time period from either Delmarva and Hudson Canyon Access Areas, regardless of whether or not they were harvested on a single access area trip or on multiple trips by taking compensation trips, as specified in § 648.60(c), will be applied to this possession and landing limit. This restriction does not include the additional possession allowance to defray the cost of carrying an observer, as specified in § 648.60(d), that occur during observed trips between June 15 through October 31.

(*2*) [Reserved]

(G) Part-time vessels shall not fish for, possess, or retain more than a combined total of 14,400 lb (6,532 kg; the equivalent of one part-time access area trip) of scallops from the Delmarva and Hudson Canyon Access Areas specified in § 648.59(a) and (e) during the period June 15 through October 31. Any scallops fished for, possessed, or retained during this time period from either Delmarva and Hudson Canyon Access Areas, regardless of whether or not they were harvested on a single access area trip or on multiple trips by taking compensation trips, as specified in § 648.60(c), will be applied to this possession and landing limit. This restriction does not include the additional possession allowance to defray the cost of carrying an observer, as specified in § 648.60(d), that occur during observed trips between June 15 through October 31.

* * * * *

3. In § 648.53:

a. The section heading is revised;

b. Paragraph (a), the introductory text to paragraph (b), paragraphs (b)(1), (b)(4), (b)(5), (c), (d), (g), (h)(2)(iii), (h)(3)(i)(A), (h)(3)(i)(B), (h)(3)(i)(C), the introductory text to paragraph (h)(4), and paragraphs (h)(5)(ii), (h)(5)(iii), and (h)(5)(iv) are revised;

c. Paragraphs (h)(2)(v) and (h)(2)(vi) are added; and

d. Paragraph (b)(2) is removed and reserved

The revisions and additions read as follows:

§ 648.53 Acceptable biological catch (ABC), annual catch limits (ACL), annual catch targets (ACT), DAS allocations, and individual fishing quotas (IFQ).

(a) *Scallop fishery ABC.* The ABC for the scallop fishery shall be established through the framework adjustment process specified in § 648.55 and is equal to the overall scallop fishery ACL. The ABC/ACL shall be divided as sub-ACLs between limited access vessels, limited access vessels that are fishing under a limited access general category permit, and limited access general category vessels as specified in paragraphs (a)(3) and (a)(4) of this section, after deducting the scallop incidental catch target TAC specified in paragraph (a)(2) of this section, observer set-aside specified in paragraph (g)(1) of this section, and research set-aside specified in Section 648.56(d). The ABC/ACL for the 2013 fishing year is subject to change through a future framework adjustment.

(1) ABC/ACL for fishing years 2011 through 2013 shall be:

(i) *2011:* 27,269 mt.

(ii) *2012:* 28,961 mt.

(iii) *2013:* 28,700 mt.

(2) *Scallop incidental catch target TAC.* The incidental catch target TAC for vessels with incidental catch scallop permits is 50,000 lb (22.7 mt) for fishing years 2011, 2012, and 2013.

(3) *Limited access fleet sub-ACL and ACT.* The limited access scallop fishery shall be allocated 94.5 percent of the ACL specified in paragraph (a)(1) of this section, after deducting incidental catch, observer set-aside, and research set-aside, as specified in this paragraph (a). ACT for the limited access scallop fishery shall be established through the framework adjustment process described in § 648.55. DAS specified in paragraph (b) of this section shall be based on the ACTs specified in paragraph (a)(3)(ii) of this section. The limited access fleet sub-ACL and ACT for the 2013 fishing year are subject to change through a future framework adjustment.

(i) The limited access fishery sub-ACLs for fishing years 2011 through 2013 are:

(A) *2011:* 24,954 mt.

(B) *2012:* 26,537 mt.

(C) *2013:* 26,293 mt.

(ii) The limited access fishery ACTs for fishing years 2011 through 2013 are:

(A) *2011:* 21,431 mt.

(B) *2012:* 23,546 mt.

(C) *2013:* 19,688 mt.

(4) *LAGC fleet sub-ACL.* The sub-ACL for the LAGC IFQ fishery shall be equal to 5.5 percent of the ACL specified in paragraph (a)(1) of this section, after deducting incidental catch, observer set-aside, and research set-aside, as specified in this paragraph (a). The LAGC IFQ fishery ACT shall be equal to the LAGC IFQ fishery's ACL. The ACL for the LAGC IFQ fishery for vessels issued only a LAGC IFQ scallop permit shall be equal to 5 percent of the ACL specified in paragraph (a)(1) of this section, after deducting incidental catch, observer set-aside, and research set-aside, as specified in this paragraph (a). The ACL for the LAGC IFQ fishery for vessels issued only both a LAGC IFQ scallop permit and a limited access scallop permit shall be 0.5 percent of the ACL specified in paragraph (a)(1) of this section, after deducting incidental catch, observer set-aside, and research set-aside, as specified in this paragraph (a). The LAGC ACLs for the 2013 fishing year are default allocations and are subject to change through a future framework adjustment.

(i) The ACLs for fishing years 2011 through 2013 for LAGC IFQ vessels without a limited access scallop permit are:

(A) *2011:* 1,320 mt.

(B) *2012:* 1,404 mt.

(C) *2013:* 1,391 mt.

(ii) The ACLs for fishing years 2011 through 2013 for vessels issued both a LAGC and a limited access scallop permit are:

(A) *2011:* 132 mt.

(B) *2012:* 140 mt.

(C) *2013:* 139 mt.

(b) *DAS allocations.* DAS allocations for limited access scallop trips in all areas other than those specified in § 648.59 shall be specified through the framework adjustment process, as specified in § 648.55, using the ACT specified in paragraph (a)(3)(ii) of this section. A vessel's DAS shall be determined and specified in paragraph (b)(4) of this section by dividing the total DAS specified in the framework adjustment by the landings per unit effort (LPUE) specified in paragraph (b)(1) of this section, then dividing by the total number of vessels in the fleet.

(1) *Landings per unit effort (LPUE).* LPUE is an estimate of the average amount of scallops, in pounds, that the limited access scallop fleet lands per DAS fished. The estimated LPUE is the average LPUE for all limited access scallop vessels fishing under DAS, and shall be used to calculate DAS specified in paragraph (b)(4) of this section, the DAS reduction for the AM specified in paragraph (b)(4)(ii) of this section, and the observer set-aside DAS allocation specified in paragraph (g)(1) of this section. LPUE shall be:

(i) 2011 fishing year: 2,441 lb/DAS.

(ii) 2012 fishing year: 2,662 lb/DAS.

(iii) 2013 fishing year: 2,676 lb/DAS.

* * * * *

(4) Each vessel qualifying for one of the three DAS categories specified in the table in this paragraph (b)(4) (full-time, part-time, or occasional) shall be allocated the maximum number of DAS for each fishing year it may participate in the open area limited access scallop fishery, according to its category, excluding carryover DAS in accordance with paragraph (d) of this section. DAS allocations shall be determined by distributing the portion of ACT specified in paragraph (a)(3)(ii), as reduced by access area allocations specified in § 648.59, and dividing that amount among vessels in the form of DAS calculated by applying estimates of open area LPUE specified in paragraph (b)(1) of this section. Allocation for part-time and occasional scallop vessels shall be equal to 40 percent and 8.33 percent of the full-time DAS allocations, respectively. DAS allocations for the 2013 fishing year are default allocations and are subject to change through a future framework adjustment. The annual open area DAS allocations for each category of vessel for the fishing years indicated are as follows:

Scallop open area DAS allocations

Permit category	2011	2012	2013
Full-Time	32	34	26
Part-Time	13	14	11
Occasional ..	3	3	3

(i) If, prior to the implementation of Framework 22, a limited access vessel uses more open area DAS in the 2011 fishing year than specified in this section, such vessel shall have the DAS used in excess of the 2012 fishing year allocation specified in this paragraph (b)(4) deducted from its fishing year 2012 open area DAS allocation.

(ii) *Accountability measures (AM).* Unless the limited access AM exception is implemented in accordance with the provision specified in paragraph (b)(4)(iii) of this section, if the ACL specified in paragraph (a)(3)(i) of this section is exceeded for the applicable fishing year, the DAS specified in paragraph (b)(4) of this section for each limited access vessel shall be reduced by an amount equal to the amount of landings in excess of the ACL divided by the applicable LPUE for the fishing year in which the AM will apply as specified in paragraph (b)(1) of this section, then divided by the number of scallop vessels eligible to be issued a full-time limited access scallop permit. For example, assuming a 300,000-lb (136-mt) overage of the ACL in 2011, an open area LPUE of 2,500 lb (1.13 mt) per DAS in 2012, and 313 full-time vessels, each full-time vessel's DAS would be reduced by 0.38 DAS (300,000 lb (136 mt)/2,500 lb (1.13 mt) per DAS = 120 lb (0.05 mt) per DAS/313 vessels = 0.38 DAS per vessel). Deductions in DAS for part-time and occasional scallop vessels shall be equal to 40 percent and 8.33 percent of the full-time DAS deduction, respectively, as calculated pursuant to this paragraph (b)(4)(ii). The AM shall take effect in the fishing year following the fishing year in which the overage occurred. For example, landings in excess of the ACL in fishing year 2011 would result in the DAS reduction AM in fishing year 2012. If the AM takes effect, and a limited access vessel uses more open area DAS in the fishing year in which the AM is applied, the vessel shall have the DAS used in excess of the allocation after applying the AM deducted from its open area DAS allocation in the subsequent fishing year. For example, a vessel initially allocated 32 DAS in 2011 uses all 32 DAS prior to application of the AM. If, after application of the AM, the vessel's DAS allocation is reduced to 31 DAS, the vessel's DAS in 2012 would be reduced by 1 DAS.

(iii) *Limited access AM exception*—(A) If NMFS determines, in accordance with paragraph (b)(4)(ii) of this section, that the fishing mortality rate associated with the limited access fleet's landings in a fishing year is less than 0.24, the AM specified in paragraph (b)(4)(ii) of this section shall not take effect. The fishing mortality rate of 0.24 is the fishing mortality that is one standard deviation below the fishing mortality rate for the scallop fishery ACL, currently estimated at 0.28.

(B) If the limited access AM exception described in this paragraph (b)(4)(iii) is invoked, the Regional Administrator shall increase the sub-ACL for the LAGC IFQ fleet specified in paragraph (a)(4)(i) of this section by the amount of scallops equal to 5.5 percent of the amount of scallop landings in excess of the limited access fleet's ACL specified in paragraph (a)(3)(i) of this section. The applicable sub-ACL for the limited access fleet specified in paragraph (a)(3)(i) of this section shall be reduced by the amount equivalent to the increase

in the sub-ACL for LAGC IFQ specified pursuant to this paragraph (b)(4)(iii)(B). For example, if the limited access fishery ACL is exceeded by 1 million lb (453.6 mt), but the limited access AM exception is invoked, the LAGC sub-ACL shall be increased, and the limited access fleet's ACL decreased, by 55,000 lb (24.9 mt) (1 million lb (453.6 mt) × 5.5% (0.055) = 55,000 lb (24.9 mt)). The ACL adjustments in this paragraph (b)(4)(iii)(B) shall take effect in the fishing year immediately following the fishing year in which the overage of the ACL occurred. For example, for an ACL overage in the 2011 fishing year, the adjustments due to implementation of the exception would be implemented in the 2012 fishing year.

(iv) *Limited access fleet AM and exception provision timing.* The Regional Administrator shall determine whether the limited access fleet exceeded its ACL specified in paragraph (a)(3)(i) of this section by July of the fishing year following the year for which landings are being evaluated. On or about July 1, the Regional Administrator shall notify the New England Fishery Management Council (Council) of the determination of whether or not the ACL for the limited access fleet was exceeded, and the amount of landings in excess of the ACL. Upon this notification, the Scallop Plan Development Team (PDT) shall evaluate the overage and determine if the fishing mortality rate associated with total landings by the limited access scallop fleet is less than 0.24. On or about September 1 of each year, the Scallop PDT shall notify the Council of its determination, and the Council, on or about September 30, shall make a recommendation, based on the Scallop PDT findings, concerning whether to invoke the limited access AM exception. If NMFS concurs with the Scallop PDT's recommendation to invoke the limited access AM exception, in accordance with the APA, the limited access AM shall not be implemented. If NMFS does not concur, in accordance with the APA, the limited access AM shall be implemented as soon as possible after September 30 each year.

(v) The Elephant Trunk Access Area shall change to an open area starting in fishing year 2011. For reference, the Elephant Trunk Sea Scallop Access Area was defined by straight lines connecting the following points in the order stated (copies of a chart depicting the area previously known as the Elephant Trunk Access Area are available from the Regional Administrator upon request):

Point	Latitude	Longitude
ETAA1	38°50′ N.	74°20′ W.
ETAA2	38°10′ N.	74°20′ W.
ETAA3	38°10′ N.	73°30′ W.
ETAA4	38°50′ N.	73°30′ W.
ETAA1	38°50′ N.	74°20′ W.

(vi) If, prior to the implementation of Framework 22, a vessel lands all or part of an Elephant Trunk Access Area trip than was allocated at the start of the 2011 fishing year, any pounds landed from that declared Elephant Trunk Access Area trip would be converted to DAS and deducted from the vessel's open area DAS allocations in fishing year 2012. This DAS deduction would be equivalent to the scallop fishing mortality resulting from the open area DAS allocation. For example, if a full-time vessel lands the full 18,000-lb (8,165-kg) possession limit from an Elephant Trunk Access Area trip allocated at the start of the 2011 fishing year, the pounds landed would be converted to DAS and deducted from the vessel's 2012 fishing year DAS allocation as follows: The 18,000 lb (8,165-kg) would first be multiplied by the estimated average meat count in the Elephant Trunk Access Area (18.4 meats/lb) and then divided by the estimated open area average meat count (also 18.4 meats/lb) and by the estimated open area LPUE for fishing year 2011 (2,441 lb/DAS), resulting in a DAS deduction of 7.4 DAS ((18,000 lb x 18.4 meats/lb)/(18.4 meats/lb x 2,441 lb/DAS) = 7.4 DAS). This amount would be deducted from that vessel's 2012 fishing year (*i.e.,* 34 DAS minus 7.4 DAS), resulting in a total 2012 fishing year DAS allocation of 26.6 DAS. Similarly, Part-time and occasional vessels shall receive deductions of 5.9 DAS and 2.5 DAS, respectively, based on their respective possession limits, for landing their full trip possession limits from the area formerly known as the Elephant Trunk Access Area. If a vessel only lands a portion of its full possession limit, the applicable DAS reduction shall be proportional to those landings. For example, if a full-time vessel lands 9,000 lb (4,082 kg) during a declared Elephant Trunk Access Area trip, that vessel's fishing year 2012 DAS allocation would be reduced by 3.7 DAS (*i.e.,* half of the DAS that would be deducted for a full trip).

(vii) If, prior to the implementation of Framework 22, a vessel owner exchanges an Elephant Trunk Access Area trip for another access area trip as specified in § 648.60(a)(3)(ii) in fishing year 2011, the vessel that receives an additional Elephant Trunk Access Area trip would receive a DAS credit of 7.4 DAS in FY 2011, resulting in a total fishing year 2011 DAS allocation of 39.4 DAS (32 DAS plus 7.4 DAS). This DAS credit from unused Elephant Trunk Access Area trip gained through a trip exchange is based on a full-time vessel's 18,000-lb (8,165-kg) possession limit and is calculated by using the formula specified in paragraph (b)(4)(vi) but the DAS conversion is applied as a DAS credit in the 2011 fishing year, rather than as a DAS deduction in fishing year 2012. Similarly, using the same calculation with a 14,400-lb (6,532-kg) possession limit, part-time vessels would receive a credit of 5.9 DAS if the vessel owner received an additional Elephant Trunk Access Area trip through a trip exchange in the interim between the start of the 2011 fishing year and the implementation of Framework 22 and did not use it. If a vessel fishes any part of an Elephant Trunk Access Area trip gained through a trip exchange, those landings would be deducted from any DAS credit applied to the 2011 fishing year. For example, if a full-time vessel lands 10,000 lb (4,536 kg) from an Elephant Trunk Access Area trip gained through a trip exchange, the pounds landed would be converted to DAS and deducted from the trip-exchange credit as follows: The 10,000 lb (4,536 kg) would first be multiplied by the estimated average meat count in the Elephant Trunk Access Area (18.4 meats/lb) and then divided by the estimated open area average meat count (also 18.4 meats/lb) and by the estimate open area LPUE for fishing year 2011 (2,441 lb/DAS), resulting in a DAS deduction of 4.1 DAS ((10,000 lb x 18.4 meats/lb)/(18.4 meats/lb x 2,441 lb/DAS) = 4.1 DAS). Thus, this vessel would receive a reduced DAS credit in FY 2011 to account for the Elephant Trunk Access Area trip exchange of 3.3 DAS (7.4 DAS − 4.1 DAS = 3.7 DAS).

(5) *Additional open area DAS.* (i) When Closed Area I, Closed Area II, and/or the Nantucket Lightship Access Areas close due to the yellowtail flounder bycatch TAC, for each remaining complete trip in each of these Access Areas, a full-time, part-time, or occasional vessel may fish an additional DAS in open areas during the same fishing year. Part-time and occasional vessels shall only receive additional DAS if there are no other access areas available in which to take an access area trip. A complete trip is deemed to be a trip that is not subject to a reduced possession limit under the broken trip provision in § 648.60(c). The Access Area DAS trip conversion for fishing

years 2011 and 2013 are specified in paragraph (b)(5)(ii) of this section.

(ii) *Access area trip conversion to open area DAS.*

Access area trip conversion to open area DAS

Permit category	FY	CAI	CAII	NLAA
Full-Time	2011	4.3	5.7	N/A
	2012	4.4	5.4	4.3
	2013	N/A	5.4	4.9
Part-Time	2011	3.4	4.5	N/A
	2012	3.6	4.3	3.4
	2013	N/A	4.3	3.9
Occasional	2011	1.4	1.9	N/A
	2012	1.5	1.8	1.4
	2013	N/A	1.8	1.6

(iii) If a vessel has unused broken trip compensation trip(s), as specified in § 648.60(c), when Closed Area I, Closed Area II, and/or Nantucket Lightship Access Areas close due to the yellowtail flounder bycatch TAC, it will be issued additional open area DAS in proportion to the unharvested possession limit. For example, if a full-time vessel had an unused 9,000-lb (4,082-kg) Nantucket Lightship Access Area compensation trip (half of the possession limit) at the time of a Nantucket Lightship Access Area yellowtail flounder bycatch TAC closure in FY 2012, the vessel will be allocated 2.15 DAS (half of 4.3 DAS).

* * * * *

(c) *Adjustments in annual DAS allocations.* Annual DAS allocations shall be established for 3 fishing years through biennial framework adjustments as specified in § 648.55. If a biennial framework action is not undertaken by the Council and implemented by NMFS before the beginning of the third year of each biennial adjustment, the third-year measures specified in the biennial framework adjustment shall remain in effect for the next fishing year. If a new biennial or other framework adjustment is not implemented by NMFS by the conclusion of the third year, the management measures from that third year would remain in place until a new action is implemented. The Council may also recommend adjustments to DAS allocations or other measures through a framework adjustment at any time.

(d) *End-of-year carry-over for open area DAS.* With the exception of vessels that held a Confirmation of Permit History as described in § 648.4(a)(2)(i)(J) for the entire fishing year preceding the carry-over year, limited access vessels that have unused open area DAS on the last day of February of any year may carry over a maximum of 10 DAS, not to exceed the total open area DAS allocation by permit category, into the next year. DAS carried over into the next fishing year may only be used in open areas. Carry-over DAS are accounted for in setting the ACT for the limited access fleet, as specified in paragraph (a)(3)(ii) of this section. Therefore, if carry-over DAS result or contribute to an overage of the ACL, the limited access fleet AM specified in paragraph (b)(4)(ii) of this section would still apply, provided the AM exception specified in paragraph (b)(4)(iii) of this section is not invoked.

* * * * *

(g) *Set-asides for observer coverage.* (1) To help defray the cost of carrying an observer, 1 percent of the ABC/ACL specified in paragraph (a)(1) of this section shall be set aside to be used by vessels that are assigned to take an at-sea observer on a trip. The total TAC for observer set aside is 273 mt in fishing year 2011, 290 mt in fishing year 2012, and 287 mt in fishing year 2013. This 1 percent is divided proportionally into access areas and open areas, as specified in § 648.60(d)(1) and paragraph (g)(2) of this section, respectively. The total observer set-aside TAC specified for fishing year 2013 is a default allocation and is subject to change through a future framework adjustment

(2) *DAS set-aside for observer coverage.* For vessels assigned to take an at-sea observer on a trip other than an Access Area Program trip, the open-area observer set-aside TACs are 139 mt, 161 mt, and 136 mt for fishing years 2011, 2012, and 2013, respectively. The DAS set-aside shall be determined by dividing these amounts by the LPUE specified in paragraph (b)(1)(i) of this section for each specific fishing year. The DAS set-aside for observer coverage is 137 DAS for the 2011 fishing year, 133 DAS for the 2012 fishing year, and 112 DAS for the 2013 fishing year. A vessel carrying an observer shall be compensated with reduced DAS accrual rates for each trip on which the vessel carries an observer. For each DAS that a vessel fishes for scallops with an observer on board, the DAS shall be charged at a reduced rate, based on an adjustment factor determined by the Regional Administrator on an annual basis, dependent on the cost of observers, catch rates, and amount of available DAS set-aside. The Regional Administrator shall notify vessel owners of the cost of observers and the DAS adjustment factor through a permit holder letter issued prior to the start of each fishing year. This DAS adjustment factor may also be changed during the fishing year if fishery conditions warrant such a change. The number of DAS that are deducted from each trip based on the adjustment factor shall be deducted from the observer DAS set-aside amount in the applicable fishing year. Utilization of the DAS set-aside shall be on a first-come, first-served basis. When the DAS set-aside for observer coverage has been utilized, vessel owners shall be notified that no additional DAS remain available to offset the cost of carrying observers. The obligation to carry and pay for an observer shall not be waived if set-aside is not available.

(h) * * *

(2) * * *

(iii) *Contribution percentage.* A vessel's contribution percentage shall be determined by dividing its contribution factor by the sum of the contribution factors of all vessels issued an IFQ scallop permit. Continuing the example in paragraph (h)(1)(ii)(D) of this section, the sum of the contribution factors for 380 IFQ scallop vessels is estimated for the purpose of this example to be 4.18 million lb (1,896 mt). The contribution percentage of the above vessel is 1.45 percent (60,687 lb (27,527 kg)/4.18 million lb (1,896 mt) = 1.45 percent). The contribution percentage for a vessel that is issued an IFQ scallop permit and that has permanently transferred all of its IFQ to another IFQ vessel, as

specified in paragraph (h)(5)(ii) of this section, shall be equal to 0 percent.

* * * * *

(v) *End-of-year carry-over for IFQ.* (A) With the exception of vessels that held a confirmation of permit history as described in § 648.4(a)(2)(ii)(L) for the entire fishing year preceding the carry-over year, LAGC IFQ vessels that have unused IFQ on the last day of February of any year may carry over up to 15 percent of the vessel's original IFQ and transferred (either temporary or permanent) IFQ into the next fishing year. For example, a vessel with a 10,000-lb (4,536-kg) IFQ and 5,000-lb (2,268-kg) of leased IFQ may carry over 2,250 lb (1,020 kg) of IFQ (*i.e.,* 15 percent of 15,000 lb (6,804 kg)) into the next fishing year if it landed 12,750 lb (5,783 kg) (*i.e.,* 85 percent of 15,000 lb (6,804 kg)) of scallops or less in the preceding fishing year. Using the same IFQ values from the example, if the vessel landed 14,000 lb (6,350 kg) of scallops, it could carry over 1,000 lb (454 kg) of scallops into the next fishing year.

(B) For accounting purposes, the combined total of all vessels' IFQ carry-over shall be added to the LAGC IFQ fleet's applicable ACL for the carry-over year. Any IFQ carried over that is landed in the carry-over fishing year shall be counted against the ACL specified in paragraph (a)(4)(i) of this section, as increased by the total carry-over for all LAGC IFQ vessels, as specified in this paragraph (h)(2)(v)(B).

(vi) *AM for the IFQ fleet.* If a vessel exceeds its IFQ, including all temporarily and permanently transferred IFQ, in a fishing year, the amount of landings in excess of the vessel's IFQ, including all temporarily and permanently transferred IFQ, shall be deducted from the vessel's IFQ as soon as possible in the fishing year following the fishing year in which the vessel exceeded its IFQ. If the AM takes effect, and an IFQ vessel lands more scallops than allocated after the AM is applied, the vessel shall have the IFQ landed in excess of its IFQ after applying the AM deducted from its IFQ in the subsequent fishing year. For example, a vessel with an initial IFQ of 1,000 lb (453.6 kg) in 2010 landed 1,200 lb (544.3 kg) of scallops in 2010, and is initially allocated 1,300 lb (589.7 kg) of scallops in 2011. That vessel would be subject to an IFQ reduction equal to 200 lb (90.7 kg) to account for the 200 lb (90.7 kg) overage in 2010. If that vessel lands 1,300 lb (589.7 kg) of scallops in 2011 prior to application of the 200 lb (90.7 kg) deduction, the vessel would be subject to a deduction of 200 lb (90.7 kg) in 2012. For vessels involved in a temporary IFQ transfer, the entire deduction shall apply to the vessel that acquired IFQ, not the transferring vessel. A vessel that has an overage that exceeds its IFQ in the subsequent fishing year shall be subject to an IFQ reduction in subsequent years until the overage is paid back. For example, a vessel with an IFQ of 1,000 lb (454 kg) in each year over a 3-year period that harvests 2,500 lb (1,134 kg) of scallops the first year would have a 1,500-lb (680-kg) IFQ deduction, so that it would have zero pounds to harvest in year 2, and 500 lb (227 kg) to harvest in year 3. A vessel that has a "negative" IFQ balance, as described in the example, could lease or transfer IFQ to balance the IFQ, provided there are no sanctions or other enforcement penalties that would prohibit the vessel from acquiring IFQ.

(3) * * *

(i) * * *

(A) Unless otherwise specified in paragraphs (h)(3)(i)(B) and (C) of this section, a vessel issued an IFQ scallop permit or confirmation of permit history shall not be issued more than 2.5 percent of the TAC allocated to the IFQ scallop vessels as described in paragraphs (a)(3)(ii) and (iii) of this section.

(B) A vessel may be initially issued more than 2.5 percent of the TAC allocated to the IFQ scallop vessels as described in paragraphs (a)(3)(ii) and (iii) of this section, if the initial determination of its contribution factor specified in accordance with § 648.4(a)(2)(ii)(E) and paragraph (h)(2)(ii) of this section, results in an IFQ that exceeds 2.5 percent of the TAC allocated to the IFQ scallop vessels as described in paragraphs (a)(3)(ii) and (iii) of this section. A vessel that is allocated an IFQ that exceeds 2.5 percent of the TAC allocated to the IFQ scallop vessels as described in paragraphs (a)(3)(ii) and (iii) of this section, in accordance with this paragraph (h)(3)(i)(B), may not receive IFQ through an IFQ transfer, as specified in paragraph (h)(5) of this section.

(C) A vessel initially issued a 2008 IFQ scallop permit or confirmation of permit history, or that was issued or renewed a limited access scallop permit or confirmation of permit history for a vessel in 2009 and thereafter, in compliance with the ownership restrictions in paragraph (h)(3)(i)(A) of this section, is eligible to renew such permits(s) and/or confirmation(s) of permit history, regardless of whether the renewal of the permit or confirmations of permit history will result in the 2.5-percent IFQ cap restriction being exceeded.

* * * * *

(4) *IFQ cost recovery.* A fee, not to exceed 3 percent of the ex-vessel value of IFQ scallops harvested, shall be collected to recover the costs associated with management, data collection, and enforcement of the IFQ program. The owner of a vessel issued an IFQ scallop permit and subject to the IFQ program specified in this paragraph (h)(4), shall be responsible for paying the fee as specified by NMFS in this paragraph (h)(4). An IFQ scallop vessel shall incur a cost recovery fee liability for every landing of IFQ scallops. The IFQ scallop permit holder shall be responsible for collecting the fee for all of its vessels' IFQ scallop landings, and shall be responsible for submitting this payment to NMFS once per year. The cost recovery fee for all landings, regardless of ownership changes throughout the fishing year, shall be the responsibility of the official owner of the vessel, as recorded in the vessel permit or confirmation of permit history file, at the time the bill is sent.

* * * * *

(5) * * *

(ii) *Permanent IFQ transfers.* Subject to the restrictions in paragraph (h)(5)(iii) of this section, the owner of an IFQ scallop vessel not issued a limited access scallop permit may transfer IFQ permanently to or from another IFQ scallop vessel. Any such transfer cannot be limited in duration and is permanent, unless the IFQ is subsequently transferred to another IFQ scallop vessel, other than the originating IFQ scallop vessel, in a subsequent fishing year. If a vessel permanently transfers its entire IFQ to another vessel, the LAGC IFQ scallop permit shall remain valid on the transferring vessel, unless the owner of the transferring vessel cancels the IFQ scallop permit. Such cancellation shall be considered voluntary relinquishment of the IFQ permit, and the vessel shall be ineligible for an IFQ scallop permit unless it replaces another vessel that was issued an IFQ scallop permit. The Regional Administrator has final approval authority for all IFQ transfer requests.

(iii) *IFQ transfer restrictions.* The owner of an IFQ scallop vessel not issued a limited access scallop permit that has fished under its IFQ in a fishing year may not transfer that vessel's IFQ to another IFQ scallop vessel in the same fishing year. Requests for IFQ transfers cannot be less than 100 lb (46.4 kg), unless that value reflects the total IFQ amount remaining on the transferor's vessel, or the entire IFQ

allocation. IFQ can be transferred only once during a given fishing year. A transfer of an IFQ may not result in the sum of the IFQs on the receiving vessel exceeding 2.5 percent of the TAC allocated to IFQ scallop vessels. A transfer of an IFQ, whether temporary or permanent, may not result in the transferee having a total ownership of, or interest in, general category scallop allocation that exceeds 5 percent of the TAC allocated to IFQ scallop vessels. Limited access scallop vessels that are also issued an IFQ scallop permit may not transfer to or receive IFQ from another IFQ scallop vessel.

(iv) *Application for an IFQ transfer.* The owners of vessels applying for a transfer of IFQ must submit a completed application form obtained from the Regional Administrator. The application must be signed by both parties (transferor and transferee) involved in the transfer of the IFQ, and must be submitted to the NMFS Northeast Regional Office at least 30 days before the date on which the applicants desire to have the IFQ effective on the receiving vessel. The Regional Administrator shall notify the applicants of any deficiency in the application pursuant to this section. Applications may be submitted at any time during the scallop fishing year, provided the vessel transferring the IFQ to another vessel has not utilized any of its own IFQ in that fishing year. Applications for temporary transfers received less than 45 days prior to the end of the fishing year may not be processed in time for a vessel to utilize the transferred IFQ prior to the expiration of the fishing year for which the IFQ transfer, if approved, would be effective.

(A) *Application information requirements.* An application to transfer IFQ must contain at least the following information: Transferor's name, vessel name, permit number, and official number or state registration number; transferee's name, vessel name, permit number, and official number or state registration number; total price paid for purchased IFQ; signatures of transferor and transferee; and date the form was completed. In addition, applications to transfer IFQ must indicate the amount, in pounds, of the IFQ allocation transfer, which may not be less than 100 lb (45 kg) unless that value reflects the total IFQ amount remaining on the transferor's vessel, or the entire IFQ allocation. Information obtained from the transfer application will be held confidential, and will be used only in summarized form for management of the fishery.

(B) *Approval of IFQ transfer applications.* Unless an application to transfer IFQ is denied according to paragraph (h)(5)(iii)(C) of this section, the Regional Administrator shall issue confirmation of application approval to both parties involved in the transfer within 30 days of receipt of an application.

(C) *Denial of transfer application.* The Regional Administrator may reject an application to transfer IFQ for any of the following reasons: The application is incomplete; the transferor or transferee does not possess a valid limited access general category permit; the transferor's vessel has fished under its IFQ prior to the completion of the transfer request; the transferor's or transferee's vessel or IFQ scallop permit has been sanctioned, pursuant to a final administrative decision or settlement of an enforcement proceeding; the transfer will result in the transferee's vessel having an allocation that exceeds 2.5 percent of the TAC allocated to IFQ scallop vessels; the transfer will result in the transferee having a total ownership of, or interest in, a general category scallop allocation that exceeds 5 percent of the TAC allocated to IFQ scallop vessels; or any other failure to meet the requirements of the regulations in 50 CFR part 648. Upon denial of an application to transfer IFQ, the Regional Administrator shall send a letter to the applicants describing the reason(s) for the rejection. The decision by the Regional Administrator is the final agency decision, and there is no opportunity to appeal the Regional Administrator's decision. An application that was denied can be resubmitted if the discrepancy(ies) that resulted in denial are resolved.

* * * * *

§ 648.58 [Amended]

4. In § 648.58, paragraph (a) is removed and reserved.

5. In § 648.59:

a. Paragraphs (a)(4) and (c)(1) are removed and reserved;

b. The introductory text in paragraphs (b) and (c) are revised; and

c. Paragraphs (a)(1), (a)(3), (b)(1), (b)(2), (b)(5)(i), (b)(5)(ii)(A), (b)(5)(ii)(B), (c)(2), (c)(5)(i), (c)(5)(ii)(A), (d)(1), (d)(2), (d)(5)(i), (d)(5)(ii)(A), (d)(5)(ii)(B), and (e) are revised to read as follows.

§ 648.59 Sea Scallop Access Areas.

(a) * * *

(1) From March 1, 2011, through February 28, 2014 (i.e., fishing years 2011 through 2013), a vessel issued a scallop permit may fish for, possess, or land scallops in or from the area known as the Delmarva Sea Scallop Access Area, described in paragraph (a)(2) of this section, only if the vessel is participating in, and complies with the requirements of, the area access program described in § 648.60. The Delmarva Scallop Access Area schedule and TACs specified in paragraph (a)(3) of this section for fishing year 2013 are default measures and subject to change through a future framework adjustment.

* * * * *

(3) *Number of trips*—(i) *Limited access vessels.* Based on its permit category, a vessel issued a limited access scallop permit may fish no more than the maximum number of trips in the Delmarva Access Area as specified in § 648.60(a)(3)(i), unless the vessel owner has made an exchange with another vessel owner whereby the vessel gains a Delmarva Access Area trip and gives up a trip into another Sea Scallop Access Area, as specified in § 648.60(a)(3)(ii), or unless the vessel is taking a compensation trip for a prior Delmarva Access Area trip that was terminated early, as specified in § 648.60(c). Additionally, limited access full-time and part-time scallop vessels are restricted in the number of trips that may be taken from June 15 through October 31, as specified in § 648.60(a)(3)(i)(B)(*4*) and (a)(3)(i)(C)(*4*). The number of trips allocated to limited access vessels in the Delmarva Access Area shall be based on the TAC for the access area, which shall be determined through the annual framework process and specified in paragraph (a)(5)(i) of this section. The Delmarva Access Area scallop TACs for limited access scallop vessels are 5,886,000 lb (2,670 mt) in fishing year 2011, and 2,943,000 lb (1,335 mt) in fishing years 2012 and 2013.

(ii) *LAGC IFQ scallop vessels.*—(A) The percentage of the Delmarva Access Area TAC to be allocated to LAGC IFQ scallop vessels shall be specified in paragraph (a)(4)(ii)(A) of this section through the framework adjustment process, and shall determine the number of trips allocated to LAGC IFQ scallop vessels as specified in paragraph (a)(4)(ii)(B) of this section. LAGC IFQ vessels will be allocated 355,900 lb (161 mt) in fishing year 2011, 177,490 lb (81 mt) in fishing year 2012, and 178,600 lb (81 mt) in fishing year 2013, which represent 5.5 percent of the Delmarva Access Area TACs for each fishing year. This TAC applies to both LAGC IFQ vessels and limited access vessels with LAGC IFQ permits that are fishing under the provisions of the LAGC IFQ permit.

(B) Based on the TAC specified in paragraph (a)(4)(ii)(A) of this section,

LAGC scallop vessels are allocated 593 trips in fishing year 2011, 296 trips in fishing year 2012, and 298 trips in fishing year 2013 to the Delmarva Access Area. This fleet-wide trip allocation applies to both LAGC IFQ vessels and limited access vessels with LAGC IFQ permits that are fishing under the provisions of the LAGC IFQ permit. The Regional Administrator shall notify all LAGC IFQ scallop vessels of the date when the total number of trips have been, or are projected to be, taken by providing notification in the **Federal Register**, in accordance with § 648.60(g)(4). An LAGC IFQ scallop vessel may not fish for, possess, or land sea scallops in or from the Delmarva Access Area, or enter the Delmarva Access Area on a declared LAGC IFQ scallop trip after the effective date published in the **Federal Register**, unless transiting pursuant to paragraph (f) of this section.

(*1*) If the fleet-wide Delmarva Access Area trip allocation implemented by Framework 22 is exceeded in the 2011 fishing year, the fleet-wide Delmarva Access Area trip allocation in fishing year 2012 shall be reduced by the number of trips taken in excess of the amount specified in paragraph (a)(3)(ii)(B) of this section.

(*2*) [Reserved]

(C) Scallops landed by each LAGC IFQ vessel on a Delmarva Access Area trip shall be counted against that vessel's IFQ.

* * * * *

(b) *Closed Area I Access Area*—(1) From March 1, 2013, through February 28, 2014 (i.e., fishing year 2013), vessels issued scallop permits may not fish for, possess, or land scallops in or from, the area known as the Closed Area I Access Area, described in paragraph (b)(3) of this section, unless transiting pursuant to paragraph (f) of this section. Vessels issued both a NE Multispecies permit and an LAGC scallop permit may fish in an approved SAP under § 648.85 and under multispecies DAS in the scallop access area, provided they comply with restrictions in paragraph (b)(5)(ii)(C) of this section. The Closed Area I Sea Scallop Access Area schedule and TACs specified in paragraph (b)(5) of this section for fishing year 2013 are default measures and subject to change through a future framework adjustment.

(2) From March 1, 2011, through February 28, 2013 (*i.e.,* fishing years 2011 and 2012), subject to the seasonal restrictions specified in paragraph (b)(4) of this section, a vessel issued a scallop permit may fish for, possess, and land scallops in or from the area known as the Closed Area I Access Area, described in paragraph (b)(3) of this section, only if the vessel is participating in, and complies with the requirements of, the area access program described in § 648.60.

* * * * *

(5) * * *

(i) *Limited access vessels.* Based on its permit category, a vessel issued a limited access scallop permit may fish no more than the maximum number of trips in the Closed Area I Access Area, unless the vessel owner has made an exchange with another vessel owner whereby the vessel gains a Closed Area I Access Area trip and gives up a trip into another Sea Scallop Access Area, as specified in § 648.60(a)(3)(ii), or unless the vessel is taking a compensation trip for a prior Closed Area I Access Area trip that was terminated early, as specified in § 648.60(c). The number of trips allocated to limited access vessels in the Closed Area I Access Area shall be based on the TAC for the access area, which will be determined through the annual framework process and specified in paragraph (c)(5)(i) of this section. The number of trips allocated to limited access vessels in the Closed Area I Access Area shall be based on the TAC for the access area, which shall be determined through the annual framework process and specified in this paragraph (b)(5)(i). The Closed Area I Access Area scallop TAC for limited access scallop vessels is 8,829,000 (4,005 mt) in fishing year 2011, and 2,943,000 lb (1,335 mt) in fishing year 2012. Closed Area I Access Area is closed to limited access vessels for the 2013 fishing year.

(ii) * * *

(A) The percentage of the Closed Area I Access Area TAC to be allocated to LAGC scallop vessels shall be specified through the framework adjustment process and shall determine the number of trips allocated to LAGC scallop vessels as specified in paragraph (b)(5)(ii)(B) of this section. The TAC applies to both LAGC IFQ vessels and limited access vessels with LAGC IFQ permits that are fishing under the provisions of the LAGC IFQ permit. LAGC IFQ vessels will be allocated 533,850 lb (242 mt) in fishing year 2011, and 177,490 lb (81 mt) in fishing year 2012, which represent 5.5 percent of the Closed Area I Access Area TACs for each fishing year. This TAC applies to both LAGC IFQ vessels and limited access vessels with LAGC IFQ permits that are fishing under the provisions of the LAGC IFQ permit. The Closed Area I Access Area will be closed to LAGC IFQ vessels in fishing year 2013.

(B) Based on the TACs specified in paragraph (b)(5)(ii)(A) of this section, LAGC IFQ vessels are allocated a total of 890 trips in fishing year 2011, and 296 trips in fishing year 2012 in the Closed Area I Access Area. No LAGC IFQ trips will be allocated in Closed Area I Access Area in fishing year 2013. The Regional Administrator shall notify all LAGC scallop vessels of the date when the maximum number of allowed trips for the applicable fishing year have been, or are projected to be, taken by providing notification in the **Federal Register**, in accordance with § 648.60(g)(4). Except as provided in paragraph (b)(5)(ii)(C) of this section, and subject to the seasonal restrictions specified in paragraph (b)(4) of this section, an LAGC scallop vessel may not fish for, possess, or land sea scallops in or from the Closed Area I Access Area, or enter the Closed Area I Access Area on a declared LAGC scallop trip after the effective date published in the **Federal Register**, unless transiting pursuant to paragraph (f) of this section.

* * * * *

(c) * * *

(2) From March 1, 2011, through February 28, 2014 (*i.e.*, fishing years 2011 through 2013), subject to the seasonal restrictions specified in paragraph (c)(4) of this section, a vessel issued a scallop permit may fish for, possess, or land scallops in or from the area known as the Closed Area II Sea Scallop Access Area, described in paragraph (c)(3) of this section, only if the vessel is participating in, and complies with the requirements of, the area access program described in § 648.60. The Closed Area II Sea Scallop Access Area schedule and TACs specified in paragraph (c)(5) of this section for fishing year 2013 are default measures and subject to change through a future framework adjustment.

* * * * *

(5) * * *

(i) *Limited access vessels.* Based on its permit category, a vessel issued a limited access scallop permit may fish no more than the maximum number of trips in the Closed Area II Access Area, unless the vessel owner has made an exchange with another vessel owner whereby the vessel gains a Closed Area II Access Area trip and gives up a trip into another Sea Scallop Access Area, as specified in § 648.60(a)(3)(ii), or unless the vessel is taking a compensation trip for a prior Closed Area II Access Area trip that was terminated early, as specified in § 648.60(c). The number of trips allocated to limited access vessels in the Closed Area II Access Area shall be based on the TAC for the access area, which will be determined through the annual framework process and specified

in this paragraph (c)(5)(i). The Closed Area II Access Area scallop TACs for limited access scallop vessels are 2,943,000 lb (1,335 mt) in fishing year 2011 and 5,886,000 lb (2,670 mt) in fishing years 2012 and 2013.

(ii) * * *

(A) The percentage of the total Closed Area II Access Area TAC to be allocated to LAGC IFQ scallop vessels shall be specified through the framework adjustment process and shall determine the number of trips allocated to IFQ LAGC scallop vessels as specified in paragraph (c)(5)(ii)(B) of this section. The TAC applies to both LAGC IFQ vessels and limited access vessels with LAGC IFQ permits. The Closed Area II Access Area is closed to LAGC IFQ vessels in the 2011 through 2013 fishing years.

* * * * *

(d) * * *

(1) From March 1, 2011, through February 28, 2012 (i.e., fishing year 2011), vessels issued scallop permits may not fish for, possess, or land scallops in or from the area known as the Nantucket Lightship Access Area, described in paragraph (d)(3) of this section, unless transiting pursuant to paragraph (f) of this section. Vessels issued both a NE multispecies permit and an LAGC scallop permit may fish in an approved SAP under § 648.85 and under multispecies DAS in the scallop access area, provided they comply with restrictions in paragraph (d)(5)(ii)(C) of this section.

(2) From March 1, 2012, through February 28, 2014 (i.e., fishing years 2012 and 2013), subject to the seasonal restrictions specified in paragraph (d)(4) of this section, a vessel issued a scallop permit may fish for, possess, or land scallops in or from the area known as the Nantucket Lightship Sea Scallop Access Area, described in paragraph (d)(3) of this section, only if the vessel is participating in, and complies with the requirements of, the area access program described in § 648.60. The Nantucket Lightship Sea Scallop Access Area schedule and TACs specified in paragraph (d)(5) of this section for fishing year 2013 are default measures and subject to change through a future framework adjustment.

* * * * *

(5) * * *

(i) *Limited access vessels.* Based on its permit category, a vessel issued a limited access scallop permit may fish no more than the maximum number of trips in the Nantucket Lightship Access Area, unless the vessel owner has made an exchange with another vessel owner whereby the vessel gains a Nantucket Lightship Access Area trip and gives up a trip into another Sea Scallop Access Area, as specified in § 648.60(a)(3)(ii), or unless the vessel is taking a compensation trip for a prior Nantucket Lightship Access Area trip that was terminated early, as specified in § 648.60(c). The number of trips allocated to limited access vessels in the Nantucket Lightship Access Area shall be based on the TAC for the access area. The Nantucket Lightship Access Area scallop TACs for limited access scallop vessels are 2,943,000 lb (1,335 mt) in fishing year 2012, and 5,886,000 lb (2,670 mt) in fishing year 2013. The Nantucket Lightship Access Area will be closed to limited access vessels in fishing year 2011.

(A) A limited access vessel that uses a Nantucket Lightship Access Area trip in the 2011 fishing year prior to the implementation of Framework 22 shall have those pounds landed during that trip deducted from an access area trip allocation in fishing year 2012.

(B) [Reserved]

(ii) * * *

(A) The percentage of the Nantucket Lightship Access Area TAC to be allocated to LAGC IFQ scallop vessels shall be specified through the framework adjustment process and shall determine the number of trips allocated to LAGC IFQ scallop vessels as specified in paragraph (d)(5)(ii)(B) of this section. The Nantucket Lightship Access Area will be closed to LAGC IFQ vessels in fishing year 2011. LAGC IFQ vessels are allocated 177,490 lb (81 mt) in fishing year 2012 and 357,200 lb (162 mt) in fishing year 2013, which represent 5.5 percent of the Nantucket Lightship Access Area TAC for each fishing year. The TAC applies to both LAGC IFQ vessels and limited access vessels with LAGC IFQ permits that are fishing under the provisions of the LAGC IFQ permit.

(*1*) If LAGC IFQ vessels declare a trip into the Nantucket Lightship Access Area in the 2011 fishing year prior to the implementation of Framework 22 and the closure of the Nantucket Lightship Access Area in fishing year 2011, the number of LAGC IFQ trips that have been declared on which scallops have been landed shall be deducted from the total number of LAGC IFQ fleet-wide trips allocated in the Nantucket Lightship Access Area in fishing year 2012.

(*2*) [Reserved]

(B) Based on the TAC specified in paragraph (d)(5)(ii)(A) of this section, LAGC scallop vessels are allocated 296 trips in fishing year 2012, and 595 trips in fishing year 2013 to the Nantucket Lightship Access Area. This fleet-wide trip allocation applies to both LAGC IFQ vessels and limited access vessels with LAGC IFQ permits that are fishing under the provisions of the LAGC IFQ permit. The Regional Administrator shall notify all LAGC IFQ scallop vessels of the date when the total number of trips have been, or are projected to be, taken by providing notification in the **Federal Register**, in accordance with § 648.60(g)(4). Except as provided in paragraph (d)(5)(ii)(C) of this section, an LAGC IFQ scallop vessel may not fish for, possess, or land sea scallops in or from the Nantucket Lightship Access Area, or enter the Nantucket Lightship Access Area on a declared LAGC IFQ scallop trip after the effective date published in the **Federal Register**, unless transiting pursuant to paragraph (f) of this section.

* * * * *

(e) *Hudson Canyon Sea Scallop Access Area.* (1) From March 1, 2011, through February 28, 2014 (*i.e.,* fishing years 2011 through 2013), a vessel issued a scallop permit may fish for, possess, or land scallops in or from the area known as the Hudson Canyon Sea Scallop Access Area, described in paragraph (e)(2) of this section, only if the vessel is participating in, and complies with the requirements of, the area access program described in § 648.60. The Hudson Canyon Sea Scallop Access Area schedule and TACs specified in paragraph (e)(4) of this section for fishing year 2013 are default measures and subject to change through a future framework adjustment.

(2) The Hudson Canyon Sea Scallop Access Area is defined by straight lines connecting the following points in the order stated (copies of a chart depicting this area are available from the Regional Administrator upon request):

Point	Latitude	Longitude
H1	39°30′ N.	73°10′ W.
H2	39°30′ N.	72°30′ W.
H3	38°30′ N.	73°30′ W.
H4	38°50′ N.	73°30′ W.
H5	38°50′ N.	73°42′ W.
H1	39°30′ N.	73°10′ W.

(3) [Reserved]

(4) *Number of trips*—(i) *Limited access vessels.* Based on its permit category, a vessel issued a limited access scallop permit may fish no more than the maximum number of trips in the Hudson Canyon Sea Scallop Access Area, unless the vessel owner has made an exchange with another vessel owner whereby the vessel gains a Hudson Canyon Sea Scallop Access Area trip and gives up a trip into another Sea Scallop Access Area, as specified in

§ 648.60(a)(3)(ii), or unless the vessel is taking a compensation trip for a prior Hudson Canyon Access Area trip that was terminated early, as specified in § 648.60(c). Additionally, limited access full-time and part-time scallop vessels are restricted in the number of trips that may be taken from June 15 through October 31, as specified in § 648.60(a)(3)(i)(B)(*4*) or § 648.60(a)(3)(i)(C)(*4*). The Hudson Canyon Access Area scallop TACs for limited access scallop vessels are 5,886,000 lb (2,670 mt) in fishing year 2011, and 8,829,000 lb (4,005 mt) in fishing years 2012 and 2013.

(ii) *LAGC IFQ scallop vessels.*—(A) The percentage of the Hudson Canyon Access Area TAC to be allocated to LAGC scallop vessels shall be specified through the framework adjustment process and shall determine the number of trips allocated to LAGC IFQ scallop vessels as specified in paragraph (e)(4)(ii)(B) of this section. LAGC IFQ vessels shall be allocated 355,900 lb (161 mt) in fishing year 2011, 532,460 lb (242 mt) in fishing year 2012, and 535,800 lb (243 mt) in fishing year 2013, which is 5.5 percent of the Hudson Canyon Access Area TAC for each fishing year. The TAC applies to both LAGC IFQ vessels and limited access vessels with LAGC IFQ permits that are fishing under the provisions of the LAGC IFQ permit.

(B) Based on the TACs specified in paragraph (e)(4)(ii)(A) of this section, LAGC IFQ vessels are allocated a total of 593, 887, and 893 trips in the Hudson Canyon Access Area in fishing years 2011, 2012, and 2013, respectively. This fleet-wide trip allocation applies to both LAGC IFQ vessels and limited access vessels with LAGC IFQ permits that are fishing under the provisions of the LAGC IFQ permit. The Regional Administrator shall notify all LAGC IFQ scallop vessels of the date when the maximum number of allowed trips have been, or are projected to be taken by providing notification in the **Federal Register**, in accordance with § 648.60(g)(4). An LAGC IFQ scallop vessel may not fish for, possess, or land sea scallops in or from the Hudson Canyon Access Area, or enter the Hudson Canyon Access Area on a declared LAGC IFQ scallop trip after the effective date published in the **Federal Register**, unless transiting pursuant to paragraph (f) of this section.

(C) Scallops landed by each LAGC IFQ vessel on a Hudson Canyon Access Area trip shall count against that vessel's IFQ.

* * * * *

6. In § 648.60, paragraphs (a)(3)(i), (a)(5)(i), (c)(5)(ii)(A), (c)(5)(v), (d)(1), the heading of paragraph (e), the introductory text of paragraph (e)(1), and paragraphs (e)(1)(ii), (e)(1)(iii), and (g)(1) are revised and paragraph (e)(1)(ii) is added to read as follows:

§ 648.60 Sea scallop area access program requirements.

(a) * * *

(3) * * *

(i) *Limited access vessel trips.* (A) Except as provided in paragraph (c) of this section, paragraphs (a)(3)(i)(B) through (E) of this section specify the total number of trips that a limited access scallop vessel may take into Sea Scallop Access Areas during applicable seasons specified in § 648.59. The number of trips per vessel in any one Sea Scallop Access Area may not exceed the maximum number of trips allocated for such Sea Scallop Access Area as specified in § 648.59, unless the vessel owner has exchanged a trip with another vessel owner for an additional Sea Scallop Access Area trip, as specified in paragraph (a)(3)(ii) of this section, or has been allocated a compensation trip pursuant to paragraph (c) of this section.

(B) *Full-time scallop vessels.* —(*1*) In fishing year 2011, each full-time vessel will have a total of four access area trips and is subject to the following seasonal trip restrictions specified in paragraph (a)(3)(i)(B)(*4*) of this section. All full-time scallop vessels will be allocated one trip in the Delmarva Access Area, one trip into the Hudson Canyon Access Area, and one trip into the Closed Area I Access Area. In addition, each vessel will receive either an additional trip into the Closed Area I Access Area or a trip into the Closed Area II Access Area. These allocations will be determined by the Regional Administrator through a random assignment and shall be made publically available on the Northeast Regional website prior to the start of the 2011 fishing year. The 2011 fishing year access area assignment will not be applicable to full-time vessels until the effective date of Framework 22 implementation. A full description of the random assignment process for FY 2011 is outlined in Section 2.4.2 of Framework 22 to the Scallop Fishery Management Plan.

(*2*) In fishing year 2012, each full-time vessel shall have a total of four access area trips and is subject to the following seasonal trip restrictions specified in paragraph (a)(3)(i)(B)(*4*) of this section. All full-time vessels shall receive one trip into the Closed Area II Access Area and one trip into the Hudson Canyon Access Area. Each vessel shall also receive an additional two access area trips that must be allocated in one of the following combinations: One trip in the Closed Area I Access Area and one trip in the Nantucket Lightship Access Area; one trip in the Closed Area I Access Area and one additional trip in the Hudson Canyon Access Area; one trip in the Closed Area I Access Area and one trip in the Delmarva Access Area; one trip in the Nantucket Lightship Access Area and an additional trip in the Hudson Canyon Access Area; one trip in the Nantucket Lightship Access Area and one trip in the Delmarva Access Area; or an additional trip in the Hudson Canyon Access Area and one in the Delmarva Access Area. These allocations shall be determined by the Regional Administrator through a random assignment and shall be made publically available prior to the start of the 2012 fishing year. A full description of the random assignment process for FY 2012 is outlined in Section 2.4.2 of Framework 22 to the Scallop Fishery Management Plan.

(*3*) At the start of fishing year 2013, each full-time vessel shall have a total of four access area trips and are subject to the following seasonal trip restrictions specified in paragraph (a)(3)(i)(B)(*4*) of this section. The access area trip allocations for the 2013 fishing year are default allocations that are subject to change in a future framework adjustment. All full-time scallop vessels shall be allocated one trip in the Closed Area II Access Area, one trip in the Nantucket Lightship Access Area, and one trip in the Hudson Canyon Access Area. In addition, each vessel shall receive either an additional trip in the Hudson Canyon Access Area or in the Delmarva Access Area. These allocations shall be determined by the Regional Administrator through a random assignment and will be made publically available prior to the start of the 2013 fishing year. A full description of the random assignment process for FY 2013 is outlined in Section 2.4.2 of Framework 22 to the Scallop Fishery Management Plan.

(*4*) A full-time scallop vessel may not fish for, possess, or retain more than a combined total of 18,000 lb (8,165 kg) of scallops during the period June 15 through October 31, the equivalent of one full trip possession limit specified in § 648.60(a)(5)(i), during this time period from the Delmarva and Hudson Canyon Access Areas specified in § 648.59(a) and (e). For example, a full-time vessel may possesses or land up to 18,000 lb (8,165 kg) from the Hudson Canyon Access Area, up to 18,000 lb (8,165 kg) from the Delmarva Access Area, or up to 18,000 lb (8,165 kg)

combined from separate trips into each access area during June 15 through October 31. The remaining access area trips may be taken during the remainder of the fishing year. These possession and landing restrictions does not include the additional possession allowance to defray the cost of carrying an observer as specified in § 648.60(d) that occur during observed trips between June 15 through October 31. In addition, if the owner of a full-time vessel has exchanged a trip(s) with another vessel owner(s) so that the vessel has an allocation of four combined trips into the Delmarva and/or Hudson Canyon Access Areas, that vessel may not fish for, possess, or retain more than a combined total of 36,000 lb (16,329 kg) of scallops, the equivalent of two full trip possession limits specified in § 648.60(a)(5)(i), during this time period from the Delmarva and/or Hudson Canyon Access Areas combined.

(*i*) If, prior to the implementation of Framework 22, a full-time vessel with less than four total Mid-Atlantic access trips possesses or lands more than 18,000 lb (8,165 kg) from declared access area trips into the Delmarva and Hudson Canyon Access Areas during June 15 through October 31 in fishing year 2011, that vessel shall not declare an access area trip in fishing year 2012 in the Mid-Atlantic during June 15 through October 31. Alternatively, a full-time vessel could account for the overage by exchanging trips with another vessel(s) so that it has an allocation of a total of four Mid-Atlantic trips and continue to fish up to a maximum of 36,000 lb (16,329 kg) (*i.e.,* the equivalent of two full-time limited access trips) through October 31, 2011.

(*ii*) [Reserved]

(C) *Part-time scallop vessels.* (*1*) For the 2011 fishing year, a part-time scallop vessel is allocated two trips that may be distributed between access areas as follows: Two trips in the Closed Area I Access Area; one trip in the Closed Area I Access Area and one trip in the Closed Area II Access Area; one trip in the Closed Area I Access Area and one trip in the Hudson Canyon Access Area; one trip in the Closed Area I Access Area and one trip in the Delmarva Access Area; one trip in the Closed Area II Access Area and one trip in the Hudson Canyon Access Area; one trip in the Closed Area II Access Area and one trip in the Delmarva Access Area; or one trip in the Hudson Canyon Access Area and one trip in the Delmarva Access Area. Part-time vessels are subject to the seasonal trip restrictions specified in paragraph (a)(3)(i)(C)(*4*) of this section.

(*2*) For the 2012 fishing year, a part-time scallop vessel is allocated two trips that may be distributed between access areas as follows: Two trips in the Hudson Canyon Access Area; one trip in the Closed Area I Access Area and one trip in the Nantucket Lightship Access Area; one trip in the Closed Area I Access Area and one trip in the Hudson Canyon Access Area; one trip in the Closed Area I Access Area and one trip in the Delmarva Access Area; one trip in the Nantucket Lightship Access Area and one trip in the Hudson Canyon Access Area; one trip in the Nantucket Lightship Access Area and one trip in the Delmarva Access Area; or one trip in the Hudson Canyon Access Area and one trip in the Delmarva Access Area. Part-time vessels are subject to the seasonal trip restrictions specified in paragraph (a)(3)(i)(C)(*4*) of this section.

(*3*) For the 2013 fishing year, a part-time scallop vessel is allocated two trips that may be distributed between access areas as follows: Two trips in the Hudson Canyon Access Area; one trip in the Closed Area II Access Area and one trip in the Nantucket Lightship Access Area; one trip in the Closed Area II Access Area and one trip in the Hudson Canyon Access Area; one trip in the Closed Area II Access Area and one trip in the Delmarva Access Area; one trip in the Nantucket Lightship Access Area and one trip in the Hudson Canyon Access Area; one trip in the Nantucket Lightship Access Area and one trip in the Delmarva Access Area; or one trip in the Hudson Canyon Access Area and one trip in the Delmarva Access Area. Part-time vessels are subject to the seasonal trip restrictions specified in paragraph (a)(3)(i)(C)(*4*) of this section. The access area trip allocations for the 2013 fishing year are default allocations and are subject to change in a future framework adjustment.

(*4*) A part-time scallop vessel may not fish for, possess, or retain more than a combined total of 14,400 lb (6,532 kg) of scallops, the equivalent of one full trip possession limit specified in § 648.60(a)(5)(i), during the period June 15 through October 31 from the Delmarva and Hudson Canyon Access Areas specified in § 648.59(a) and (e). For example, a part-time vessel may possess or land up to 14,400 lb (6,532 kg) from the Hudson Canyon Access Area, up to 14,400 lb (6,532 kg) from the Delmarva Access Area, or up to 14,400 lb (6,532 kg) combined from separate trips into each access area during June 15 through October 31. The remaining access area trips allocated to part-time vessels may be taken in the Hudson Canyon Access Area or Delmarva Access Area during the remainder of the fishing year, or taken in a different access area during the period of June 15 through October 31. These possession and landing restrictions does not include the additional possession allowance to defray the cost of carrying an observer as specified in § 648.60(d) that occur during observed trips between June 15 through October 31.

(*i*) If, prior to the implementation of Framework 22, a part-time vessel possesses or lands more than 14,400 lb (6,532 kg) from declared access area trips into the Delmarva and Hudson Canyon Access Areas combined during June 15 through October 31 in fishing year 2011, that vessel shall not declare an access area trip in fishing year 2012 in the Mid-Atlantic during June 15 through October 31.

(*ii*) [Reserved]

(D) *Occasional scallop vessels.* (*1*) For the 2011 fishing year, an occasional scallop vessel may take one trip in the Closed Area I Access Area, or one trip in the Closed Area II Access Area, or one trip in the Hudson Canyon Access Area, or one trip in the Delmarva Access Area.

(*2*) For the 2012 fishing year, an occasional scallop vessel may take one trip in the Hudson Canyon Access Area, or one trip in the Closed Area I Access Area, or one trip in the Closed Area II Access Area, or one trip in the Nantucket Lightship Access Area, or one trip in the Delmarva Access Area.

(*3*) For the 2013 fishing year, an occasional scallop vessel may take one trip in the Hudson Canyon Access Area, or one trip in the Closed Area II Access Area, or one trip in the Nantucket Lightship Access Area, or one trip in the Delmarva Access Area. The access area trip allocations for the 2013 fishing year are default allocations and are subject to change in a future framework adjustment.

(E) [Reserved]

* * * * *

(5) * * *

(i) *Scallop possession limits.* Unless authorized by the Regional Administrator, as specified in paragraphs (c) and (d) of this section, after declaring a trip into a Sea Scallop Access Area, a vessel owner or operator of a limited access scallop vessel may fish for, possess, and land, per trip, scallops, up to the maximum amounts specified in the table in this paragraph (a)(5). Full-time and part-time vessels shall not fish for, possess, or retain more than 18,000 lb (8,165 kg) and 14,400 lb (6,532 kg), respectively, of scallops from the Hudson Canyon and Delmarva Access Areas, combined, from trips taken between June 15 and October 31

(i.e., the equivalent of one full trip based on permit category). In addition, if the owner of a full-time vessel has exchanged a trip(s) with another vessel owner(s) so that the vessel has a total allocation of four combined trips into the Delmarva and/or Hudson Canyon Access Areas, that vessel may not fish for, possess, or retain more than a combined total of 36,000 lb (16,329 kg) of scallops, the equivalent of two full trip possession limits specified in paragraph (a)(5)(i) of this section, during this time period from the Delmarva and/or Hudson Canyon Access Areas. These possession and landing restrictions do not include the additional possession allowance to defray the cost of carrying an observer as specified in paragraph (d) of this section that occur during observed trips between June 15 and October 31. No vessel declared into the Access Areas as described in § 648.59(a) through (e) may possess more than 50 bu (17.62 hL) of in-shell scallops outside of the Access Areas described in § 648.59(a) through (e).

Fishing year	Permit category possession limit		
	Full-time	Part-time	Occasional
2010	18,000 lb (8,165 kg)	14,400 lb (6,532 kg)	6,000 lb (2,722 kg)
2012	18,000 lb (8,165 kg)	14,400 lb (6,532 kg)	6,000 lb (2,722 kg)
2013	18,000 lb (8,165 kg)	14,400 lb (6,532 kg)	6,000 lb (2,722 kg)

* * * * *

(c) * * *

(5) * * *

(ii) * * *

(A) Pursuant to paragraphs (a)(3)(i)(B)(*4*) or (a)(3)(i)(C)(*4*) of this section, a full-time or part-time vessel may not take a compensation trip based on a single or multiple terminated trip(s) during the period June 15 through October 31 if the compensation trip would allow a vessel to land more than 18,000 lb (8,165 kg) or 14,400 lb (6,532 kg) (*i.e.,* the equivalent of one full access area trip), respectively, during the period June 15 through October 31, in the Hudson Canyon Access Area and Delmarva Access Area combined. For example, a vessel that terminated a trip in the Delmarva Access Area on June 1, 2011, and intends to declare two full trips in the Hudson Canyon Access Area from June 15 through October 31, must wait to fish its compensation trip in the Delmarva Access Area until on or after November 1, 2011. If the owner of a full-time vessel has exchanged a trip(s) with another vessel owner(s) so that the vessel has an allocation of four combined trips into the Delmarva and/or Hudson Canyon Access Areas, that vessel may not fish for, possess, or retain more than a combined total of 36,000 lb (16,329 kg) of scallops, the equivalent of two full trip possession limits specified in paragraph 648.60(a)(5)(i) of this section, during this time period from the Delmarva and/or Hudson Canyon Access Areas.

* * * * *

(v) *Additional compensation trip carryover.* If an Access Area trip conducted during the last 60 days of the open period or season for the Access Area is terminated before catching the allowed possession limit, and the requirements of paragraph (c) of this section are met, the vessel operator shall be authorized to fish an additional trip as compensation for the terminated trip in the following fishing year. The vessel owner/operator must take such additional compensation trips, complying with the trip notification procedures specified in paragraph (a)(2)(iii) of this section, within the first 60 days of that fishing year the Access Area first opens in the subsequent fishing year. For example, a vessel that terminates an Delmarva Access Area trip on December 29, 2011, must declare that it is beginning its additional compensation trip during the first 60 days that the Delmarva Access Area is open (March 1, 2012, through April 29, 2012). If an Access Area is not open in the subsequent fishing year, then the additional compensation trip authorization would expire at the end of the Access Area Season in which the trip was broken. For example, a vessel that terminates a Closed Area I trip on December 10, 2012, may not carry its additional compensation trip into the 2013 fishing year because Closed Area I is not open during the 2013 fishing year, and must complete any compensation trip by January 31, 2013.

(d) * * *

(1) *Observer set-aside limits by area*—(i) *Nantucket Lightship Access Area.* For the 2012 and 2013 fishing years, the observer set-asides for the Nantucket Lightship Access Area are 36,000 lb (16 mt) and 84,450 lb (38 mt), respectively.

(ii) *Closed Area I Access Area.* For the 2011 and 2012 fishing years, the observer set-asides for the Closed Area I Access Area are 111,540 lb (51 mt) and 36,000 lb (316 mt), respectively.

(iii) *Closed Area II Access Area.* For the 2011, 2012, and 2013 fishing years, the observer set-aside for the Closed Area II Access Area are 35,060 lb (16 mt), 67,890 lb (31 mt), and 79,600 lb (36 mt), respectively.

(iv) *Delmarva Access Area.* For the 2011, 2012, and 2013 fishing years, the observer set-aside for the Delmarva Access Area are 74,360 lb (34 mt), 36,000 lb (316 mt), and 42,230 lb (19 mt), respectively.

(v) *Hudson Canyon Access Area.* For the 2011, 2012, and 2013 fishing years, the observer set-aside for the Hudson Canyon Access Area are 74,360 lb (34 mt), 107,980 lb (49 mt), and 126,680 lb (57 mt), respectively.

* * * * *

(e) Sea Scallop Research in Access Areas

(1) *Access Areas available for harvest of research set-aside (RSA).* RSA may be harvested in any access area that is open in a given fishing year, as specified through a framework adjustment and pursuant to § 648.56. The amount of pounds that can be harvested in each access area by vessels participating in approved RSA projects shall be determined through the RSA application review and approval process. The access areas open for RSA harvest for fishing years 2011 through 2013 are:

(i) *2011:* Delmarva Access Area, Hudson Canyon Access Area, Closed Area I Access Area, and Closed Area II Access Area.

(ii) *2012:* Delmarva Access Area, Hudson Canyon Access Area, Closed Area I Access Area, Closed Area II Access Area, and Nantucket Lightship Access Area.

(iii) *2013:* Delmarva Access Area, Hudson Canyon Access Area, Nantucket Lightship Access Area, and Closed Area II Access Area.

* * * * *

(g) * * *

(1) An LAGC scallop vessel may only fish in the scallop access areas specified in § 648.59(a) through (e), subject to the seasonal restrictions specified in § 648.59(b)(4), (c)(4), and (d)(4), and subject to the possession limit specified in § 648.52(a), and provided the vessel complies with the requirements specified in paragraphs (a)(1), (a)(2), (a)(6) through (a)(9), (d), (e), (f), and (g)

of this section, and § 648.85(c)(3)(ii). A vessel issued both a NE Multispecies permit and an LAGC scallop permit may fish in an approved SAP under § 648.85 and under multispecies DAS in the Closed Area I, Closed Area II, and Nantucket Lightship Sea Scallop Access Areas specified in § 648.59(b) through (d), provided the vessel complies with the requirements specified in § 648.59(b)(5)(ii), (c)(5)(ii), and (d)(5)(ii), and this paragraph (g), but may not fish for, possess, or land scallops on such trips.

* * * * *

7. In § 648.62, paragraph (b)(1) is revised to read as follows.

§ 648.62 Northern Gulf of Maine (NGOM) scallop management area.

* * * * *

(b) * * *

(1) *NGOM annual hard TACs.* The annual hard TAC for the NGOM is 70,000 lb (31.8 mt) for the 2011, 2012, and 2013 fishing years. The NGOM TAC for the 2013 fishing year is a default allocation and is subject to change in a future framework adjustment.

* * * * *

[FR Doc. 2011–10334 Filed 4–28–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No.101102552–1232–01]

RIN 0648–BA35

Fisheries Off West Coast States; Highly Migratory Species Fisheries; Annual Catch Limits and Accountability Measures

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations under authority of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) to implement Amendment 2 to the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (HMS FMP) which is currently under review by NMFS. The proposed rule would change the suite of management unit species, modify the process for revising numerical estimates of maximum sustainable yield and optimal yield, and specify status determination criteria so that overfishing and overfished determinations can be made for all management unit species. The proposed rule is necessary to ensure that the HMS FMP is consistent with the objectives of National Standard 1 in the MSA. National Standard 1 mandates that "Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the U.S. fishing industry."

DATES: Comments must be received by May 31, 2011.

ADDRESSES: You may submit comments on this proposed rule, identified by 0648–BA35, the draft environmental assessment (EA), and the regulatory impact review (RIR) prepared for the proposed rule by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Rodney R. McInnis, Regional Administrator, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213.
- *Fax:* (562) 980–4047.

Instructions: All comments received are part of the public record and generally will be posted to *http://www.regulations.gov* without change. All personal identifying information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. NMFS will accept anonymous comments (if submitting comments via the Federal e-Rulemaking portal, enter "N/A" in the relevant required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only. Copies of the draft EA and RIR prepared for this proposed rule are available at *http://swr.nmfs.noaa.gov/* or may be obtained from Rodney R. McInnis (see **ADDRESSES**).

FOR FURTHER INFORMATION CONTACT: Craig Heberer, Sustainable Fisheries Division, NMFS, 760–431–9440, ext. 303.

SUPPLEMENTARY INFORMATION:

Electronic Access

This proposed rule is also accessible at (*http://swr.nmfs.noaa.gov/*). An electronic copy of the current HMS FMP and accompanying appendices, including Amendment 1, are available on the Pacific Fishery Management Council's Web site at *http://www.pcouncil.org/hms/hmsfmp.html.*

The HMS FMP was developed by the Pacific Fishery Management Council (Council) in response to the need to coordinate state, Federal, and international management of HMS stocks. The management unit in the FMP consists of several highly migratory species (tunas, billfish, and sharks) that occur within the West Coast (California, Oregon, and Washington) Exclusive Economic Zone (EEZ) and to a limited extent on adjacent high seas waters. The National Marine Fisheries Service (NMFS), on behalf of the U.S. Secretary of Commerce, partially approved the HMS FMP on February 4, 2004. The majority of HMS FMP implementing regulations became effective on April 7, 2004. Reporting and recordkeeping provisions became effective on February 10, 2005.

On June 7, 2007, NMFS approved Amendment 1 to the HMS FMP to incorporate recommended international measures to end overfishing of the Pacific stock of bigeye tuna (*Thunnus obesus*) in response to formal notification from NMFS that overfishing was occurring on this stock. Amendment 1 also served as a means to substantially reorganize the original combined FMP and Final Environmental Impact Statement, published in August 2003. NMFS implements the Council's recommended management measures through the Federal regulatory process.

In June 2010, the Council took final action to recommend Amendment 2 to the HMS FMP, which would address statutory requirements of the MSA National Standard Guidelines in regard to the establishment of annual catch limits (ACLs) and accountability measures (AMs). This proposed rule to implement Amendment 2 would reduce the number of HMS FMP Management Unit Species (MUS) listed in 50 CFR part 660 from 13 to 11. The Council has recommended that all 11 MUS should be deemed to fall under the international exemption for setting ACLs and AMs as outlined in the revised MSA National Standard 1 (NS1) Guidelines described in detail below, and therefore the Council has not proposed implementing regulations for ACLs and AMs. The proposed rule would also modify the process for revising and seeking NMFS approval for numerical estimates of maximum sustainable yield (MSY) and optimal yield (OY) and to specify status determination criteria (SDC) so that overfishing and overfished determinations can be made for all MUS stocks.

The Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 amended the MSA to include new requirements for establishing ACLs and AMs and other provisions regarding preventing and ending overfishing and rebuilding fisheries. In response to these changes in the MSA, in 2009 NMFS revised the NS1 Guidelines (50 CFR 600.310) (see: 74 FR 3178, January 16, 2009). The Guidelines are intended to help the regional fishery management councils and NMFS meet the objectives of NS1 by providing guidance on: Specifying MSY and OY; specifying SDC so that overfishing and overfished determinations can be made for stocks and stock complexes that are part of a fishery; preventing overfishing and achieving OY; incorporating of scientific and management uncertainty in control rules, adaptive management using ACLs and AMs; and rebuilding stocks and stock complexes. MSY is the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological, environmental conditions and fishery technological characteristics (e.g., gear selectivity), and the distribution of catch among fleets. OY is the long-term average amount of fish that will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities and taking into account the protection of marine ecosystems. SDC are quantifiable factors or their proxies, which are used to determine if overfishing has occurred, or if the stock or stock complex is overfished. "Overfished" relates to biomass of a stock or stock complex, and "overfishing" pertains to a rate or level of removal of fish from a stock or stock complex.

The revisions to the NS1 Guidelines also dictate that fisheries undergoing overfishing have ACLs and AMs in place to end overfishing by 2010, and all fisheries to have ACLs and AMs in place to prevent or end overfishing by 2011. However, a stock or stock complex does not require an ACL or AM if it qualifies for any of several MSA-defined exceptions. The most important of these with respect to highly migratory species is the so-called "international exception" for stocks managed under an international agreement to which the United States is a party (§ 660.310(h)(2)(ii)). The international exception applies to stocks or stock complexes subject to management under an international agreement, which is defined as "any bilateral or multilateral treaty, convention, or agreement which relates to fishing and to which the United States is a party." The management unit species in the HMS FMP occur in the convention area of, and are subject to the conservation and management authority of the Inter-American Tropical Tuna Commission; furthermore most of the management unit species also occur in the convention area of, and are subject to the conservation and management authority of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean.

In April 2009, the Council initiated scoping under the National Environmental Policy Act for Amendment 2 of the HMS FMP to address the revised NS 1 Guidelines. Initial scoping focused principally on classification of stocks in the FMP as either "in the fishery" and subject to management or as ecosystem component (EC) species and the application of the "international exception" to HMS FMP MUS. At their April 2010 meeting, the Council reviewed the Highly Migratory Species Management Team's (HMSMT) recommendations for the range of alternatives and adopted a set of alternatives for public review. These alternatives were made available to the public in the form of a draft environmental assessment included in the briefing materials for the Council's June 2010 meeting. At their June 2010 meeting, the Council took final action to adopt a preferred alternative. The public had the opportunity to comment on the proposal, including the issues to be addressed and the range of alternatives, during Council and advisory body meetings.

In regard to classification of stocks in the FMP, the preferred alternative would reclassify bigeye thresher shark (*Alopias superciliosus*) and pelagic thresher shark (*A. pelagicus*) as EC species thereby reducing the current suite of MUS from 13 to 11. Bigeye and pelagic thresher sharks were included originally in the HMS FMP as MUS due to concern over their low resiliency to exploitation. The recommendation to drop them as MUS under this proposed action is based in part on the minor levels of west coast commercial and recreational catch that have been reported for these species since the FMP was implemented. However, given the presence of these species off the West Coast, particularly during El Nino warming periods, it was deemed appropriate to categorize them as EC species. One of the essential purposes behind identifying EC species is to monitor these species over time, periodically evaluate their status, and assess whether any management is needed under the FMP, in which case an EC species could be reclassified as MUS, which means they would be treated as "in the fishery." If Amendment 2 is approved, there would be eight EC species included in the FMP: the two thresher shark species (bigeye and pelagic) that are currently MUS, plus pelagic sting ray (*Dasyetis violacea*), wahoo (*Acathocybium solandri*), common mola (*Mola mola*), escolar (*Lepidocybium flavobrunneum*), lancetfishes (*Alepisauridae*), and louvar (*Luvarus imperialis*). The international exception to setting ACLs and AMs as described at 50 CFR 660.310(h)(2)(ii) would be applied to all eight of the managed species under the preferred alternative.

In regard to the process for revising numerical estimates of management reference points, the methods for determining MSY (or proxies), OY, and SDC are currently described in the HMS FMP. Existing numerical estimates of these quantities (shown in FMP Table 4–3) would be retained. However, upon receipt of any new information based on the best available science, the Council may adjust the numerical estimates of MSY, OY, and SDC periodically under the Council's management measure process. The process would involve the Council's HMSMT identifying the numerical estimates within the draft HMS Stock Assessment and Fishery Evaluation (SAFE) document that is submitted in June with the Council's SSC HMS subcommittee and then making a recommendation on their suitability. The Council would then decide whether to adopt updated numerical estimates of MSY and OY, which would be submitted as recommendations for NMFS to review as part of the management measure review process. This provides the Secretary the opportunity to review revised MSY and OY estimates. In this process, the Council takes final action in November and then NMFS engages in rulemaking to implement the specifications of any management measures proposed by the Council. The revised estimates of MSY, OY, and SDC would also be published in the annual HMS SAFE document. If, however, a regional fisheries management organization formally adopts reference points for the purpose of regional management for any of the HMS FMP managed species, these would generally take precedence. The Council would engage in a review process similar to that described above before adopting them as appropriate for domestic

management purposes under the HMS FMP.

Classification

NMFS has determined that the proposed rule is consistent with the HMS FMP and preliminarily determined that this proposed rule is consistent with the MSA and other applicable laws.

An Initial Regulatory Impact Review was conducted to analyze the potential economic impacts and costs of each proposed alternative under consideration, including the preferred alternative addressed in this proposed rule.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

Under the Regulatory Flexibility Act, the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed action is not expected to have any direct or indirect socioeconomic impacts, because harvest limits and management measures influencing ex-vessel revenue and personal income are not established under the range of alternatives considered. Instead, the proposed action amends the HMS FMP to modify the suite of MUS and to revise the framework and process used by the Council and NMFS to prevent overfishing on MUS. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: April 25, 2011.

John Oliver,

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

For the reasons set out in the preamble, 50 CFR part 660 is proposed to be amended as follows:

PART 660—FISHERIES OFF THE WEST COAST STATES

1. The authority citation for part 660 continues to read as follows:

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

2. In § 660.702, revise the definition of "Highly Migratory Species (HMS)" to read as follows:

§ 660.702 Definitions.

* * * * *

Highly Migratory Species (HMS) means species managed by the FMP, specifically:

Billfish/Swordfish:
- striped marlin (*Tetrapturus audax*)
- swordfish (*Xiphias gladius*)

Sharks:
- common thresher shark (*Alopias vulpinus*)
- shortfin mako or bonito shark (*Isurus oxyrinchus*)
- blue shark (*Prionace glauca*)

Tunas:
- north Pacific albacore (*Thunnus alalunga*)
- yellowfin tuna (*Thunnus albacares*)
- bigeye tuna (*Thunnus obesus*)
- skipjack tuna (*Katsuwonus pelamis*)
- northern bluefin tuna (*Thunnus orientalis*)

Other:
- dorado or dolphinfish (*Coryphaena hippurus*)

* * * * *

3. In § 660.709, revise paragraph (a) to read as follows:

§ 660.709 Annual specifications.

(a) *Procedure.* (1) In June of each year, the HMSMT will deliver a preliminary SAFE report to the Council for all HMS with any necessary recommendations for harvest guidelines, quotas or other management measures to protect HMS, including updated MSY and OY estimates based on the best available science. The Council's HMS Science and Statistical Committee will review the estimates and makes a recommendation on their suitability for management. The Council will review these recommendations and decide whether to adopt updated numerical estimates of MSY and OY, which are then submitted as recommendations for NMFS to review as part of the management measures review process.

(2) In September of each year, the HMSMT will deliver a final SAFE report to the Council. The Council will adopt any necessary harvest guidelines, quotas or other management measures including updated MSY and OY estimates if any for public review.

(3) In November each year, the Council will take final action on any necessary harvest guidelines, quotas, or other management measures including updated MSY and OY estimates if any and make its recommendations to NMFS.

(4) Based on recommendations of the Council, the Regional Administrator will approve or disapprove any harvest guideline, quota, or other management measure including updated MSY and OY estimates after reviewing such recommendations to determine compliance with the FMP, the Magnuson Act, and other applicable law. The Regional Administrator will implement through rulemaking any approved harvest guideline, quota, or other management measure adopted under this section.

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[FR Doc. 2011–10443 Filed 4–28–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[Docket No. 0808061074–81147–01]

RIN 0648–AW66

Fisheries in the Western Pacific; Pelagic Fisheries; Purse Seine Prohibited Areas Around American Samoa

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

ACTION: Proposed rule; request for comments.

SUMMARY: This proposed rule would establish 75-nautical mile (nm) purse seine fishing prohibited areas in the U.S. Exclusive Economic Zone (EEZ) around American Samoa. The proposed rule is intended to reduce catch competition between purse seine vessels and local trolling and longline fleets due to localized stock depletion by purse seine fishing, and minimize gear conflicts between the local longline fleet and domestic purse seine vessels. Currently, there are two 50 nm areas around American Samoa where large fishing vessels (50 ft and longer) are prohibited from fishing. The proposed rule would increase the distance from shore of these prohibited areas for U.S. purse seine vessels only.

DATES: Comments on the proposed rule must be received by June 13, 2011.

ADDRESSES: You may send a comment on this proposed rule, identified by 0648–AW66, to either of the following addresses:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal *http://www.regulations.gov;* or
- *Mail:* Michael D. Tosatto, Regional Administrator, NMFS, Pacific Islands Region (PIR), 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814–4700.

Instructions: You must send comments to one of the two addresses

above to ensure that the comments are received, documented, and considered by NMFS. Comments sent to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.) submitted voluntarily by the commenter may be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter "N/A" in the required name and organization fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

In March 2011, the Western Pacific Fishery Management Council (Council) prepared Amendment 3 to the Fishery Ecosystem Plan for Pelagic Fisheries of the Western Pacific Region (Pelagics FEP), which describes the issues this rule is intended to address. Amendment 3 also includes an environmental assessment (EA) of the action proposed in this rulemaking. Copies of Amendment 3 and the EA are available from *http://www.regulations.gov* or the Council, 1164 Bishop St., Suite 1400, Honolulu, HI 96813, tel 808–522–8220, fax 808–522–8226, *http://www.wpcouncil.org.*

FOR FURTHER INFORMATION CONTACT: Adam Bailey, Sustainable Fisheries Division, NMFS PIR, 808–944–2248.

SUPPLEMENTARY INFORMATION: Pelagic fisheries in the U.S. western Pacific are managed under the Pelagics FEP. The Council prepared Amendment 3 to the Pelagics FEP to address their concerns over potential localized stock depletion, and catch competition between purse seine vessels and the local longline and trolling fleets in the American Samoa Archipelago. This proposed rule would implement the Council's recommendations.

Because 2007 is the most recent year for which we have the most comprehensive information about purse seine activity in the EEZ around American Samoa, 2007 is used as the baseline year for analyzing the potential effects of this proposed rule. Although some more recent purse seine fishery information exists and more recent troll and longline fishery information beyond 2008 is available, the more recent information does not indicate that the areas fished, fishing effort, or landings differed substantially from those analyzed. Thus, inclusion of more recent information would not change the Council's analyses or management objectives. More recent troll and longline fishery information is included here for completeness.

Local pelagic trolling vessels target skipjack and yellowfin tunas in EEZ waters around American Samoa. These vessels are usually small (about 30 ft (9 m) long), fiberglass or aluminum, outboard-powered, twin-hulled "alia." Alias are not designed for traveling long distances from shore or holding large quantities of fish and are, therefore, limited to day trips in nearshore areas (less than 50 nm (93 km) from shore). From 1982 to 2008, an average of 25.5 metric tons (mt) (56,218 lb) of skipjack tuna and 11 mt (24,251 lb) of yellowfin tuna were caught annually by commercial trolling alia vessels in waters around American Samoa. These vessels may use other fishing methods, such as bottomfish fishing, during any given fishing trip.

Local pelagic longline vessels target albacore in the waters around American Samoa. Longline vessels include alias and larger monohull vessels, and range in length from 25 ft (8 m) to over 90 ft (27 m). The smaller longline alias usually fish within 50 nm of shore, and large longline vessels (50 ft (15.2 m) and longer) travel throughout the EEZ around American Samoa and beyond to fish. Longline gear is deployed in the morning, left to fish, and brought back on board starting in the late afternoon extending into the following morning. The main line averages 40 nm (74 km) in length, is deployed horizontally with floats at the surface, and drifts with the current. Individual vessels usually set one line per day. In 2008, large longline vessels made over 4,500 sets, and landed over 3,500 mt (7,716,181 lb) of albacore, and over 150 mt (330,693 lb) of non-target skipjack tuna.

In 2002, large vessel prohibited areas were established to prohibit large vessels from fishing in the EEZ within approximately 50 nm (93 km) around the islands of American Samoa (67 FR 4369, January 30, 2002). That measure was implemented to prevent gear interactions between small and large pelagic fishing vessels, and to reduce the chances of fish density and catch rate reductions within fishing grounds accessible to the small-scale troll and longline fleets. Reductions in fish density and catch rate could cause small vessels to travel farther to maintain catch rates, resulting in lost revenue due to increased expenses and possible safety-at-sea issues if vessels fish farther from port and for longer durations.

Like the local troll vessels, purse seine vessels also target skipjack tuna. Purse seine vessels are much larger, more sophisticated and more efficient. Tunas, along with other animals, such as pelagic fishes and sea turtles, tend to congregate to naturally-occurring floating objects in the ocean, such as mats of flotsam, logs, or garbage, which fishermen refer to as "fish aggregating devices" (FADs). Roughly half of historical domestic purse seine sets in the WCPO are made on FADs. FADs can be natural, with or without artificial augmentation such as floats, markers, or electronics, or man-made. One purse seine vessel can deploy many FADs to drift around the ocean, until sufficient quantities of fish are accumulated to them. Purse seines are then deployed near or around the FADs. Purse seine vessels currently operating in the western and central Pacific Ocean (WCPO) range in length from 191 to 293 ft (58 to 98 m), with an average length of 225 ft (68 m) and an average gross registered tonnage of 1,341 mt. Fish carrying capacities range from approximately 800 to 1,500 mt (1.8 to 3.3 million lb) per vessel. Recent U.S. purse seine catches of skipjack tuna in the WCPO increased from 60,600 mt (133 million lb) in 2007 to 242,000 mt (533 million lb) in 2009.

Purse seine fishing effort in American Samoa was sporadic from 1997 to 2007, with skipjack tuna catches ranging from zero to 152.2 mt (335,522 lb) and averaging 40.9 mt (90,125 lb) annually over this period. Catches of yellowfin tuna were smaller, ranging from zero to 20.8 mt (45,856 lb), and averaging 7.4 mt (16,314 lb) annually from 1997 to 2007. Conditions for purse seine fishing in EEZ waters around American Samoa are less favorable than other areas, and the average skipjack tuna catch per set is approximately 2.4 mt (5,308 lb). Most domestic purse seine fishing is conducted outside the EEZ around American Samoa, to the north and northwest.

Nevertheless, the Western and Central Pacific Fishery Commission has closed the two major high seas pockets in the western and central Pacific Ocean to all purse seine fishing, and the Pacific Island Parties to the Nauru Agreement are reportedly imposing increasingly stringent measures on distant water fishing nations as a condition of licensing, including bans on high seas fishing in certain areas. Accordingly, the Council is concerned about possible impacts, such as localized fish stock depletion, on other pelagic fisheries if U.S. purse seine vessels were to increase their activity in the EEZ around American Samoa near areas

traditionally fished by pelagic troll and longline vessels. Localized fish depletion occurs when a stock in a small area is reduced by the removal of large amounts of fish, thereby temporarily depleting the availability of the stock to fishing activity or other predators in that area. Research suggests that localized depletion may occur when purse seine fishing activity competes with small-scale fishing operations, triggering catch competition for a single resource in a limited area.

While targeting skipjack tuna, particularly around fish aggregating devices, purse seine vessels also catch juvenile yellowfin and bigeye tuna. Bigeye tuna are currently subject to overfishing, and the harvest of juvenile bigeye by purse seines contributes to recruitment overfishing. The impacts from an increase in juvenile catch of bigeye tuna in the action area could eventually reduce the number of mature fish in the population, thereby decreasing the number of fish reproduced. This reduction could also decrease the future availability of adult fish for fisheries that target adult bigeye tuna.

This proposed rule would create new prohibited areas only for purse seine vessels (see Fig. 1). Due to purse seine vessels' large skipjack tuna harvests, coupled with their inability to target only mature skipjack and potential impact on juvenile bigeye tuna, the Council is concerned that purse seine fishing in the EEZ around American Samoa has the potential to negatively impact the viability of American Samoa-based small-scale troll fishery. The proposed purse seine fishing prohibited areas are intended to reduce catch competition between purse seine vessels and the small-scale pelagic fleets, and provide some geographical separation between large longline and purse seine fishing sectors.

Large-scale longline and purse seine gear may drift and interfere with fishing operations; therefore, this proposed rule would create additional 25 nm (46 km) areas of exclusion for purse seine fishing to minimize gear conflicts. This proposed rule would prohibit all purse seine fishing within 75 nm (139 km) of American Samoa. All other measures currently applicable to the purse seine fishery would remain unchanged, including, but not limited to, the existing 50-nm large vessel prohibited areas, vessel and gear marking requirements, reporting requirements, vessel monitoring system (VMS), and the use of safe sea turtle handling techniques.

BILLING CODE 3510–22–P

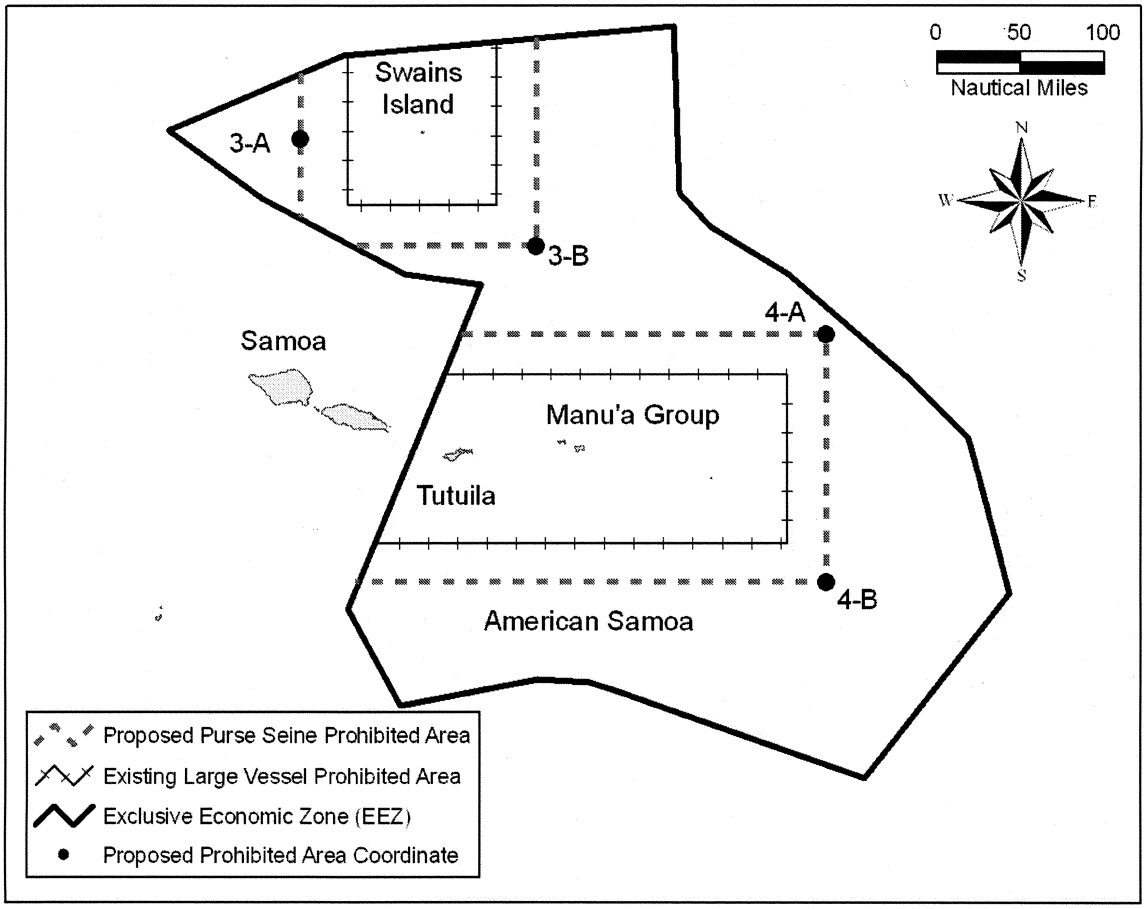

Figure 1. Proposed Purse Seine Fishing Prohibited Areas Around American Samoa.

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This proposed rule is intended to further the intent of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by ensuring the sustained participation of American Samoa's small troll and pelagic longline fishing fleets in the pelagic fisheries, along with

the continued operations of the domestic purse seine fleet in the EEZ around American Samoa.

NMFS notes that U.S. purse seine catches from the EEZ around American Samoa have been relatively small compared to the high seas and other areas. Accordingly, NMFS specifically invites public comments addressing whether the action is "necessary and appropriate" according to Magnuson-Stevens Act section 303(a)(1) to accomplish its identified conservation and management objectives, and the state of the science supporting the action.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the Pelagic FEP, other provisions of the Magnuson-Stevens Act, and other applicable laws, subject to further consideration after public comment.

The Chief Council for Regulation of the Department of Commerce certified to the Chief Council for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities, as follows:

"A description of the reasons why action by the agency is being considered and a statement of the objectives of, and legal basis for this rulemaking are found in the preamble to the proposed rule. There are no additional recordkeeping, reporting, or compliance requirements. There are no rules which may duplicate, overlap, or conflict with the proposed rule.

This rule would affect U.S. purse seine vessels licensed under the South Pacific Tuna Treaty. As of 2007, the last year when a complete data set was available, the fleet of U.S. purse seine vessels licensed under the South Pacific Tuna Treaty consisted of 21 vessels at the end of the 2007 calendar year, with only five of these vessels landing fish caught in the U.S. EEZ around American Samoa. By comparison, 37 U.S. purse seine vessels were licensed in the Pacific in 2008, 39 in 2009, and 37 in 2010. However, we have no information about the number of purse seiners that were active in the EEZ around American Samoa.

NMFS internal data reflect that most or all of the businesses that operated the 21 vessels were large entities. The average 1998 gross revenue per purse seine vessel was $4.7 million, equivalent to $6.1 million in 2009 dollars. Therefore, most or all of the 38 purse seine licenses in 2009–10 were held by large entities. NMFS recognizes that newly-permitted vessels may experience lower revenues during the start-up period, and may constitute small entities under the RFA, but it is expected that the purse seine provisions of the rule will only affect large entities. However, it is possible that only one or a few of these fish harvesting businesses met the criteria of small entities; that is, they are independently owned and operated and not dominant in their fields of operation, and have annual receipts of no more than $4.0 million. Since it is not possible to determine with any certainty how many small purse seine entities, if any, landed fish in American Samoa in 2007, no attempt is made here to determine whether a substantial number of small entities would be impacted by the proposed rule. Instead, this certification is based on a finding that the proposed rule would not have significant economic impacts on affected entities.

The proposed action is expected to benefit the local troll fleet by reducing the likelihood of catch competition and gear conflict. Because the proposed action is not expected to alter the current fishing practices of the troll fleet, it will not have a significant economic impact on the regulated entities.

The proposed action would extend the prohibited fishing areas for U.S. purse seine vessels from 50 to 75 nautical miles (nm) from shore. In 2006, (no purse seine vessels caught fish in 2007), five U.S. purse seine vessels landed a total of 2.7 metric tons (mt) of skipjack tuna and 6.3 mt of yellowfin tuna harvested from inside the U.S. EEZ around American Samoa, yielding an average of 0.54 mt of skipjack tuna and 1.26 mt of yellowfin tuna per vessel. Furthermore, a total of 43,335 mt of skipjack tuna and 8,821 mt of yellowfin tuna (with some bigeye tuna mixed in) were landed in Pago Pago in 2007 by 11 U.S. vessels averaging 3,940 mt ($4.73 million) per vessel of skipjack tuna and 802 mt ($962,000) per vessel of yellowfin tuna. Thus, gross receipts for skipjack and yellowfin tunas from the entire EEZ, of which the proposed 25-nm extended area is a subset, represented only 0.01 percent of total skipjack tuna landings, and a potential average loss of $473 per vessel (based on a price of $1,200 per mt) if this proposed rule were to prevent those landings. For yellowfin tuna, gross receipts represented only 0.16 percent of total landings and this rule, if implemented, could reduce gross receipts by $1,540 per vessel, or by a miniscule amount, necessarily making gross receipts from the extended area also miniscule if this proposed rule were to prevent those landings. Therefore, gross receipts and potential losses as a result of this rule from the extended area are negligible (less than or equal to $473 for skipjack and $1,540 for yellowfin). Although NMFS used the best and most recent data available on EEZ catch for 2006, NMFS also looked at an 11-year window from 1997–2007 and chose the two years, 1999 and 2001, with the highest EEZ catch by species, as representative of catch levels for purposes of this analysis. In 2001, 152.19 mt ($182,628) of skipjack tuna (15 vessels) and for 1999, 20.8 mt ($24,960) of yellowfin tuna (10 vessels) were harvested from the EEZ. For skipjack tuna, these average annual landings would equate to 10.1 mt per vessel, and 2.1 mt per vessel for yellowfin tuna.

Purse seine vessels are not likely to be negatively affected because approximately 19 percent of fishing effort (assuming an even effort distribution) would be displaced outside the proposed purse seine prohibited area to remaining open areas of the EEZ around American Samoa. Based on historical fishing effort, this means that under the proposed rule, 3.2 fishing days per year of effort that ordinarily would occur inside the proposed purse seine prohibited area could be displaced, and those purse seine vessels may incur more costs in terms of fuel and travel time. However, any impacts would be expected to be minimal due to historically low amounts of participation in the EEZ around American Samoa.

Additionally, there are no disproportionate economic impacts between large and small entities. Fishing activities for small trollers will not be altered under the proposed rule and these small entities may benefit from reduced catch competition and localized depletion. Therefore, for the reasons stated above, there will be no disproportionate effect on the profits, revenues, or costs on small entities relative to large entities."

As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

List of Subjects in 50 CFR Part 665

Administrative practice and procedure, American Samoa, Fishing, Purse seine.

Dated: April 26, 2011.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR chapter VI is proposed to be amended as follows:

PART 665—FISHERIES IN THE WESTERN PACIFIC

1. The authority citation for 50 CFR part 665 continues to read as follows:

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

2. In § 665.800, add a definition of "Purse seine" in alphabetical order to read as follows:

§ 665.800 Definitions.

* * * * *

Purse seine means a floated and weighted encircling net that is closed by means of a drawstring threaded through rings attached to the bottom of the net.

* * * * *

3. In § 665.802, add a new paragraph (n) to read as follows:

§ 665.802 Prohibitions.

* * * * *

(n) Use a purse seine to fish within a purse seine fishing prohibited area in violation of § 665.817, except as allowed pursuant to an exemption issued under § 665.17.

* * * * *

4. In § 665.817, add a new paragraph (d) to read as follows:

§ 665.817 American Samoa pelagic fishery area management.

* * * * *

(d) *Purse seine prohibited areas.* Purse seine fishing is prohibited in the American Samoa purse seine prohibited areas as defined in paragraphs (d)(1) and (d)(2) of this section.

(1) *Swains Island (AS–3).* The purse seine fishing prohibited area around Swains Island consists of the waters of the EEZ around American Samoa enclosed by straight lines connecting the following coordinates:

Point	S. latitude	W. longitude
AS–3–A	11°12′	172°18′
AS–3–B	12°12′	169°56′

and from Point AS–3–A northward and southward along longitude 172°18′ W. until intersecting the U.S. EEZ boundary with Tokelau and Samoa, respectfully, and from Point AS–3–B northward along longitude 169°56′ W. until intersecting the U.S. EEZ boundary with Tokelau, and westward along latitude 12°12′ S. until intersecting the U.S. EEZ boundary with Samoa.

(2) *Tutuila Island, Manua Islands, and Rose Atoll (AS–4).* The purse seine fishing prohibited area around Tutuila Island, the Manua Islands, and Rose Atoll consists of the waters of the EEZ around American Samoa enclosed by straight lines connecting the following coordinates:

Point	S. latitude	W. longitude
AS–4–A	13°05′	167°01′
AS–4–B	15° 36′	167° 01′

and from Point AS–4–A westward along latitude 13° 05' S. until intersecting the U.S. EEZ boundary with Samoa, and from Point AS–4–B westward along the latitude 15° 36' S. until intersecting the U.S. EEZ boundary with Samoa.

[FR Doc. 2011–10451 Filed 4–28–11; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 76, No. 83
Friday, April 29, 2011

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

April 26, 2011.

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) 720–8958.

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.

Food and Nutrition Service

Title: Special Nutrition Program Operations Study—Year 1.

OMB Control Number: 0584–NEW.

Summary of Collections: The objective of the Special Nutrition Program Operations Study (SNPOS) is to collect timely data on policies, administrative, and operational issues on the Child Nutrition Programs. The ultimate goal of the study is to analyze these data and provide input for new legislation on Child Nutrition Programs as well as to provide pertinent technical assistance and training to program implementation staff. This study is necessary to implement Section 28(a) (1) of the Richard B. Russell National School Lunch Act. This legislation directs the U.S. Department of Agriculture to carry out annual national performance assessments of the School Breakfast Program and the National School Lunch Program.

Need and Use of the Information: This study involves the development of an on-going modular data collection system for the collection of data policy and operational issues related to the Child Nutrition program operations. The finding from this study survey will be used to identify program operational and policy issues, and topic for technical assistance and training. The information will be collected from a nationally representative sample of School Food Authorities directors and State Agency Directors.

Description of Respondents: State, Local, or Tribal Government; not-for-profit institutions.

Number of Respondents: 1,831.

Frequency of Responses: Reporting; Other (One time).

Total Burden Hours: 2,765.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2011–10412 Filed 4–28–11; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Virginia Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Virginia Resource Advisory Committee will meet in Roanoke, Virginia. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the title II of the Act. The meeting is open to the public. The purpose of the meeting is for the committee to select the chairperson, operating guidelines, the next meeting date and location, and other administrative business.

DATES: The meeting will be held May 13, 2011, 9 a.m..

ADDRESSES: The meeting will be held at the George Washington and Jefferson National Forests Supervisor's Office conference room at 5162 Valleypointe Parkway, Roanoke, Virginia 24019. Written comments may be submitted as described under Supplementary Information.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at George Washington and Jefferson National Forest Supervisor's Office at 5162 Valleypointe Parkway, Roanoke, Virginia 24019. Please call ahead to 540–265–5100 to facilitate entry into the building to view comments.

FOR FURTHER INFORMATION CONTACT: Joanne Sanfilippo, Deputy Public Affairs Officer, Supervisor's Office, 540–265–5102, *jmsanfilippo@fs.fed.us.*

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 Standard Time, Monday through Friday. Requests for reasonable accommodation for access to the facility or proceedings may be made by contacting the person listed for further information.

SUPPLEMENTARY INFORMATION: Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. The agenda will include time

for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by May 9, 2011 to be scheduled on the agenda. Written comments and requests for time for oral comments must be sent to Joanne Sanfilippo, Public Affairs, George Washington and Jefferson National Forests Supervisor's Office at 5162 Valleypointe Parkway, Roanoke, Virginia 24019; or by e-mail to *jmsanfilippo@fs.fed.us,* or via facsimile to 540–265–5145.

Dated: April 25, 2011.

Kenneth G. Landgraf,

Acting Forest Supervisor.

[FR Doc. 2011–10380 Filed 4–28–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Juneau Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Juneau Resource Advisory Committee will meet in Juneau, AK. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the title II of the Act. The meeting is open to the public. The purpose is to hold the first meeting of the newly formed committee.

DATES: The meeting will be held on May 23, 2011, and will begin at 2 p.m.

ADDRESSES: The meeting will be held at the Juneau Federal Building, 709 W. 9th Street, Room 541a, Juneau, AK. Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION.**

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at Juneau Ranger District, 8510 Mendenhall Loop Road, Juneau, AK 99801. Please call ahead to 907–586–8800 to facilitate entry into the building to view comments.

FOR FURTHER INFORMATION CONTACT: Hannah Atadero, RAC Coordinator, PO Box 21628, Juneau, AK 99802; 907–586–8879; *hatadero@fs.fed.us.*

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 Standard Time, Monday through Friday. Requests for reasonable accomodation for access to the facility or procedings may be made by contacting the person listed For Further Information.

SUPPLEMENTARY INFORMATION: The following business will be conducted: (1) Introductions of all committee members, replacement members and Forest Service personnel. (2) Distribution of materials explaining the process for considering and recommending Title II projects; and (3) Selection of a chairperson by the committee members. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by May 13, 2011 to be scheduled on the agenda. Written comments and requests for time for oral comments must be sent to Hannah Atadero, Juneau Resource Advisory Committee, PO Box 21628, Juneau, AK 99802, or by e-mail to *hatadero@fs.fed.us,* or via facsimile to 907–586–7090.

Dated: April 22, 2011.

Marti M. Marshall,

Designated Federal Official

[FR Doc. 2011–10398 Filed 4–28–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Delta-Bienville Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Delta-Bienville Resource Advisory Committee will meet in Forest, Mississippi. The committee is meeting as 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 purpose of the meeting is to review and approve project proposals.

DATES: The meeting will be held on May 9, 2011, and will begin at 6 p.m.

ADDRESSES: The meeting will be held at the Bienville Ranger District Work Center, Hwy 501 South, 935A South Raleigh St, Forest, Mississippi 39074. Written comments should be sent to Michael T. Esters, Bienville Ranger District Office, 3473 Hwy 35 South, Forest, Mississippi 39074. Comments may also be sent via e-mail to *mesters@fs.fed.us,* or via facsimile to 601 469–2513.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at Bienville Ranger District Office, 3473 Hwy 35 South, Forest, Mississippi 39074. Visitors are encouraged to call ahead to 601 469–3811 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Nefisia Kittrell, RAC coordinator, USDA, Bienville Ranger District Office, 3473 Hwy 35 South, Forest, Mississippi; (601) 469–3811; e-mail *nkittrell@fs.fed.us.*

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 Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. The following business will be conducted: (1) Review and approve project proposals and recommendations. Persons who wish to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting.

Dated: April 25, 2011.

Michael T. Esters,

Designated Federal Officer.

[FR Doc. 2011–10400 Filed 4–28–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Notice of Proposed Changes to Section IV of the Virginia State Technical Guide

AGENCY: Natural Resources Conservation Service (NRCS), U.S. Department of Agriculture.

ACTION: ACTION: Notice of availability of proposed changes in the Virginia NRCS State Technical Guide for review and comment.

SUMMARY: It has been determined by the NRCS State Conservationist for Virginia that changes must be made in the NRCS State Technical Guide specifically in the following practice standards: #390,

Riparian Herbaceous Cover, #394, Firebreak, #395, Stream Habitat Improvement and Management, #422, Hedgerow Planting, #643, Restoration and Management of Rare or Declining Habitats, and #647, Early Successional Habitat Development/Management. These practices will be used to plan and install conservation practices.

DATES: Comments will be received for a 30-day period commencing with this date of publication.

FOR FURTHER INFORMATION CONTACT: John A. Bricker, State Conservationist, Natural Resources Conservation Service (NRCS), 1606 Santa Rosa Road, Suite 209, Richmond, Virginia 23229–5014; Telephone number (804) 287–1691; Fax number (804) 287–1737. Copies of the practice standards will be made available upon written request to the address shown above or on the Virginia NRCS Web site: *http://www.va.nrcs.usda.gov/technical/draftstandards.html.*

SUPPLEMENTARY INFORMATION: Section 343 of the Federal Agriculture Improvement and Reform Act of 1996 states that revisions made after enactment of the law to NRCS State technical guides used to carry out highly erodible land and wetland provisions of the law shall be made available for public review and comment. For the next 30 days, the NRCS in Virginia will receive comments relative to the proposed changes. Following that period, a determination will be made by the NRCS in Virginia regarding disposition of those comments and a final determination of change will be made to the subject standards.

Dated: April 22, 2011.

Chad E. Wentz,

Acting State Conservationist, Natural Resources Conservation Service, Richmond, Virginia.

[FR Doc. 2011–10437 Filed 4–28–11; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Proposed Information Collection; Comment Request; Special Iraqi Reconstruction License (SIRL) Supporting Documents

AGENCY: Bureau of Industry and Security, Commerce.

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 June 28, 2011.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 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 Larry Hall, BIS ICB Liaison, (202) 482–4895, *lhall@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The primary purpose of this collection of information is to maintain an expedited export license developed specifically for exports and reexports of controlled items, under the Export Administration Regulations, to civil infrastructure rebuilding projects in Iraq. The name given this expedited license is the Special Iraq Reconstruction License (SIRL). This collection provides for additional supporting documentation on the civil infrastructure project, project security, who retains control over the exported commodities, and sources of funding for the project, which are necessary for expedited review by the Government.

II. Method of Collection

Submitted electronically or paper.

III. Data

OMB Control Number: 0694–0129.

Form Number(s): None.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 5.

Estimated Time per Response: 3 minutes to 1 hour and 45 minutes.

Estimated Total Annual Burden Hours: 19.

Estimated Total Annual Cost to Public: $263.

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: April 26, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–10420 Filed 4–28–11; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Proposed Information Collection; Comment Request; Competitive Enhancement Needs Assessment Survey Program

AGENCY: Bureau of Industry and Security.

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 June 28, 2011.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 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 Larry Hall, BIS ICB Liaison, (202) 482–4895, *lhall@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The Defense Production Act of 1950, as amended, and Executive Order 12919, authorizes the Secretary of Commerce to assess the capabilities of the defense industrial base to support the national defense. They also develop policy alternatives to improve the

international competitiveness of specific domestic industries and their abilities to meet defense program needs. The information collected from voluntary surveys will be used to assist small- and medium-sized firms in defense transition and in gaining access to advanced technologies and manufacturing processes available from Federal laboratories. The goal is to improve regions of the country adversely affected by cutbacks in defense spending and military base closures.

II. Method of Collection

Submitted electronically.

III. Data

OMB Control Number: 0694–0083.

Form Number(s): None.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 2,400.

Estimated Time Per Response: 1 hour.

Estimated Total Annual Burden Hours: 2,400.

Estimated Total Annual Cost to Public: $0.

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: April 26, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–10419 Filed 4–28–11; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–351–838, A–533–840, A–570–893, A–549–822, A–552–802]

Certain Frozen Warmwater Shrimp From Brazil, India, the People's Republic of China, Thailand, and the Socialist Republic of Vietnam: Continuation of Antidumping Duty Orders

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determinations by the Department of Commerce (the Department) and the International Trade Commission (ITC) that revocation of the antidumping duty orders on certain frozen warmwater shrimp (shrimp) from Brazil, India, the People's Republic of China (PRC), Thailand, and the Socialist Republic of Vietnam (Vietnam) would be likely to lead to continuation or recurrence of dumping and of material injury to an industry in the United States within a reasonably foreseeable time, the Department is publishing notice of the continuation of these antidumping duty orders.

DATES: *Effective Date:* April 29, 2011.

FOR FURTHER INFORMATION CONTACT: Kate Johnson or David Goldberger, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4929 or (202) 482–4136, respectively.

SUPPLEMENTARY INFORMATION:

Background

On January 4, 2010, the Department initiated and the ITC instituted sunset reviews of the antidumping duty orders on shrimp from Brazil, India, the PRC, Thailand, and Vietnam, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act). *See Initiation of Five-Year ("Sunset") Review,* 75 FR 103 (January 4, 2010), and *Frozen Warmwater Shrimp From Brazil, China, India, Thailand, and Vietnam,* 75 FR 1078 (January 8, 2010).

The Department conducted expedited sunset reviews of the antidumping duty orders from Brazil, India, the PRC, and Thailand. As a result of its reviews, the Department found that revocation of the antidumping duty orders would be likely to lead to continuation or recurrence of dumping and notified the ITC of the magnitude of the margins likely to prevail were the orders to be revoked. *See Certain Frozen Warmwater Shrimp from Brazil, India, the People's Republic of China, and Thailand: Final Results of the Expedited Sunset Reviews of the Antidumping Duty Orders,* 75 FR 27299 (May 14, 2010). With respect to Vietnam, the Department conducted a full sunset review of the antidumping duty order and also found that revocation of the antidumping duty order would be likely to lead to continuation or recurrence of dumping and notified the ITC of the magnitude of the margins likely to prevail if the order were to be revoked. *See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of the First Five-year "Sunset" Review of the Antidumping Duty Order,* 75 FR 75965 (December 7, 2010).

Prior to the completion of the sunset reviews by the Department, on April 14, 2010, the United States Court of International Trade (CIT) sustained the remand redetermination issued by the Department pursuant to the CIT's remand order, which found that dusted shrimp should be included within the scope of the antidumping duty investigations of certain frozen warmwater shrimp from Brazil, Ecuador, India, the PRC, Thailand, and Vietnam.[1] On September 2, 2010, the Department published in the **Federal Register** the amended final determinations of certain frozen warmwater shrimp from Brazil, India, the PRC, Thailand, and Vietnam.[2]

On April 5, 2011, the ITC published its determination pursuant to section 751(c) of the Act, that revocation of the antidumping duty orders on shrimp from Brazil, India, the PRC, Thailand, and Vietnam would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See Frozen Warmwater Shrimp From Brazil, China, India, Thailand, and Vietnam,* 76 FR 18782 (April 5, 2011). The ITC also found the domestic like product to include dusted shrimp. *See id.* at footnote 22. On April 18, 2011, the Department amended the antidumping duty orders to include dusted shrimp within the scope of the orders.[3]

[1] *See Ad Hoc Shrimp Trade Action Committee* v. *United States,* 703 F. Supp. 2d 1330 (CIT 2010).

[2] *See Certain Frozen Warmwater Shrimp From Brazil, India, the People's Republic of China, Thailand, and the Socialist Republic of Vietnam: Notice of Amended Final Determinations of Sales at Less Than Fair Value Pursuant to Court Decision,* 75 FR 53947 (September 2, 2010).

[3] *Certain Frozen Warmwater Shrimp from Brazil, India, the People's Republic of China, Thailand, and the Socialist Republic of Vietnam: Amended Antidumping Duty Orders in Accordance with Final*

Scope of the Orders

The scope of the orders includes certain warmwater shrimp and prawns, whether frozen, wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,[4] deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of these orders, regardless of definitions in the Harmonized Tariff Schedule of the United States ("HTS"), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn *(Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp *(Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of these orders. In addition, food preparations (including dusted shrimp), which are not "prepared meals," that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of these orders.

Excluded from the scope are: (1) Breaded shrimp and prawns (HTS subheading 1605.20.10.20); (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled (HTS subheadings 0306.23.00.20 and 0306.23.00.40); (4) shrimp and prawns in prepared meals (HTS subheading 1605.20.05.10); (5) dried shrimp and prawns; (6) Lee Kum Kee's shrimp sauce;[5] (7) canned warmwater shrimp and prawns (HTS subheading 1605.20.10.40); and 8) certain battered shrimp. Battered shrimp is a shrimp-based product: (1) That is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a "dusting" layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and (5) that is subjected to individually quick frozen ("IQF") freezing immediately after application of the dusting layer. When dusted in accordance with the definition of dusting above, the battered shrimp product is also coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products covered by these orders are currently classified under the following HTS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24, 0306.13.00.27, 0306.13.00.40, 1605.20.10.10, and 1605.20.10.30. These HTS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of these orders is dispositive.

Continuation of the Orders

As a result of the determinations by the Department and the ITC that revocation of the antidumping duty orders would be likely to lead to continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, the Department hereby orders the continuation of the antidumping duty orders on shrimp from Brazil, India, the PRC, Thailand, and Vietnam.

U.S. Customs and Border Protection will continue to collect antidumping duty cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of continuation of these orders will be the date of publication in the **Federal Register** of this notice of Continuation. Pursuant to section 751(c)(2) of the Act, the Department intends to initiate the next five-year reviews of these orders not later than March 2016.

These five-year (sunset) reviews and this notice are in accordance with sections 751(c) and 777(i)(1) of the Act.

Date: April 22, 2011.

Paul Piquado,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 2011–10427 Filed 4–28–11; 8:45 am]

BILLING CODE 3510–DS–P

Court Decision, signed April 18, 2011 (to be published).

[4] "Tails" in this context means the tail fan, which includes the telson and the uropods.

[5] The specific exclusion for Lee Kum Kee's shrimp sauce applies only to the scope in the PRC case.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–475–818]

Certain Pasta From Italy: Notice of Partial Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* April 29, 2011.

FOR FURTHER INFORMATION CONTACT: Joy Zhang 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) 482–1168 or (202) 482–1167, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 1, 2010, the Department of Commerce ("the Department") published a notice of opportunity to request an administrative review of the antidumping duty order on certain pasta from Italy.[1] Pursuant to requests from interested parties, the Department published in the **Federal Register** the notice of initiation of this antidumping duty administrative review with respect to the following companies for the period July 1, 2009, through June 30, 2010: Agritalia S.r.L. ("Agritalia"), Domenico Paone fu Erasmo S.p.A. ("Erasmo"), Industria Alimentare Colavita, S.p.A. ("Indalco"), Labor S.r.L. ("Labor"), Molino e Pastificio Tomasello, S.p.A. ("Tomasello"), PAM. S.p.A. and its affiliate, Liguori Pastificio dal 1820 SpA ("PAM"), P.A.P. SNC Di Pazienza G.B. & C. ("P.A.P."), Premiato Pastificio Afeltra S.r.L. ("Afeltra"), Pasta Zara SpA ("Zara"), Pastificio Di Martino Gaetano & F.lli SpA ("Di Martino"), Pastificio Fabianelli S.p.A. ("Fabianelli"), Pastificio Felicetti SrL ("Felicetti"), Pastificio Lucio Garofalo S.p.A. ("Garofalo"), Pastificio Riscossa F.lli

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 75 FR 38074 (July 1, 2010).

Mastromauro S.p.A. ("Riscossa"), Rummo S.p.A. Molino e Pastificio ("Rummo"), and Rustichella d'Abruzzo S.p.A ("Rustichella").[2]

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.

Partial Rescission of the 2009–2010 Administrative Review

On September 13, 2010, the Department announced its intention to select mandatory respondents based on U.S. Customs and Border Protection ("CBP") data.[3] On October 10, 2010, the Department selected Garofalo and Tomasello as mandatory respondents.[4] On November 12, 2010, counsel for Afeltra, Agritalia, Di Martino, Felicetti, Labor, PAM, Erasmo, P.A.P., Riscossa, Rustichella, and Zara (collectively "certain non-mandatory respondents") requested that the Department extend the deadline to withdraw from the instant review for 45 days. On November 24, 2010, the Department declined to modify the 90-day deadline for parties to withdraw their requests for review. *See* the Department's letter to counsel for the certain non-mandatory respondents, dated November 24, 2010. On November 29, 2010, Di Martino, Felicetti, and Zara withdrew their requests for a review.

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 August 31, 2010. *See Initiation Notice.* Di Martino, Felicetti, and Zara's withdrawal of their requests for a review falls within the 90-day deadline. No other party requested an administrative review of these particular companies. Therefore, in accordance with 19 CFR 351.213(d)(1), and consistent with our practice, we are rescinding this review of the antidumping duty order on certain pasta from Italy, in part, with respect to Di Martino, Felicetti, and Zara.[5] The instant review will continue with respect to Agritalia, Erasmo, Indalco, Labor, Tomasello, PAM, P.A.P., Afeltra, Fabianelli, Garofalo, Riscossa, Rummo, and Rustichella.

Assessment

The Department will instruct CBP to assess antidumping duties on all appropriate entries. For the companies for which this review is rescinded, Di Martino, Felicetti, and Zara, antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, during the period July 1, 2009, through June 30, 2010, in accordance with 19 CFR 351.212(c)(1)(i).

The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of this notice.

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 doubled antidumping duties.

Notification Regarding Administrative Protective Order

This notice serves as a final reminder to parties subject to administrative protective orders ("APOs") of their responsibility concerning the disposition of proprietary information disclosed under an APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: April 25, 2011.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–10426 Filed 4–28–11; 8:45 am]

BILLING CODE 3510–DS–P

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Initiation of Administrative Review,* 75 FR 53274, (August 31, 2010) ("*Initiation Notice*").

[3] *See* Memorandum from Christopher Hargett to Melissa Skinner titled "Customs and Border Protection Data for Selection of Respondents for Individual Review," dated September 13, 2010.

[4] *See* Memorandum from Christopher Hargett to Melissa Skinner titled "Selection of Respondents for Individual Review," dated October 10, 2010.

[5] *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); *see also Carbon Steel Butt-Weld Pipe Fittings from Thailand: Rescission of Antidumping Duty Administrative Review*, 74 FR 7218 (February 13, 2009).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–805]

Certain Pasta From Turkey: Notice of Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to a request from petitioners [1] to conduct an administrative review of Marsan Gida Sanayi ve Ticaret A.S. (Marsan), the

[1] New World Pasta Company, American Italian Pasta Company, and Dakota Growers Pasta Company (collectively, petitioners).

Department of Commerce (the Department) initiated an administrative review of the antidumping duty order on certain pasta (pasta) from Turkey. The period of review (POR) is July 1, 2009, through June 30, 2010. As discussed below, we preliminarily find that Marsan was not a producer of subject merchandise during the POR. In addition, because the producer of subject merchandise, Birlik Paz. San. ve Tic. A.S. (Birlik), had knowledge that the pasta it produced and sold to Marsan was destined for the United States, we preliminarily determine that Marsan had no reviewable entries during the POR.

Interested parties are invited to comment on these preliminary results. We intend to issue the final results no later than 120 days from the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act).

DATES: *Effective Date:* April 29, 2011.

FOR FURTHER INFORMATION CONTACT: Stephanie Moore or Cindy Robinson, 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 and (202) 482–3797, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 24, 1996, the Department published in the **Federal Register** the antidumping duty order on pasta from Turkey. *See Notice of Antidumping Duty Order and Amended Final Determination of Sales at Less Than Fair Value: Certain Pasta From Turkey,* 61 FR 38545 (July 24, 1996) (*Amended Final Determination*). On July 1, 2010, we published in the **Federal Register** the notice of "Opportunity to Request Administrative Review" of this order. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 75 FR 38074 (July 1, 2010). On July 30, 2010, we received a request from petitioners to review Marsan, in accordance with 19 CFR 351.213(b)(1). On August 31, 2010, we published the notice of initiation of review of Marsan (successor-in-interest to Gidasa Sabanci gida Sanayi ve Ticaret ("Gidasa")). *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Initiation of Administrative Review,* 75 FR 53274 (August 31, 2010); *see also Certain Pasta from Turkey: Notice of Final Results of Antidumping Duty Changed Circumstances Review,* 74 FR 26373 (June 2, 2009) (determining that Marsan is the successor-in-interest to Gidasa in the antidumping duty proceeding).

The Department disregarded sales that failed the cost test during the most recently completed segment of the proceeding in which this company participated.[2] Therefore, pursuant to section 773(b)(2)(A)(ii) of the Act, we had reasonable grounds to believe or suspect that sales by this company of the foreign like product under consideration for the determination of normal value in this review were made at prices below the cost of production. Thus, we initiated a cost investigation of Marsan at the time we initiated the antidumping review.

On September 15, 2010, we sent the antidumping duty questionnaire for Sections A through D to Marsan. Marsan submitted its response to the initial questionnaire for Sections A through D on November 12, 2010. From December 3, 2010, to February 15, 2011, supplemental questionnaires were issued to Marsan, and responses were submitted to the Department from December 10, 2010, to March 9, 2011. In its response to Section D, Marsan submitted cost information on behalf of Birlik. On April 12, 2010, the Department extended the time limit for the preliminary results of this proceeding until no later than May 4, 2011.[3]

Period of Review

The POR covered by this review is July 1, 2009, through June 30, 2010.

Scope of Review

Imports covered by this review are shipments of certain non-egg dry pasta in packages of five pounds (2.27 kilograms) or less, whether or not enriched or fortified or containing milk or other optional ingredients such as chopped vegetables, vegetable purees, milk, gluten, diastases, 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 review 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.

The merchandise subject to review is currently classifiable under item 1902.19.20 of the *Harmonized Tariff Schedule of the United States* (*HTSUS*). Although the *HTSUS* subheading is provided for convenience and customs purposes, the written description of the merchandise subject to the order is dispositive.

Whether Marsan Is Affiliated With the Producer

Marsan asserts that it is affiliated with the producer of subject merchandise, Birlik, part of the larger Ulker group business structure, because a principal shareholder of MGS Marmara Gida San. ve Tic. A.S. (MGS), Marsan's holding company, is also a shareholder in BIM Birlesik Magazalar (BIM). BIM is owned 12 percent by Ulker Biskuvi, which is also an Ulker group company. *See* November 12, 2010, questionnaire response at 9. Marsan argues that, under the Department's rules for affiliation, because the owner of Marsan is affiliated with the Ulker group, Marsan is also affiliated with the Ulker group.

Marsan states that prior to November 2008, it owned and operated the Hendek facility in Hendek, Turkey and produced pasta at that facility. On November 4, 2008, Marsan leased the entire Hendek facility to Birlik. Under the lease agreement, Marsan contracted with Birlik to produce PIYALE pasta (Marsan's brand) until November 2009. Marsan argues that, although it retained ownership of the assets in the Hendek facility as of November 2008, Birlik took over the pasta production and became Marsan's sole supplier. *See* January 24, 2011, questionnaire response at 7. In December 2009, Marsan sold the durum wheat milling equipment and the pasta production equipment to the company Olkusan (renamed Bellini in April 2010), which is also an Ulker group company. *See* November 12, 2010, questionnaire response at 5. Marsan continued ownership of the Hendek facility buildings and silos as well as the soft wheat milling equipment, which Marsan had continued to lease to Birlik until June 1, 2010. In June 2010, Marsan leased all of its assets in the Hendek facility to Bellini. Bellini then contracted with Birlik for Birlik to continue pasta production. *See id.*

Marsan asserts that the Ulker group exercised control-in-fact over Marsan because Marsan increasingly lost its independence, first by selling the durum mill and pasta plant to Olkusan/

[2] The administrative review covering the period July 1, 1998, through June 30, 1999, was the most recently completed review for Marsan's predecessor. *See Notice of Final Results of Antidumping Duty Administrative Review: Certain Pasta from Turkey,* 64 FR 69493 (December 13, 1999).

[3] *See Certain Pasta From Turkey: Extension of Time Limit for the Preliminary Results of Antidumping Duty Administrative Review,* 76 FR 20312 (April 12, 2011).

Bellini (an Ulker group company). Marsan further asserts that the Ulker group exercises full operational and strategic control over Birlik with respect to the brands sold by Birlik, Birlik's customers (Birlik is a supplier only to Marsan and to Ulker group companies), and Birlik's product line. Marsan argues that because, it is co-dependent on Birlik, the Ulker group effectively exercises considerable control over Marsan's domestic sales activities. *See* November 12, 2010, questionnaire response at 12.

Marsan surmises that even if there were no intertwining of activities, the mere fact of cross-ownership between the owner of MGS and the Ulker Group, coupled with the potential for mutual influence inherent in the sole supplier/customer relationship between Marsan and Birlik/Bellini, compels the conclusion that the parties are affiliated for antidumping purposes.

The Department preliminary finds that Marsan and Birlik are not affiliated under section 771(33) of the Act. Pursuant to section 771(33) of the Act, an affiliated person may be: (A) a family member; (B) an officer or director of an organization; (C) partners; (D) employers and their employees; (E) any person or organization directly or indirectly owning, controlling, or holding with power to vote, five percent or more of the outstanding voting stock or shares of any organization and that organization; (F) two or more persons who directly or indirectly control, are controlled by, or are under common control with, any person; and (G) any person who controls any other person and such other person.

To determine affiliation between companies, the Department must find at least one of the criteria above is applicable to the respondent. As defined by section 771(33) of the Act, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person. Section 351.102(b)(3) of the Department's regulations provides that in finding affiliation based on control, the Department will, among other factors, consider (i) corporate or family groupings; (ii) franchise or joint venture agreements; (iii) debt financing; and (iv) close supplier relationships. In determining whether control exists, the Department does not require evidence of the actual exercise of control by one party over another party. Rather, we focus upon one party's ability to control the other.[4] In the present case, we do not find the existence of an affiliation, as defined by the statute, between Marsan and Birlik. First, the evidence on the record shows that there is no direct cross-ownership between Marsan and Birlik. The only ownership the parties have in common is that the majority owner of Marsan's parent company and Birlik's parent company each own shares in BIM, a third party. *See id.,* at 9. Thus, nothing about this ownership creates affiliation pursuant to section 771(33) of the Act. Due to the proprietary nature of this issue, *see* Preliminary Results Memorandum to Melissa G. Skinner, Office Director, AD/CVD Operations 3 from the Team regarding Marsan's Affiliation, dated April 4, 2011.

We preliminarily find that Marsan's argument of affiliation based on control and a close supplier relationship between Marsan and Birlik do not meet the standards for affiliation based on a close supplier relationship, within the meaning of section 771(33)(G) of the Act. Section 771(33)(G) of the Act defines an affiliated party as "any person who controls any other person and such other person." Section 771(33) of the Act states further that "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person."

The Statement of Administrative Action (SAA) defines a close supplier relationship as one where "the supplier or buyer becomes reliant upon another."[5] To establish a close supplier relationship, the party must demonstrate that the "relationship is so significant that it could not be replaced."[6] The Department's regulations at 19 CFR 351.102(b), states that such a relationship must have the potential to impact decisions concerning the production, pricing or cost of the subject merchandise or foreign like product. In *Stainless Steel Wire Rod,* for instance, the Department found a close supplier relationship between two companies based on the fact that the purchaser, whose operations were almost exclusively dependent upon finishing unfinished stainless steel wire rod (also known as black coil), was not able to obtain suitable black coil from sources other than the supplier in question.[7]

The information on the record of this case does not support Marsan's argument of affiliation based on control and a close supplier relationship between Marsan and Birlik. The record indicates that during the POR, Marsan and Birlik entered into a lease and contract production agreement. Under the terms of the agreement, Marsan leased its Hendek pasta production facility to Birlik for a fee, and Birlik produced and sold PIYALE pasta (Marsan's brand) to Marsan. *See* November 12, 2010, questionnaire response at 5–6, and Exhibit 2. Although Birlik acts as Marsan's sole supplier under the terms of the contract production agreement, Birlik produces pasta for other companies in the Ulker group. *See id. See also* January 24, 2011, questionnaire response at 7.

Although Marsan argues that the Ulker group exercises full operational and strategic control over Birlik with respect to its product line and its customers, there is no record evidence that Birlik determined the types of pasta it produces for Marsan or that Marsan was fully inhibited to purchase pasta from other suppliers. Nothing in the contract production agreement between Marsan and Birlik indicates that either party could control the pricing of the other party. *See* November 12, 2010, questionnaire response at Exhibit 2. To the extent that the production agreement between Marsan and Birlik can be considered an exclusive sales contract, the Department has previously recognized such a commercial arrangement to be "common" in that it is typically made at arm's length and does not normally indicate control of one party over the other.[8] Moreover, the Court of International Trade has held that, even where there are exclusive sales contracts, the Department has properly found that such contracts alone were insufficient to support an affiliation finding.[9]

Because there is no evidence on the record that indicates that Birlik or any other company in the Ulker group had the ability to control Marsan or that a

[4] *See Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27297–98 (May 19, 1997) (*Final Rule*).

[5] SAA accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, vol. 1 at 838 (1994); *see also Notice of Preliminary Determination of Sales at Less Than Fair Value: Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation,* 65 FR 1139, 1142–43 (January 7, 2000), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value; Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation,* 65 FR 42669 (July 11, 2000).

[6] *Id.*

[7] *Stainless Steel Wire Rod from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review,* 71 FR 59739, 59739–59740 (October 11, 2006), unchanged in *Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review,* 72 FR 6528 (February 12, 2007) (*Stainless Steel Wire Rod*).

[8] *See Honey from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review,* 70 FR 38872 (July 6, 2005), and accompanying Issues and Decision Memorandum at Comment 11.

[9] *See Hontex Enterprises, Inc.* v. *United States,* 342 F. Supp. 1225, 1243 (Ct. Int'l Trade 2004).

close supplier relationship exists, we preliminarily determine that there is no affiliation between Marsan and Birlik.

Whether the Producer Had Knowledge of Destination

Marsan states that, should the Department find that Marsan and the Ulker group are not related, then Marsan would not be the proper respondent because it is not the manufacturer. *See* November 12, 2010, questionnaire response at 12.

Marsan explains that after it confirms the pro-forma invoice, the order information is entered into the computer system, and Birlik has access to this module of Marsan's computer system. Birlik then produces the merchandise, loads it onto the container, and prepares the "Shipping Advice" on Marsan's letterhead, which accompanies the merchandise from the Hendek facility to the port of export. *See* March 1, 2011, questionnaire response at 2. Marsan states that Birlik knows that the pasta sold to Marsan for exportation to the United States is destined for the United States. *See Id.,* at 4. Marsan also states that Birlik is familiar with the brands that Marsan exports to the United States, and that Marsan informs Birlik of the destinations for its export orders. *See id.*

The Department's review of information on the record shows that Marsan did not produce the subject merchandise and it was not the first party in the transaction chain to have knowledge that the merchandise was destined for the United States. The record also shows that the shipments of the merchandise at issue were produced by Birlik and that Birlik had knowledge of the destination of the exports. Therefore, it is appropriate to apply the reseller policy, as follows:

> As described in the October 15, 1998, *Federal Register* notice, automatic liquidation at the cash-deposit rate required at the time of entry can only apply to a reseller which does not have its own rate if no administrative review has been requested, either of the reseller or of any producer of merchandise the reseller exported to the United States. If the Department conducts a review of a producer of the reseller's merchandise where entries of the merchandise were suspended at the producer's rate, automatic liquidation will not apply to the reseller's sales. If, in the course of an administrative review, the Department determines that the producer knew, or should have known, that the merchandise it sold to the reseller was destined for the United States, the reseller's merchandise will be liquidated at the producer's assessment rate which the Department calculates for the producer in the review. If, on the other hand, the Department determines in the administrative review that the producer did not know that the merchandise it sold to the reseller was destined for the United States, the reseller's merchandise will not be liquidated at the assessment rate the Department determines for the producer or automatically at the rate required as a deposit at the time of entry. In that situation, the entries of merchandise from the reseller during the period of review will be liquidated at the all others rate if there was no company-specific review of the reseller for that review period.[10]

The Court of International Trade upheld the Department's reseller policy in *Parkdale Int'l, Ltd.* v. *United States,* 508 F. Supp. 2d 1338, 1343–44 (Ct. Int'l Trade 2007) (*Parkdale*). In its decision, the Court described the Department's reseller policy, including the producer's knowledge of whether its product was destined for the United States as a critical factor in determining the appropriate dumping duty rate:

> If a review is requested for a reseller, Commerce will cease to assume that the producer was aware of the reseller's entries, and set a rate specific to the reseller if Commerce determines it was unaffiliated with a producer. If someone requests a review of a producer, Commerce will determine whether the producer in question was aware of the ultimate destination of sales to a given reseller. If Commerce discovers that the producer was aware of the destination of a sale to a reseller, Commerce will find that the producer set the price of sale into the United States and assess antidumping duties accordingly. If, however, Commerce finds that a producer is unaware of the ultimate destination of the sales to a reseller, it can no longer rely on its prior assumption to apply the producer's assessment rate calculated during the administrative review.

Id. at 1343–44. In affirming the Department's reseller policy, the Court held that the policy permissibly filled a gap in the Department's automatic assessment regulation, 19 CFR 351.212(c), which the Court described as applying "only to entries that are not covered by the request for review; it says nothing about entries that were covered by the request for review, but are not within the scope of the final results of the review." *Id.* at 1353. The Court further explained:

> To require Commerce to adhere to a producer's cash deposit rate in liquidating entries, even after it discovers that the assumption upon which the use of that rate was based is false, would not result in the rate the reseller should have received, *i.e.,* the "proper rate." * * * Under the *Reseller Policy,* Commerce has chosen to apply the rate the reseller would have been assigned had Commerce initially known that the reseller, rather than the producer, was the first party in the commercial chain to know of the destination of the merchandise. Use of the all others rate most closely adheres to Commerce's policy of setting antidumping duty rates based on the first entity in the commercial chain that has knowledge of the destination of the subject merchandise. Thus, the all others rate is the "proper rate."

Id.

In light of the principles affirmed in *Parkdale* and our preliminary findings that Birlik and not Marsan was the producer of the subject pasta and that Birlik had knowledge that the pasta was destined for the United States, we preliminarily find that application of the reseller policy is appropriate and that liquidation of entries corresponding to pasta produced by Birlik should not occur at the cash deposit rate applicable to Marsan at the time of entry.

Preliminary Results of Review

As noted above, we preliminarily determine that Marsan was not the first party in the transaction chain to have knowledge that the merchandise was destined for the United States, and thus Marsan is not considered the exporter of subject merchandise during the POR for purposes of this review. In accordance with the 1997 regulations concerning no shipment respondents, the Department's practice had been to rescind the administrative review.[11] As a result, in such circumstances, we normally instruct U.S. Customs and Border Protection (CBP) to liquidate any entries from the no-shipment company at the deposit rate in effect on the date of entry. However, in our May 6, 2003, "automatic assessment" clarification, we explained that, where respondents in an administrative review demonstrate that they had no knowledge of sales through resellers to the United States, we would instruct CBP to liquidate such entries at the all-others rate applicable to the proceeding. *See Assessment of Antidumping Duties.*

The Department preliminary finds that Marsan had no shipments to the United States during the POR for which it was the first party with knowledge of U.S. destination. Because "as entered" liquidation instructions do not alleviate the concerns which the May 2003, clarification was intended to address, we find it appropriate in this case to instruct CBP to liquidate any existing entries of merchandise produced by Birlik and exported by Marsan at the rate applicable to Birlik, *i.e.,* the all others rate from the investigation. *See, e.g., Certain Frozen Warmwater Shrimp from India: Partial Rescission of*

[10] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954, 23954 (May 6, 2003) (*Assessment of Antidumping Duties*).

[11] *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27393 (May 19, 1997).

Antidumping Duty Administrative Review, 73 FR 77610, 77612 (December 19, 2008). In addition, the Department finds that it is more consistent with the May 2003 clarification not to rescind the review in these circumstances but, rather, to complete the review with respect to Marsan and issue appropriate instructions to CBP based on the final results of the review. *See Magnesium Metal From the Russian Federation: Final Results of Antidumping Duty Administrative Review,* 75 FR 56989, 56989–56990 (September 17, 2010). *See also* the *Assessment Rates* section of this notice below.

Disclosure

The Department will disclose these preliminary results to the parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Comments

Interested parties are invited to comment on the preliminary results and may submit case briefs and/or written comments within 30 days of the date of publication of this notice. *See* 19 CFR 351.309(c)(1)(ii). Rebuttal briefs, limited to issues raised in the case briefs, will be due five days later, pursuant to 19 CFR 351.309(d). Parties who submit case or rebuttal briefs in this proceeding are requested to submit with each argument (1) a statement of the issue, and (2) a brief summary of the argument. Parties are requested to provide a summary of the arguments not to exceed five pages and a table of statutes, regulations, and cases cited. *See* 19 CFR 351.309(c)(2). Additionally, parties are requested to provide their case brief and rebuttal briefs in electronic format (*e.g.,* Microsoft Word, pdf, etc.). Interested parties, who wish to request a hearing or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration within 30 days of the date of publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. *See* 19 CFR 351.310(c). Issues raised in the hearing will be limited to those raised in case and rebuttal briefs. The Department will issue the final results of this review, including the results of its analysis of issues raised in any such written briefs or at the hearing, if held, not later than 120 days after the date of publication of this notice.

Assessment Rates

The Department intends to issue appropriate assessment instructions directly to CBP 15 days after the publication of the final results of this review.

Normally, the Department instructs CBP to liquidate any entries from the no-shipment producer at the deposit rate in effect on the date of entry. However, in this case, because there was only a request for review of the reseller and not the producer, we intend to liquidate entries at the producer's rate. However, because Birlik does not have its own rate, we intend to instruct CBP to liquidate entries at the "all others" rate from the investigation of 51.49 percent, in accordance with the reseller policy.

Cash Deposit Requirements

The following deposit rates will be effective upon publication of the final results of this administrative review for all shipments of certain pasta from Turkey entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act for Marsan, and for previously reviewed or investigated companies, the cash deposit rate will continue to be the company-specific rate published for the most recent final results in which that manufacturer or exporter participated; (2) if the exporter is not a firm covered in these reviews, a prior review, or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent final results for the manufacturer of the merchandise; and (3) if neither the exporter nor the manufacturer is a firm covered in this or any previous review or the LTFV conducted by the Department, the cash deposit rate will be 51.49 percent, the all-others rate established in the LTFV. *See Amended Final Determination.* These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and countervailing 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 and countervailing duties occurred and the subsequent assessment of double antidumping and countervailing duties.

These preliminary results of review are issued and published in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.221(b)(4).

Dated: April 22, 2011.

Paul Piquado,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 2011–10434 Filed 4–28–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–904]

Certain Activated Carbon From the People's Republic of China: Preliminary Results of the Third Antidumping Duty Administrative Review, and Preliminary Rescission in Part

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce ("Department") is conducting the third administrative review of the antidumping duty order on certain activated carbon from the People's Republic of China ("PRC") for the period April 1, 2009, through March 31, 2010. The Department has preliminarily determined that sales have been made below normal value ("NV") by the respondents examined in this administrative review. If these preliminary results are adopted in our final results of this review, the Department will instruct U.S. Customs and Border Protection ("CBP") to assess antidumping duties on all appropriate entries of subject merchandise during the period of review.

DATES: *Effective Date:* April 29, 2011.

FOR FURTHER INFORMATION CONTACT: Bob Palmer or Katie Marksberry, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–9068 or (202) 482–7906, respectively.

SUPPLEMENTARY INFORMATION:

Background

The Department received timely requests from Petitioners [1] and certain PRC and other companies, in accordance with 19 CFR 351.213(b), during the anniversary month of April, to conduct a review of certain activated carbon exporters from the PRC. On May 28, 2010, and June 30, 2010, the

[1] Collectively, Norit Americas Inc. ("Norit") and Calgon Carbon Corporation.

Department initiated this review with respect to all requested companies with the exception of ten companies for which Petitioners did not demonstrate that they had made a reasonable attempt to serve the request for review as required by the Department in 19 CFR 351.303(f)(3)(ii), nor did they explain satisfactorily why they desired a review of these ten companies, as required by 19 CFR 351.213(b)(1).[2]

On June 15, 2010, Petitioners withdrew the request for review with respect to 157 of the 192 companies under review. On August 11, 2010, the Department published a notice of rescission in the **Federal Register** for those 157 companies for which the request for review was withdrawn.[3] On July 8, 2010, Petitioners withdrew the request for review with respect to an additional 17 companies. On August 23, 2010, the Department published a second notice of rescission in the **Federal Register** for those 17 companies.[4] Eighteen companies remain subject to this review.[5] On July 27, 2010, Ningxia Lingzhou Foreign Trade Co., Ltd. ("Lingzhou") submitted a letter certifying it had no shipments during the period of review ("POR").[6] On October 6, 2010, the Department published a notice[7] extending the time period for issuing the preliminary results by 120 days to April 30, 2011.[8]

Albemarle's Status as an Interested Party

On April 30, 2010, Albemarle Corporation ("Albemarle") requested a review of Calgon Carbon (Tianjin) Co., Ltd. ("CCT"). On May 27, 2010, Petitioners submitted comments disputing Albemarle's status as a domestic interested party. On June 2, 2010, the Department issued a questionnaire to Albemarle requesting further information regarding its status as a wholesaler of the domestic like product. Albemarle submitted its response to the Department's questionnaire on June 18, 2010. Petitioners submitted additional comments regarding Albemarle's response on June 28, 2010. On August 11, 2010, the Department sent an additional questionnaire to Albemarle requesting further information regarding its status as a wholesaler of the domestic like product. Albemarle submitted its response on August 18, 2010. On August 26, 2010, CCT submitted comments in response to Albemarle's additional questionnaire response, and on August 27, 2010, Norit submitted comments as well.

The Department considered Petitioners' comments, CCT's comments, and Albemarle's submissions and determined that Albemarle is a "wholesaler in the United States of a domestic like product." Therefore, under section 771(9)(C) of the Tariff Act of 1930, as amended ("the Act"), the Department found that Albemarle is a domestic interested party, and its request for a review of CCT is proper pursuant to 19 CFR 351.213(b).[9] We have not received additional comments regarding Albemarle's status as an interested party; therefore, we continue to find that Albemarle's request for a review of CCT was proper.

Respondent Selection

Section 777A(c)(1) of the Act directs the Department to calculate individual dumping margins for each known exporter or producer of the subject merchandise.[10] However, section 777A(c)(2) of the Act gives the Department discretion to limit its examination to a reasonable number of exporters or producers, if it is not practicable to examine all exporters or producers for which the review is initiated.

On May 28, 2010, the Department released CBP data for entries of the subject merchandise during the POR under administrative protective order ("APO") to all interested parties having access to materials released under APO inviting comments regarding the CBP data and respondent selection. On June 4, 2010, the Department extended the deadline for comments regarding the CBP data. The Department received comments and rebuttal comments between June 7, 2010, and June 14, 2010.

On July 21, 2010, the Department issued its respondent selection memorandum after assessing its resources, considering the number of individual exporters of certain activated carbon for which a review had been requested, and determining that it could reasonably examine two of the exporters subject to this review.[11] Pursuant to section 777A(c)(2)(B) of the Act, the Department selected Jacobi Carbons AB ("Jacobi") as a mandatory respondent. On September 29, 2010, based on the determination that Albemarle Corporation is an interested party in this review, the Department issued an additional respondent selection memorandum selecting CCT as a mandatory respondent.[12]

Petitioners' Allegations of Third-Country Sales Made by Jacobi

On October 12, 2010, and November 1, 2010, Petitioners submitted comments requesting that the Department require Jacobi to revise its Section C database to include sales of subject merchandise that Petitioners allege were sold through Jacobi's affiliate in Sri Lanka. On November 9, 2010, the Department issued a letter to Petitioners acknowledging that the Department has the authority to address allegations of transshipment based on section 781(b) of the Act, which allows for the prevention of circumvention of

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 75 FR 29976 (May 28, 2010); *see also Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 75 FR 37759 (June 30, 2010) (collectively, "*Initiation Notices*").

[3] *See Certain Activated Carbon From the People's Republic of China: Notice of Partial Rescission of Antidumping Duty Administrative Review,* 75 FR 48644 (August 11, 2010).

[4] *See Certain Activated Carbon from the People's Republic of China: Notice of Partial Rescission of Antidumping Duty Administrative Review,* 75 FR 51754 (August 23, 2010).

[5] These companies are: Beijing Pacific Activated Carbon Products Co., Ltd., Calgon Carbon (Tianjin) Co., Ltd., Datong Juqiang Activated Carbon Co., Ltd., Datong Municipal Yungang Activated Caron Co., Ltd., Datong Yunguang Chemicals Plant, Hebei Foreign Trade and Advertising Corporation, Jacobi Carbons AB, Ningxia Guanghua Cherishment Activated Carbon Co., Ltd., Ningxia Huahui Activated Carbon Co., Ltd., Ningxia Lingzhou Foreign Trade Company, Shanxi DMD Corporation, Shanxi Newtime Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Shanxi Industry Technology Trading Co., Ltd., Tangshan Solid Carbon Co., Ltd., Tianjin Jacobi International Trading Co. Ltd., Tianjin Maijin Industries Co., Ltd., and United Manufacturing International (Beijing) Ltd.

[6] Companies have the opportunity to submit statements certifying that they did not ship the subject merchandise to the United States during the POR.

[7] *See Certain Activated Carbon From the People's Republic of China: Extension of Time Limits for Preliminary Results of the Third Antidumping Duty Administrative Review,* 75 FR 61697 (October 6, 2010).

[8] Because April 30, 2011, is a Saturday, the actual deadline for issuing the preliminary results falls on May 2, 2011, the next business day.

[9] For further discussion of Albemarle's status as a domestic interested party, *see* Memorandum to James Doyle, Director, AD/CVD Operations, Office 9, through Catherine Bertrand, Program Manager, AD/CVD Operation Office 9, from Katie Marksberry, International Trade Specialist, AD/CVD Operations, Office 9; Re: Antidumping Duty Administrative Review of Certain Activated Carbon from the People's Republic of China: Selection of Additional Mandatory Respondent, dated September 29, 2010 ("Additional Respondent Selection Memo").

[10] *See also* 19 CFR 351.204(c) regarding respondent selection, in general.

[11] *See* Memorandum to James Doyle, Director, AD/CVD Operations, Office 9, from Kabir Archuletta and Jamie Blair-Walker, International Trade Compliance Analysts, Office 9; Antidumping Duty Administrative Review of Certain Activated Carbon from the PRC: Selection of Respondents for Individual Review, dated July 21, 2010.

[12] *See* Additional Respondent Selection Memo.

antidumping duty orders for merchandise completed or assembled in other foreign countries, and 19 CFR 351.225(h), which states how the Department handles scope inquiries related to "products completed or assembled in other foreign countries," in accordance with section 781(b) of the Act. However, the Department concluded that it would not request Jacobi to revise its Section C database to include sales of subject merchandise allegedly sold through Jacobi's Sri Lankan affiliate. As upheld by the Court of International Trade ("CIT") in *Globe Metallurgical* [13] affirming the Department's remand from *Silicon Metal,* [14] where a party has placed evidence on the record of an administrative review to support allegations of transshipment involving third-country processing, it is the Department's practice to consider such allegations through a scope or anti-circumvention inquiry rather than within the context of an administrative review.[15]

On November 16, 2010, Petitioners filed additional comments asking the Department to reconsider its decision. Petitioners argued that this case differs from *Globe Metallurgical* in a number of ways. Specifically, Petitioners noted that in this case, unlike in *Globe Metallurgical:* (1) The Department has a substantial database of sales by Jacobi that are subject to review; (2) the third-country supplier is affiliated with Jacobi and the Department has the ability to require it to participate; (3) the Department has sufficient time and resources to examine the additional sales and circumstances; (4) there are suspended entries upon which the Department can assess antidumping duties; (5) the question of Jacobi's potential transshipment is best explored within the context of an administrative review; and (6) the Department should exercise the authority to examine Jacobi's third-country sales to ensure that companies do not transship their highest margin sales to manipulate margins in administrative reviews.

At this time, the Department continues to find that although the Department does have the authority to investigate allegations of transshipment within the context of an administrative review, we have determined that an administrative review is not the best context for addressing the type of allegations that Petitioners have brought to the Department. Specifically, we continue to find, as we did in the *Globe Metallurgical* remand, that evaluating and verifying additional information relating to a circumvention allegation creates an overwhelming burden in an administrative review. Therefore, as previously stated, it is the Department's practice that where a party has placed evidence on the record of an administrative review to support allegations of transshipment involving third-country processing, a scope or anti-circumvention inquiry is the proper venue and we will not consider it within the context of an administrative review. Furthermore, where the allegation concerns transshipment that does not involve third-country processing, such an allegation should be directed to CBP, which is the proper authority to investigate claims of mislabeling country-of-origin. Therefore, although the Department intends to seek additional information from Jacobi in order to ensure that its Section C database includes the full universe of its POR sales of subject merchandise, we are not requiring Jacobi to revise its Section C questionnaire responses or databases to include sales of merchandise from Sri Lanka for these preliminary results.[16]

Questionnaires

On July 21, 2010, the Department issued its initial non-market economy ("NME") antidumping duty questionnaire to the mandatory respondent Jacobi. On September 30, 2010, the Department issued its initial NME antidumping duty questionnaire to the mandatory respondent CCT. CCT and Jacobi timely responded to the Department's initial and subsequent supplemental questionnaires between August 2010 and February 2011.

Period of Review

The POR is April 1, 2009, through March 31, 2010.

Scope of the Order

The merchandise subject to the order is certain activated carbon. Certain activated carbon is a powdered, granular, or pelletized carbon product obtained by "activating" with heat and steam various materials containing carbon, including but not limited to coal (including bituminous, lignite, and anthracite), wood, coconut shells, olive stones, and peat. The thermal and steam treatments remove organic materials and create an internal pore structure in the carbon material. The producer can also use carbon dioxide gas (CO_2) in place of steam in this process. The vast majority of the internal porosity developed during the high temperature steam (or CO_2 gas) activated process is a direct result of oxidation of a portion of the solid carbon atoms in the raw material, converting them into a gaseous form of carbon.

The scope of the order covers all forms of activated carbon that are activated by steam or CO_2, regardless of the raw material, grade, mixture, additives, further washing or post-activation chemical treatment (chemical or water washing, chemical impregnation or other treatment), or product form. Unless specifically excluded, the scope of the order covers all physical forms of certain activated carbon, including powdered activated carbon ("PAC"), granular activated carbon ("GAC"), and pelletized activated carbon.

Excluded from the scope of the order are chemically activated carbons. The carbon-based raw material used in the chemical activation process is treated with a strong chemical agent, including but not limited to phosphoric acid, zinc chloride, sulfuric acid or potassium hydroxide, that dehydrates molecules in the raw material, and results in the formation of water that is removed from the raw material by moderate heat treatment. The activated carbon created by chemical activation has internal porosity developed primarily due to the action of the chemical dehydration agent. Chemically activated carbons are typically used to activate raw materials with a lignocellulosic component such as cellulose, including wood, sawdust, paper mill waste and peat.

To the extent that an imported activated carbon product is a blend of steam and chemically activated carbons, products containing 50 percent or more steam (or CO_2 gas) activated carbons are within the scope, and those containing more than 50 percent chemically activated carbons are outside the scope. This exclusion language regarding blended material applies only to mixtures of steam and chemically activated carbons.

Also excluded from the scope are reactivated carbons. Reactivated carbons are previously used activated carbons that have had adsorbed materials removed from their pore structure after use through the application of heat, steam and/or chemicals.

Also excluded from the scope is activated carbon cloth. Activated carbon

[13] *See Globe Metallurgical Inc.* v. *United States,* 722 F. Supp. 2d 1372 (Ct. Int'l Trade Sept. 1, 2010).

[14] *See* Silicon Metal from the People's Republic of China, April 8, 2010, remanded from *Globe Metallurgical, Inc.* v. *United States,* Court No. 08–00290 (December 18, 2009).

[15] *See* letter to Calgon Carbon Corporation and Norit Americas Inc., from James C. Doyle, Director, Office 9, re: Third Administrative Review of Certain Activated Carbon from the People's Republic of China, dated November 9, 2010.

[16] However, we will refer Petitioners' transshipment allegations to CBP.

cloth is a woven textile fabric made of or containing activated carbon fibers. It is used in masks and filters and clothing of various types where a woven format is required.

Any activated carbon meeting the physical description of subject merchandise provided above that is not expressly excluded from the scope is included within the scope. The products subject to the order are currently classifiable under the Harmonized Tariff Schedule of the United States ("HTSUS") subheading 3802.10.00. Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

Preliminary Partial Rescission

As discussed in the "Background" section above, Lingzhou filed a no shipment certification indicating that it did not export subject merchandise to the United States during the POR. In order to examine this claim, we reviewed the CBP data used for respondent selection and found no discrepancies with the statement made by Lingzhou. Additionally, we sent an inquiry to CBP asking if any CBP office had any information contrary to the no shipments claim and requesting CBP alert the Department of any such information within ten days of receiving our inquiry. CBP received our inquiry on October 6, 2010. We have not received a response from CBP with regard to our inquiry which indicates that CBP did not have information that was contrary to the claim of Lingzhou. Therefore, because the record indicates that Lingzhou did not export subject merchandise to the United States during the POR, we are preliminarily rescinding this administrative review with respect to this company.[17]

Non-Market Economy Country Status

In every case conducted by the Department involving the PRC, the PRC has been treated as an NME country. In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority.[18] None of the parties to this proceeding has contested such treatment. Accordingly, the Department continues to treat the PRC as an NME and calculated NV in accordance with section 773(c) of the Act, which applies to NME countries. When the Department investigates imports from an NME country and available information does not permit the Department to determine NV, pursuant to section 773(a) of the Act, then, pursuant to section 773(c)(1), the Department determines NV on the basis of the factors of production ("FOP") utilized in producing the merchandise.

Surrogate Country

Section 773(c)(4) of the Act, directs the Department to value an NME producer's FOPs, to the extent possible, in one or more market-economy countries that (1) are at a level of economic development comparable to that of the NME country, and (2) are significant producers of comparable merchandise. Pursuant to this statutory directive, the Department determined that India, Indonesia, the Philippines, Colombia, Thailand, and Peru are countries comparable to the PRC in terms of economic development.[19]

On September 28, 2010, the Department sent interested parties a letter inviting comments on surrogate country selection and information regarding valuing FOPs.[20] On January 14, 2011, the Department received information to value FOPs from CCT, Jacobi, and Petitioners. The Department did not receive any rebuttal surrogate value comments. All of the surrogate values placed on the record were obtained from sources in India. No parties provided comments with respect to selection of a surrogate country.

Based on publicly available information placed on the record (*e.g.,* production data), the Department determines India to be a reliable source for surrogate values because India is at a comparable level of economic development to the PRC pursuant to section 773(c)(4) of the Act, is a significant producer of subject merchandise, and has publicly available and reliable data for which to value the respondents' FOPs. Accordingly, the Department has selected India as the surrogate country for purposes of valuing the FOPs because it meets the Department's criteria for surrogate country selection.

Facts Available

Sections 776(a)(1) and 776(a)(2) of the Act provide that, if necessary information is not available on the record, or if an interested party: (A) Withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested subject to sections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Section 782(c)(1) of the Act provides that if an interested party "promptly after receiving a request from [the Department] for information, notifies [the Department] that such party is unable to submit the information in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information," the Department may modify the requirements to avoid imposing an unreasonable burden on that party.

Section 782(d) of the Act provides that, if the Department determines that a response to a request for information does not comply with the request, the Department will inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person the opportunity to remedy or explain the deficiency. If that person submits further information that continues to be unsatisfactory, or this information is not submitted within the applicable time limits, the Department may, subject to section 782(e) of the Act, disregard all or part of the original and subsequent responses, as appropriate.

Section 782(e) of the Act states that the Department shall not decline to consider information deemed "deficient" under section 782(d) if: (1) The information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability in

[17] *See, e.g., Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results and Partial Rescission of the Third Antidumping Duty Administrative Review,* 72 FR 53527, 53530 (September 19, 2007), unchanged in *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and Partial Rescission,* 73 FR 15479, 15480 (March 24, 2008).

[18] *See Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the 2004/2005 Administrative Review and Notice of Rescission of 2004/2005 New Shipper Review,* 71 FR 66304 (November 14, 2006).

[19] *See* Memorandum to Catherine Bertrand, Program Manager, AD/CVD Operations, Office 9, Import Administration, from Carole Showers, Director, Office of Policy, Import Administration re: Request for a List of Surrogate Countries for an Administrative Review of the Antidumping Duty Order on Certain Activated Carbon ("Carbon") from the People's Republic of China ("PRC"), dated September 21, 2010.

[20] *See* the Department's Letter to All Interested Parties; Third Administrative Review of Certain Activated Carbon from the People's Republic of China: Deadlines for Surrogate Country and Surrogate Value Comments, dated September 28, 2010.

providing the information and meeting the requirements established by the Department; and (5) the information can be used without undue difficulties.

However, section 776(b) of the Act states that if the Department "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission * * *, in reaching the applicable determination under this title, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available."[21] Adverse inferences are appropriate "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *Id.* An adverse inference may include reliance on information derived from the petition, the final determination in the investigation, any previous review, or any other information placed on the record. *See* section 776(b) of the Act.

Jacobi's Excluded Producers

On August 2, 2010, Jacobi requested to be excused from reporting FOP data for certain Chinese producers. On August 9, 2010, Petitioners submitted comments on Jacobi's request. On August 13, 2010, the Department notified Jacobi that due to the large number of producers that supplied Jacobi during the POR, Jacobi would be excused from reporting certain FOP data.[22] Specifically, the Department did not require Jacobi to report FOP data for its five smallest producers. Additionally, the Department notified Jacobi that it was not required to report FOP data for products that were purchased and not produced by Jacobi's suppliers, as indicated in Jacobi's August 2, 2010 letter. Thus, the Department determined that upon Jacobi's acceptance of the exclusion terms, the Department would determine the appropriate facts available to apply, in lieu of the actual FOP data, to the corresponding U.S. sales of subject merchandise.

CCT's Excluded Producers

On October 14, 2010, CCT requested to be excused from reporting FOP data for certain Chinese producers as well as FOP data for products that were produced prior to the POR, but were sold during the POR. On October 29, 2010, the Department notified CCT that due to the large number of producers that supplied CCT during the POR, CCT would be excused from reporting certain FOP data.[23] Specifically, the Department did not require CCT to report FOP data for its eight smallest producers. Additionally, the Department notified CCT that it was not required to report FOP data for products that were purchased and not produced by CCT's suppliers, as indicated in CCT's October 14, 2010 letter. Furthermore, the Department notified CCT that it would not be required to report FOP data for products that were produced prior to the POR, except for those products blended by CCT during the current POR. Thus, the Department determined that upon CCT's acceptance of the exclusion terms, the Department would determine the appropriate facts available to apply, in lieu of the actual FOP data, to the corresponding U.S. sales of subject merchandise.

In accordance with section 776(a)(1) of the Act, the Department is applying facts available to determine the NV for the sales corresponding to the FOP data that Jacobi and CCT were excused from reporting. As facts available, the Department is applying the calculated average normal value of Jacobi and CCT's reported sales to the sales produced by the excluded producers. These issues are addressed in separate company-specific memoranda where a detailed explanation of the facts available calculation is provided.[24]

Separate Rates

A designation of a country as an NME remains in effect until it is revoked by the Department.[25] In proceedings involving NME countries, it is the Department's practice to begin with a rebuttable presumption that all companies within the country are subject to government control and thus should be assessed a single antidumping duty rate.[26]

In the *Initiation Notices,* the Department notified parties of the application process by which exporters and producers may obtain separate rate status in NME reviews.[27] It is the Department's policy to assign all exporters of merchandise subject to investigation in an NME country this single rate unless an exporter can affirmatively demonstrate that it is sufficiently independent so as to be entitled to a separate rate.[28] Exporters can demonstrate this independence through the absence of both *de jure* and *de facto* government control over export activities.[29] The Department analyzes each entity exporting the subject merchandise under a test arising from the *Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China,* 56 FR 20588 (May 6, 1991) ("*Sparklers*"), as further developed in *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China,* 59 FR 22585 (May 2, 1994) ("*Silicon Carbide*"). However, if the Department determines that a company is wholly foreign-owned or located in a market economy ("ME"), then a separate rate analysis is not necessary to determine whether it is independent from government control.[30]

Excluding the companies selected for individual review, the Department received separate rate applications or certifications from the following companies: Beijing Pacific Activated Carbon Products Co., Ltd.; Datong Municipal Yunguang Activated Carbon Co., Ltd.; Ningxia Guanghua Cherishment Activated Carbon Co., Ltd.; Ningxia Huahui Activated Carbon Co., Ltd. ("Huahui"); Shanxi DMD Corporation; Shanxi Sincere Industrial Co., Ltd.; Shanxi Industry Technology Trading Co., Ltd.; Tangshan Solid Carbon Co., Ltd.; and Tianjin Maijin Industries Co., Ltd.

Additionally, the Department received completed responses to the

[21] *See also Statement of Administrative Action accompanying the Uruguay Round Agreements Act,* H.R. Rep. No. 103–316, Vol. 1, at 870 (1994) ("*SAA*"), reprinted in 1994 U.S.C.C.A.N. 4040, 4198–99.

[22] *See* the Department's Letter to Jacobi dated August 13, 2010.

[23] *See* the Department's letter to CCT dated October 29, 2010.

[24] *See* Memorandum to Catherine Bertrand, Program Manager, AD/CVD Operations, Office 9, from Katie Marksberry, Case Analyst, AD/CVD Operations, Office 9: Preliminary Results Analysis Memorandum for Jacobi Carbons AB in the Antidumping Duty Administrative Review of Certain Activated Carbon from the People's Republic of China, dated concurrently with this notice ("Jacobi Prelim Analysis Memo"); *see also* Memorandum to Catherine Bertrand, Program Manager, AD/CVD Operations, Office 9, from Bob Palmer, Case Analyst, AD/CVD Operations, Office 9: Preliminary Results Analysis Memorandum for Calgon Carbon (Tianjin) Co. in the Antidumping Duty Administrative Review of Certain Activated Carbon from the People's Republic of China, dated concurrently with this notice ("CCT Prelim Analysis Memo").

[25] *See* section 771(18)(c)(i) of the Act.

[26] *See Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China,* 71 FR 53079, 53080 (September 8, 2006); *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China,* 71 FR 29303, 29307 (May 22, 2006).

[27] *See Initiation Notices.*

[28] *See id.*

[29] *See id.*

[30] *See, e.g., Final Results of Antidumping Duty Administrative Review: Petroleum Wax Candles from the People's Republic of China,* 72 FR 52355, 52356 (September 13, 2007).

Section A portion of the NME questionnaire from CCT and Jacobi, which contained information pertaining to the companies' eligibility for a separate rate. However, Datong Juqiang Activated Carbon Co., Ltd.; Datong Yunguang Chemicals Plant; Hebei Foreign Trade and Advertising Corporation; Shanxi Newtime Co., Ltd.; and United Manufacturing International (Beijing) Ltd.; companies upon which the Department initiated administrative reviews that have not been rescinded, did not submit either a separate-rate application or certification. Therefore, because Datong Juqiang Activated Carbon Co., Ltd.; Datong Yunguang Chemicals Plant; Hebei Foreign Trade and Advertising Corporation; Shanxi Newtime Co., Ltd.; and United Manufacturing International (Beijing) Ltd. did not demonstrate their eligibility for separate rate status in a timely manner, we have determined it is appropriate to consider these companies as part of the PRC-wide entity.

Ningxia Huahui Activated Carbon Co., Ltd.'s Status as a Separate Rate Company

On December 23, 2010, Huahui submitted its separate rate application to the Department.[31] On January 3, 2011, Petitioners submitted comments on Huahui's application.[32] On January 21, 2011, the Department issued a supplemental questionnaire to Huahui regarding its separate rate application, and on February 22, 2011, Huahui submitted its response to the Department.[33] On March 3, 2011, Petitioners submitted additional comments to the Department regarding Huahui's application for a separate rate.[34] On March 11, 2011, the Department issued a second supplemental questionnaire to Huahui regarding its separate rate application, and on March 23, 2011, Huahui submitted a response to the Department.[35] On April 5, 2011, Petitioners submitted additional comments on Huahui's second supplemental questionnaire.

The Department has analyzed Huahui's separate rate application and supplemental responses and, for these preliminarily results, we find that Huahui has demonstrated both *de jure* and *de facto* independence from the PRC government with respect to its export activities. Consistent with the Department's requirements on exporters requesting a separate rate, Huahui placed numerous documents on the record that have been examined for these preliminary results. Specifically, Huahui demonstrated an absence of *de jure* government control by the absence of restrictive stipulations associated with its business license and export certificate of approval, and through submission of pertinent legislative enactments that protect the operational and legal independence of companies incorporated in the PRC.[36] With respect to *de facto* government control, Huahui: (1) Certified that its export prices are neither set by or subject to the approval of a government agency;[37] (2) placed on the record documents that demonstrate an absence of government control over the negotiation and signing of contracts including documents related to price negotiation for U.S. sales, and complete sales and export documentation;[38] (3) certified that it retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits and financing of losses and provided financial statements with record evidence from its Articles of Association demonstrating the independent distribution of profit;[39] and (4) certified that it has autonomy from all levels of government and government entities in making decisions regarding the selection of management and placed on the record its Articles of Association, a number of board resolutions and an internal management selection proposal, which demonstrate the independent selection of management by the Board of Directors.[40]

Although Petitioners have argued that Huahui should be denied a separate rate because it does not fulfill the criteria for establishing autonomy from *de facto* government control of its selection of management and disposition of profits, the evidence on the record of this review demonstrates that Huahui does have the ability, and has exercised its ability, to appoint its managers and control the disposition of its profits through its Board of Directors. With respect to the selection of management, the Department has previously found that management selected and appointed by an independent board of directors is sufficiently removed from government-controlled shareholders for the purpose of demonstrating the absence of *de facto* government control.[41] Furthermore, the Articles of Association submitted by Huahui clearly state that its shareholders have the right to approve profit distributions by voting according to the number of shares owned.[42] In this case, Petitioners have provided information that addresses speculative and potential control by government entities over Huahui, which the Department has found is not sufficient evidence to support denying a separate rate.[43] There is no evidence on the record of actual government control of individual export decisions of Huahui during the POR, or evidence demonstrating that government owned or controlled shareholders actually controlled the selection of Huahui's management in greater proportion to their proportion of the voting shares. Furthermore, the Department has previously determined that government ownership alone does not warrant denying a company a separate rate.[44] Therefore, based on an analysis of all of the information placed on the record of this review by Huahui and Petitioners, we preliminarily find that Huahui is eligible for a separate rate, and we are granting Huahui separate rate status for these preliminary results.

[31] *See* Separate Rate Application of Ningxia Huahui Activated Carbon Co., Ltd., dated December 23, 2010, ("Huahui Separate Rate Application").

[32] *See* Letter from Petitioners to the Department re: Third Administrative Review of the Antidumping Duty Order on Certain Activated Carbon from the People's Republic of China: Petitioners' Initial Comments on Ningxia Huahui's Separate Rate Application, dated January 3, 2011.

[33] *See* Huahui's Supplemental Questionnaire Regarding the December 23, 2010 Separate Rate Application of Ningxia Huahui Activated Carbon Co., Ltd., dated February 22, 2011.

[34] *See* Letter from Petitioners to the Department re: Third Administrative Review of the Antidumping Duty Order on Certain Activated Carbon from the People's Republic of China: Petitioners' Pre-Preliminary Comments on Ningxia Huahui's Separate Rate Application, dated March 3, 2011.

[35] *See* Huahui's Second Supplemental Questionnaire Regarding the December 23, 2010 Separate Rate Application of Ningxia Huahui Activated Carbon Co., Ltd., dated March 23, 2011 ("Huahui Second Separate Rate Supplemental").

[36] *See* Huahui Separate Rate Application at 8–11 and Exhibits 5 and 6.

[37] *See id.* at 17.

[38] *See id.* at Exhibits 2 and 3.

[39] *See id.* at 20 and Exhibits 9 and 11.

[40] *See id.* at 13 and Exhibit 13; *see also* Huahui Second Separate Rate Supplemental at 2–3 and Exhibits 1 and 2.

[41] *See Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances,* 73 FR 40485 (July 15, 2008) and accompanying Issues and Decision Memorandum at Comment 25.

[42] *See* Huahui Second Separate Rate Supplemental at 9; *see also* Huahui Separate Rate Application at Exhibit 9.

[43] *See Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 74 FR 14514 (March 31, 2009), and accompanying Issues and Decision Memorandum at Comment 11.

[44] *See e.g.* Lightweight Thermal Paper From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 73 FR 57329 (October 2, 2008) and accompanying Issues and Decision Memorandum at Comment 7.

Separate Rate Recipients

1. Wholly Foreign-Owned

Jacobi reported that it is wholly owned by a company located in an ME country, Sweden.[45] Additionally, CCT reported that it is wholly owned by a company located in the United States.[46] Therefore, there is no PRC ownership of Jacobi or CCT and, because the Department has no evidence indicating that Jacobi or CCT are under the control of the PRC, a separate rates analysis is not necessary to determine whether they are independent from government control.[47] Additionally, one of the exporters under review not selected for individual review, Tangshan Solid Carbon Co., Ltd., demonstrated in its separate-rate certification that it is 100 percent market-economy foreign owned.[48] Accordingly, the Department has preliminarily granted separate rate status to Jacobi, CCT, and Tangshan Solid Carbon Co. Ltd.

2. Joint Ventures Between Chinese and Foreign Companies or Wholly Chinese-Owned Companies

Eight [49] of the separate rate applicants in this administrative review stated that they are either joint ventures between Chinese and foreign companies or are wholly Chinese-owned companies. In accordance with its practice, the Department has analyzed whether the separate-rate applicants have demonstrated the absence of *de jure* and *de facto* governmental control over their respective export activities.

a. Absence of De Jure Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) An absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) any other formal measures by the government decentralizing control of companies.[50] The evidence provided by the eight separate rate applicants supports a preliminary finding of *de jure* absence of government control based on the following: (1) An absence of restrictive stipulations associated with the individual exporter's business and export licenses; (2) there are applicable legislative enactments decentralizing control of the companies; and (3) there are formal measures by the government decentralizing control of companies.[51]

b. Absence of De Facto Control

Typically the Department considers four factors in evaluating whether each respondent is subject to *de facto* government control of its export functions: (1) Whether the export prices are set by or are subject to the approval of a government agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.[52] The Department has determined that an analysis of *de facto* control is critical in determining whether respondents are, in fact, subject to a degree of government control which would preclude the Department from assigning separate rates. The evidence provided by the eight separate rate applicants supports a preliminary finding of *de facto* absence of government control based on the following: (1) The companies set their own export prices independent of the government and without the approval of a government authority; (2) the companies have authority to negotiate and sign contracts and other agreements; (3) the companies have autonomy from the government in making decisions regarding the selection of management; and (4) there is no restriction on any of the companies' use of export revenue.[53]

Rate for Non-Selected Companies

As stated previously, this review covers eighteen companies. Of those, the Department selected two exporters, CCT and Jacobi, as mandatory respondents. As stated above, five companies, Datong Juqiang Activated Carbon Co., Ltd.; Datong Yunguang Chemicals Plant; Hebei Foreign Trade and Advertising Corporation; Shanxi Newtime Co., Ltd.; and United Manufacturing International (Beijing) Ltd. are part of the PRC–Wide entity and, thus, are not entitled to a separate rate. Additionally, we are preliminarily rescinding the review with respect to Ningxia Lingzhou Foreign Trade Co., Ltd. because we determined that it had no shipments of subject merchandise to the United States during the POR. The remaining eight companies submitted timely information as requested by the Department and remain subject to this review as cooperative separate rate respondents.

The statute and the Department's regulations do not address the establishment of a rate to be applied to individual companies not selected for examination where the Department limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally we have looked to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for respondents we did not examine in an administrative review. Section 735(c)(5)(A) of the Act instructs that we are not to calculate an all-others rate using any zero or *de minimis* margins or any margins based entirely on facts available. Accordingly, the Department's practice in this regard, in reviews involving limited respondent selection based on exporters accounting for the largest volume of trade, has been to average the rates for the selected companies, excluding zero and *de minimis* rates and rates based entirely on facts available.[54] Section 735(c)(5)(B)

[45] *See* Jacobi's Section A Questionnaire Response dated August 11, 2010, at 3.

[46] *See* CCT's Section A Questionnaire Response dated October 27, 2010 at A–2.

[47] *See Brake Rotors From the People's Republic of China: Preliminary Results and Partial Rescission of the Fourth New Shipper Review and Rescission of the Third Antidumping Duty Administrative Review,* 66 FR 1303, 1306 (January 8, 2001), unchanged in *Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of Fourth New Shipper Review and Rescission of Third Antidumping Duty Administrative Review,* 66 FR 27063 (May 16, 2001); *Notice of Final Determination of Sales at Less Than Fair Value: Creatine Monohydrate From the People's Republic of China,* 64 FR 71104 (December 20, 1999).

[48] *See* Tangshan Solid Carbon Co. Ltd.'s Separate Rate Certification dated July 27, 2010, at Attachment 1.

[49] These companies are: Beijing Pacific Activated Carbon Products Co., Ltd.; Datong Municipal Yunguang Activated Carbon Co., Ltd.; Ningxia Guanghua Cherishment Activated Carbon Co., Ltd.; Ningxia Huahui Activated Carbon Co., Ltd.; Shanxi DMD Corporation; Shanxi Sincere Industrial Co., Ltd.; Shanxi Industry Technology Trading Co., Ltd.; and Tianjin Maijin Industries Co., Ltd.

[50] *See Sparklers,* 56 FR at 20589.

[51] *See, e.g.,* Shanxi Industry Technology Trading Co., Ltd.'s Separate Rate Certification dated July 21, 2010, at 8; and Shanxi DMD Corporation's Separate Rate Certification dated July 21, 2010, at 8.

[52] *See Silicon Carbide,* 59 FR at 22586–87; *see also Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From the People's Republic of China,* 60 FR 22544, 22545 (May 8, 1995).

[53] *See, e.g.,* Shanxi Industry Technology Trading Co., Ltd.'s Separate Rate Certification dated July 21, 2010, at 8–9; and Shanxi DMD Corporation's Separate Rate Certification dated July 21, 2010, at 8–9. Therefore, the Department preliminarily finds that Huahui and nine separate-rate applicants have established that they qualify for a separate rate under the criteria established by *Silicon Carbide* and *Sparklers.*

[54] *See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 73 FR 52273, 52275

of the Act also provides that, where all margins are zero, *de minimis,* or based entirely on facts available, we may use "any reasonable method" for assigning the rate to non-selected respondents, including "averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated." In this instance, consistent with our practice, we have preliminarily established a margin for the separate rate respondents based on the rate we calculated for the mandatory respondent whose rate was not *de minimis.*[55] For the PRC-wide entity, we have assigned the entity's current rate and only rate ever determined for the entity in this proceeding.

Date of Sale

CCT and Jacobi reported the invoice date as the date of sale because they claim that for their U.S. sales of subject merchandise made during the POR, the material terms of sale were established on the invoice date. In accordance with 19 CFR 351.401(i) and the Department's long-standing practice of determining the date of sale,[56] the Department preliminarily determines that the invoice date is the most appropriate date to use as CCT's and Jacobi's date of sale.

Fair Value Comparisons

To determine whether sales of certain activated carbon to the United States by CCT and Jacobi were made at less than normal value, the Department compared constructed export price ("CEP") to NV, as described in the "U.S. Price," and "Normal Value" sections below.

U.S. Price

Constructed Export Price

For all of CCT and Jacobi's sales, the Department based U.S. price on CEP in accordance with section 772(b) of the Act, because sales of Chinese-origin merchandise were made on behalf of the companies located in the PRC by a U.S. affiliate to unaffiliated purchasers in the United States. For these sales, the Department based CEP on prices to the first unaffiliated purchaser in the United States. Where appropriate, the Department made deductions from the starting price (gross unit price) for foreign movement expenses, international movement expenses, U.S. movement expenses, and appropriate selling adjustments, in accordance with section 772(c)(2)(A) of the Act.

In accordance with section 772(d)(1) of the Act, the Department also deducted those selling expenses associated with economic activities occurring in the United States. The Department deducted, where appropriate, commissions, inventory carrying costs, interest revenue, credit expenses, warranty expenses, and indirect selling expenses. For those expenses that were provided by an ME provider and paid for in an ME currency, the Department used the reported expense. Due to the proprietary nature of certain adjustments to U.S. price, for a detailed description of all adjustments made to U.S. price for each company, *see* the company specific analysis memoranda, dated concurrently with this notice.

CCT also requested that the Department apply the "special rule" for merchandise with value added after importation and excuse CCT from reporting U.S. re-sales of subject merchandise further processed by Calgon Carbon Corporation ("CCC"), CCT's U.S. parent company, in the United States and the U.S. further-processing cost information associated with those re-sales. CCT made this request with respect to all categories of U.S. sales with further manufacturing and provided further-processing cost data.[57]

The Department preliminarily determines to apply the "special rule" under section 772(e) of the Act for merchandise with value added after importation to the sales made by CCC in the United States. Section 772(e) of the Act provides that, when the subject merchandise is imported by an affiliated person and the value-added in the United States by the affiliated person is likely to exceed substantially the value of the subject merchandise, the Department shall determine the CEP for such merchandise using the price to an unaffiliated party of identical or other subject merchandise if there is a sufficient quantity of sales to provide a reasonable basis for comparison, and the Department determines that the use of such sales is appropriate. If there is not a sufficient quantity of such sales or if the Department determines that using the price to an unaffiliated party of identical or other subject merchandise is not appropriate, the Department may use any other reasonable basis to determine the CEP.

To determine whether the value-added is likely to exceed substantially the value of the subject merchandise, the Department estimated the value added based on the difference between the averages of the prices charged to the first unaffiliated purchaser for the merchandise as sold in the United States and the averages of the prices paid for the subject merchandise by the affiliated purchaser, CCC. Based on the information provided by CCT and the Department's analysis of this information, the Department determined that the estimated value added in the United States by CCC accounted for at least 65 percent of the price charged to the first unaffiliated customer for the merchandise as sold in the United States.[58] Therefore, the Department preliminarily determines that the value added is likely to exceed substantially the value of the subject merchandise.

For CCT, the Department preliminarily determines that the remaining quantity of sales of identical or other subject merchandise to unaffiliated persons are sufficient to provide a reasonable basis for comparison and that the use of these sales is appropriate as a basis for calculating margins of dumping on the further processed merchandise.[59]

Accordingly, the Department has determined to apply the "special rule" to CCT's sales of subject merchandise that were further processed by CCC in the United States. Furthermore, the Department has excused CCT from reporting these U.S. sales and the U.S. further-processing cost information associated with the sales. In the Special Rule Memo, the Department stated that it would apply the weight-averaged margin from CCT's non-further manufactured U.S. sales to the quantity

(September 9, 2008) and accompanying Issues and Decision Memorandum at Comment 6.

[55] *See, e.g., Forth Administrative Review of Certain Frozen Warrnwater Shrimp From the People's Republic of China: Preliminary Results, Preliminary Partial Rescission of Antidumping Duty Administrative Review and Intent Not To Revoke, In Part,* 75 FR 11855 (March 12, 2010).

[56] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From Thailand,* 69 FR 76918 (December 23, 2004), and accompanying Issues and Decision Memorandum at Comment 10.

[57] *See* CCT's Section A Questionnaire Response dated October 27, 2010, at Exhibit 11; *see also* CCT's Supplemental Section A Questionnaire Response dated December 6, 2010 at Exhibit A–14.

[58] *See* 19 CFR 351.402(c); *see also Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part,* 66 FR 36551, 36555 (July 12, 2001) and accompanying Issues and Decision Memorandum at Comment 28 ("*AFBs*").

[59] *See* section 772(e) of the Act; *see also AFBs;* Memorandum to James C. Doyle, Director, AD/CVD Operations, Office 9, through Catherine Bertrand, Program Manager, AD/CVD Operations, Office 9, from Bob Palmer, Case Analyst, Office 9: Special Rule for Merchandise with Value Added after Importation for the Antidumping Duty Administrative Review of Certain Activated Carbon from the People's Republic of China, dated January 5, 2011 ("Special Rule Memo").

of CCC's U.S. further manufactured sales.[60] However, the Department intended to explain that it would apply the weight-averaged margin calculated based upon CCT's U.S. sales to the first unaffiliated customer as the surrogate margin to the transactions to which the "special rule" applied. The latter methodology was applied in *Activated Carbon AR 1,* when we last granted CCT this "special rule" exemption.[61] Therefore, for these preliminary results, we are applying the weight-averaged margin as was intended.

Normal Value

Section 773(c)(1) of the Act provides that the Department shall determine the NV using an FOP methodology if the merchandise is exported from an NME and the information does not permit the calculation of NV using home-market prices, third-country prices, or constructed value under section 773(a) of the Act. The Department bases NV on the FOPs because the presence of government controls on various aspects of non-market economies renders price comparisons and the calculation of production costs invalid under the Department's normal methodologies.

FOP Reporting Exclusions

As stated above, the Department granted exclusions for certain nominal producers to be excused from providing FOP data for CCT and Jacobi. As the corresponding U.S. sales of the subject merchandise supplied by the excused producers were reported in the U.S. sales listing, the Department has applied the calculated average normal value of the subject merchandise produced by CCT and Jacobi, respectively, as facts available, to those sales observations associated with the excluded producers.[62]

CCT's Control Number ("CONNUM") Reporting Methodology

CCT has reported that neither it nor its individual producers can provide FOP data based on all 15 product characteristics which comprise the CONNUM.[63] Rather, CCT and its individual producers have reported FOP consumption data based on 11 of the 15 CONNUM product characteristics which CCT tracks through its product codes and is the basis on which CCT reported its weighted-average calculation of its producers' FOP consumption.[64] However, CCT states that it and its producers, in the ordinary course of business, need not, and do not, track data during the production process for the remaining four product characteristics, but test for these four characteristics prior to shipment.[65] CCT has provided detailed and potentially verifiable information on the standards used in the ordinary course of business by CCT and its producers.[66] In addition, CCT has provided samples of FOP consumption data, reconciliation worksheets, and FOP source documentation used in the ordinary course of business by its producers.[67] CCT has explained that each of its producers maintains records on the consumption of all raw materials. Further, CCT states that there is no way to link all 15 product characteristics of the finished products to the material inputs throughout the production process because each of its producers sets out to produce a particular product based on its own specific product definition. Production inputs, consumption quantities and other relevant data are only tracked on this basis. CCT notes that its producers do not track data during the production process for four product characteristics: apparent density, hardness, abrasion, and ash content.[68] CCT further explains that these four product characteristics are not relevant to the production of each producer's products and none of the producers tracks production inputs, consumption quantities or other relevant data on the basis of these four characteristics.[69] Moreover, CCT states the four product characteristics above are testing specifications which are expressed in terms of minimum and maximum values, which correspond to a range of potential actual characteristics for any particular product produced; it is therefore sufficient to ensure that each of the four characteristics is within the established characteristic-specific range. As such, during the production process none of the companies tracks the specific value for each of these four characteristics.[70] However, CCT states that it has provided its FOP data based on as much detail as the accounting books and records of itself and its producers' would allow.[71] Therefore, the Department preliminarily determines that CCT's FOP reporting methodology is sufficient to preliminarily calculate an accurate dumping margin.

Petitioner Norit argues that in *Activated Carbon AR1,* the Department has previously notified CCT that it must provide CONNUM-specific FOP data in subsequent reviews, but it has continued to report FOP data on its product codes.[72] While we note that that in *Activated Carbon AR1,* we placed CCT on notice that it should begin to track all records generated in the normal course of business that would allow CCT and its producers to report FOP consumption in future segments of this proceeding taking into account as many CONNUM characteristics as possible, we further note that because our final results of *Activated Carbon AR1* occurred eight months into the current POR, it is unreasonable to expect CCT and its producers to adjust the manner in which they maintain their records in order to report FOPs on a CONNUM-specific basis for the remaining four months of the current POR.[73] However, we are providing a second and final notice that CCT and other respondents must maintain their records in a manner that they can report FOPs on a

[60] *See* Special Rule Memo at 5.

[61] *See First Administrative Review of Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review,* 74 FR 57995 (November 10, 2009) ("*Activated Carbon AR1*") and accompanying Issues and Decisions Memorandum at Comment 7; *see also* CCT Prelim Analysis Memo.

[62] *See* Jacobi Prelim Analysis Memo; *see also* CCT Prelim Analysis Memo.

[63] *See* CCT's Supplemental Section D Questionnaire Response dated January 14, 2011, at 3.

[64] Those 11 product characteristics are: (1) Physical material; (2) form; (3) oversize mesh; (4) undersize mesh; (5) PAC mesh; (6) particle size; (7) pellet diameter; (8) carbon tetrachloride ("CTC"); (9) iodine; (10) wash type; and (11) impregnation. *See* CCT's Supplemental Section D Questionnaire Response dated January 14, 2011, at 3.

[65] *See* CCT's Supplemental Section D Questionnaire Response dated January 14, 2011, at 4.

[66] *See e.g.,* CCT's Supplemental Section D Questionnaire Responses dated January 6 and 14, 2011.

[67] *See e.g.,* CCT's Supplemental Section D Questionnaire Response dated January 6, 2010, at HQ–12 and Exhibit HQ–26, HQ–31, HQ–34 and JB–20; *see also e.g.,* CCT's Supplemental Section D Questionnaire Response dated January 14, 2010, at 7 and Exhibit DCC–17, DCC–18, DCC–21 and NC–23.

[68] We note that apparent density, abrasion and ash content are three product characteristics are components of the 15 product characteristic CONNUM. Additionally, one product characteristic CTC test (CTESTU) indicates where CTC test or another test was used.

[69] *See* CCT's Supplemental Section D Questionnaire Response dated January 14, 2011 at 3–6.

[70] *See id.*

[71] *See id.*

[72] *See* Letter from Petitioners to the Department re: Third Administrative Review of the Antidumping Duty Order on Certain Activated Carbon from the People's Republic of China: Norit America's Comments on CCT's Questionnaire Response, dated December 10, 2010.

[73] *See Activated Carbon AR1* and accompanying Issues and Decisions Memorandum at Comment 4; *see also Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 74 FR 14514 (March 31, 2009) and accompanying Issues and Decision Memorandum at Comment 1.

CONNUM-specific basis for future reviews.[74]

Factor Valuations

In accordance with 19 CFR 351.408(c)(1), the Department will normally use publicly available information to value the FOPs, but when a producer sources an input from an ME country and pays for it in an ME currency, the Department may value the factor using the actual price paid for the input.[75] During the POR, Jacobi reported that it purchased certain inputs from an ME supplier and paid for the inputs in an ME currency.[76] The Department has a rebuttable presumption that ME input prices are the best available information for valuing an input when the total volume of the input purchased from all ME sources during the period of investigation or review exceeds 33 percent of the total volume of the input purchased from all sources during the period.[77] In these cases, unless case-specific facts provide adequate grounds to rebut the Department's presumption, the Department will use the weighted average ME purchase price to value the input. Alternatively, when the volume of an NME firm's purchases of an input from ME suppliers during the period is below 33 percent of its total volume of purchases of the input during the period, but where these purchases are otherwise valid and there is no reason to disregard the prices, the Department will weight-average the ME purchase price with an appropriate surrogate value according to their respective shares of the total volume of purchases, unless case-specific facts provide adequate grounds to rebut the presumption.[78] When a firm has made ME input purchases that may have been dumped or subsidized, are not *bona fide,* or are otherwise not acceptable for use in a dumping calculation, the Department will exclude them from the numerator of the ratio to ensure a fair determination of whether valid ME purchases meet the 33-percent threshold.[79]

The Department used the Indian Import Statistics to value the raw material and packing material inputs that CCT and Jacobi used to produce the subject merchandise under review during the POR, except where listed below. With regard to both the Indian import-based surrogate values and the ME input values, the Department has disregarded prices that the Department has reason to believe or suspect may be subsidized. The Department has reason to believe or suspect that prices of inputs from Indonesia, South Korea, and Thailand may have been subsidized. The Department has found in other proceedings that these countries maintain broadly available, non-industry-specific export subsidies and, therefore, it is reasonable to infer that all exports to all markets from these countries may be subsidized.[80] The Department is also guided by the statute's legislative history that explains that it is not necessary to conduct a formal investigation to ensure that such prices are not subsidized.[81] Rather, the Department bases its decision on information that is available to it at the time it makes its determination.[82] Therefore, the Department has not used prices from these countries in calculating the Indian import-based surrogate values. Additionally, the Department disregarded prices from NME countries. Finally, imports that were labeled as originating from an "unspecified" country were excluded from the average value, as the Department could not be certain that they were not from either an NME country or a country with general export subsidies.[83]

In accordance with section 773(c) of the Act, for subject merchandise produced by CCT and Jacobi, the Department calculated NV based on the FOPs reported by CCT and Jacobi for the POR. The Department used data from the Indian Import Statistics and other publicly available Indian sources in order to calculate surrogate values for CCT's and Jacobi's FOPs (direct materials, energy, and packing materials) and certain movement expenses. To calculate NV, the Department multiplied the reported per-unit factor quantities by publicly available Indian surrogate values (except as noted below). The Department's practice when selecting the best available information for valuing FOPs is to select, to the extent practicable, surrogate values which are product-specific, representative of a broad market average, publicly available, contemporaneous with the POR and exclusive of taxes and duties.[84]

As appropriate, the Department adjusted input prices by including freight costs to render the prices delivered prices. Specifically, the Department added to Indian import surrogate values a surrogate freight cost using the shorter of the reported distance from the domestic supplier to the factory or the distance from the nearest seaport to the factory. This adjustment is in accordance with the decision of the Federal Circuit in *Sigma Corp.* v. *United States,* 117 F.3d 1401, 1408 (Fed. Cir. 1997). For a detailed description of all surrogate values used for CCT and Jacobi, *see* Memorandum to the File through Catherine Bertrand, Program Manager, Office 9, from Katie Marksberry, Case Analyst; Re: Third Administrative Review of Certain Activated Carbon from the People's Republic of China: Surrogate Values for the Preliminary Results, dated concurrently with this notice ("Prelim Surrogate Value Memo").

In those instances where the Department could not obtain publicly available information contemporaneous to the POR with which to value factors, the Department adjusted the surrogate values using, where appropriate, the Indian Wholesale Price Index as published in the International Financial Statistics of the International Monetary Fund, a printout of which is attached to

[74] *See Certain Tissue Paper Products from the People's Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review,* 73 FR 58113 (October 6, 2008) and accompanying Issues and Decision Memorandum at Comment 2.

[75] *See Lasko Metal Products, Inc. v. United States,* 43 F.3d 1442, 1445–1446 (Fed. Cir. 1994) (affirming the Department's use of market-based prices to value certain FOPs).

[76] *See* Jacobi's Section D Questionnaire Response dated September 17, 2010, at Exhibit C, page D–9.

[77] *See Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments,* 71 FR 61716, 61717–18 (October 19, 2006) ("*Antidumping Methodologies*").

[78] *See Antidumping Methodologies.*

[79] *See id.*

[80] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review,* 70 FR 54007, 54011 (September 13, 2005), unchanged in *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the First Administrative Review,* 71 FR 14170 (March 21, 2006); *China Nat'l Machinery Import & Export Corp.* v. *United States,* 293 F. Supp. 2d 1334 (CIT 2003), as affirmed by the Federal Circuit, 104 Fed. Appx. 183 (Fed. Cir. 2004).

[81] *See* Omnibus Trade and Competitiveness Act of 1988, Conference Report to accompany H.R. Rep. 100–576 at 590 (1988) reprinted in 1988 U.S.C.C.A.N. 1547, 1623–24; *see also Preliminary Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China,* 72 FR 30758, 30763 n.6 (June 4, 2007), unchanged in *Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China,* 72 FR 60632 (October 25, 2007).

[82] *See Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value,* 73 FR 24552, 24559 (May 5, 2008), unchanged in *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 73 FR 55039 (September 24, 2008).

[83] *See id.*

[84] *See, e.g., Electrolytic Manganese Dioxide From the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 73 FR 48195 (August 18, 2008) and accompanying Issues and Decision Memorandum at Comment 2.

the Prelim Surrogate Value Memo at Exhibit 2. Where necessary, the Department adjusted surrogate values for inflation, exchange rates, and taxes, and the Department converted all applicable items to a per-kilogram or per-metric ton basis.

For bituminous coal used as a feedstock in the production of the subject merchandise, the Department used Indian import prices for coking coal, because the respondents reported using low-ash content bituminous coal as a feedstock in the production of the subject merchandise and Coal India Limited ("CIL") data do not provide price data for low-ash content bituminous coal. *See* Prelim Surrogate Value Memo. The Department used CIL data to value steam coal and bituminous coal used as an energy source, where the manufacturers provided useful heat values ("UHV") and ash contents of their bituminous energy coal and steam coal. The Department finds that CIL data have specific grades of non-coking energy coal, measured in UHV, which correspond to the types of steam and bituminous coal used by the respondents as energy coals. Therefore, CIL is more specific to the reported input. The Department used CIL's prices dated from December 12, 2007, effective throughout the majority of the POR. For further details regarding the Department's use of CIL data, *see* Prelim Surrogate Value Memo.

The Department valued electricity using price data for small, medium, and large industries, as published by the Central Electricity Authority of the Government of India in its publication titled "Electricity Tariff & Duty and Average Rates of Electricity Supply in India", dated March 2008. These electricity rates represent actual country-wide, publicly available information on tax-exclusive electricity rates charged to industries in India. We did not inflate this value because utility rates represent current rates, as indicated by the effective dates listed for each of the rates provided.[85]

Because water is essential to the production process of the subject merchandise, the Department is considering water to be a direct material input, and not as overhead, and valued water with a surrogate value according to our practice.[86] The Department valued water using data from the Maharashtra Industrial Development Corporation (*http://www.midcindia.org*) as it includes a wide range of industrial water tariffs. This source provides 386 industrial water rates within the Maharashtra province from April 2009 through June 2009, of which 193 for the "inside industrial areas" usage category and 193 for the "outside industrial areas" usage category.[87]

Consistent with our practice in previous reviews, the Department calculated the surrogate value for purchased steam based upon the April 2008 through March 2009 financial statement of Hindalco Industries Limited.[88]

The Department valued truck freight expenses using a per-unit average rate calculated from data on the Infobanc Web site: *http://www.infobanc.com/logistics/logtruck.htm.* The logistics section of this website contains inland freight truck rates between many large Indian cities.[89]

To value brokerage and handling, the Department used a price list of export procedures necessary to export a standardized cargo of goods in India. The price list is compiled based on a survey case study of the procedural requirements for trading a standard shipment of goods by ocean transport in India that is published in *Doing Business 2010: India,* published by the World Bank.[90]

To value factory overhead, selling, general, and administrative ("SG&A") expenses, and profit, the Department used the average of the audited financial statements of two Indian activated carbon producing companies: Kalpalka Chemicals Ltd. for FY 2007–2008 ("Kalpalka") and Quantum Active Carbon Pvt. Ltd. ("Quantum") for 2007–2008.[91]

Jacobi submitted the 2009–2010 financial statements of Adsorbent Carbons Pvt. Ltd. ("Adsorbent") for the Department's use in calculating surrogate financial ratios. We have determined not to rely on the 2009–2010 financial statement of Adsorbent because it indicates that it received a "Capital Subsidy".[92] The Department has found India's Capital Subsidy to be a countervailable subsidy.[93] Consistent with the Department's practice, we prefer not to use financial statements of a company we have reason to believe or suspect may have received subsidies, because financial ratios derived from that company's financial statements may not constitute the best available information with which to value financial ratios.[94] Therefore, pursuant to 19 CFR 351.408(c), the Department preliminarily determines that the 2007–2008 financial statements of Quantum and the 2007–2008 financial statements of Kalpalka provide the best available information with which to calculate surrogate financial ratios, because they are complete and publicly available. Additionally, both of these companies produce comparable merchandise and use an integrated carbonization production process which closely mirrors that of both respondents. We prefer to use more than one financial statement where possible to replicate the experience of producers of certain activated carbon in the surrogate country.[95] While the Department recognizes Quantum's and Kalpalka's financial statements both pre-date the POR, we find that neither company's financial statements pre-date the POR so significantly as not to be useful.[96] Therefore, the Department has used these financial statements to value factory overhead, SG&A, and profit, for these preliminary results.

On May 14, 2010, the Court of Appeals for the Federal Circuit ("CAFC) in *Dorbest Ltd.* v. *United States,* 604 F.3d 1363, 1372 (CAFC 2010), found that the "[regression-based] method for calculating wage rates [as stipulated by 19 CFR 351.408(c)(3)] uses data not permitted by [the statutory requirements laid out in section 773 of the Act (*i.e.,* 19 U.S.C. 1677b(c))]." The Department is continuing to evaluate options for determining labor values in light of the recent CAFC decision. However, for these preliminary results, we have calculated an hourly wage rate to use in valuing the respondents' reported labor

[85] *See* Prelim Surrogate Value Memo.

[86] *See Final Determination of Sales at Less Than Fair Value and Critical Circumstances: Certain Malleable Iron Pipe Fittings From the People's Republic of China,* 68 FR 61395 (October 28, 2003) and accompanying Issues and Decision Memorandum at Comment 11.

[87] *See* Prelim Surrogate Value Memo at 8–9.

[88] *See* Jacobi's Surrogate Value Comments: Certain Activated Carbon form China, dated January 14, 2011, at Exhibit SV–7.

[89] *See* Prelim Surrogate Value Memo at Attachment 8.

[90] *See id.* at Attachment 9.

[91] Both the FY 07–08 financial statements for Quantum and the FY 07–08 financial statements for Kalpalka Chemicals Ltd. were placed on the record by Petitioners. *See Prelim Surrogate Value Memo.*

[92] *See* Annual Report Adsorbent Carbons Private Limited 2009–2010, contained in Jacobi's February 7, 2011 Resubmission of Surrogate Financial Ratios.

[93] *See Final Results of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from India,* 71 FR 7534 (February 13, 2006).

[94] *See Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results And Rescission, In Part, of 2004/2005 Antidumping Duty Administrative Review and New Shipper Reviews,* 72 FR 19174 (April 17, 2007) and accompanying Issues and Decision Memorandum at Comment 1.

[95] *See Folding Metal Tables and Chairs from the People's Republic of China: Final Results of Antidumping Duty Administrative Review,* 72 FR 71355 (December 17, 2007) and accompanying Issues and Decision Memorandum at Comment 1.

[96] *See Hebei Metals & Minerals* v. *United States,* 366 F. Supp. 2d 1264, 1275 (Ct. Int'l Trade 2005).

input by averaging industry-specific earnings and/or wages in countries that are economically comparable to the PRC and that are significant producers of comparable merchandise.

For the preliminary results of this administrative review, the Department is valuing labor using a simple average industry-specific wage rate using earnings or wage data reported under Chapter 5B by the International Labor Organization ("ILO"). To achieve an industry-specific labor value, we relied on industry-specific labor data from the countries we determined to be both economically comparable to the PRC, and significant producers of comparable merchandise. A full description of the industry-specific wage rate calculation methodology is provided in the Prelim Surrogate Value Memo. The Department calculated a simple average industry-specific wage rate of $2.06 for these preliminary results. Specifically, for this review, the Department has calculated the wage rate using a simple average of the data provided to the ILO under Sub-Classification 24 of the ISIC–Revision 3 standard by countries determined to be both economically comparable to the PRC and significant producers of comparable merchandise. The Department finds the two-digit description under ISIC–Revision 3 ("Manufacture of Chemicals and Chemical Products") to be the best available wage rate surrogate value on the record because it is specific and derived from industries that produce merchandise comparable to the subject merchandise. Consequently, we averaged the ILO industry-specific wage rate data or earnings data available from the following countries found to be economically comparable to the PRC and significant producers of comparable merchandise: Ecuador, Egypt, Indonesia, Jordan, Peru, the Philippines, Thailand and Ukraine.[97] For further information on the calculation of the wage rate, *see* Prelim Surrogate Values Memo.

Treatment of Jacobi's Water Factors

For these preliminary results, we are applying partial adverse facts available to Jacobi's supplier Ningxia Guanghua Activated Carbon Co., Ltd. ("NXGH"). The Department asked Jacobi to report the full amount of water used in the production of subject merchandise, which it was able to do for its other suppliers. In a supplemental questionnaire dated November 3, 2010, NXGH stated that the "water for acid wash can't be predicted or measured," and that the water reported in its FOP database is water used for the boiler room and does not include all of the water used in the production of subject merchandise.[98]

On December 10, 2010, Petitioners submitted comments to the Department regarding Jacobi's supplemental questionnaire responses. In their comments, Petitioners argued that NXGH has a responsibility to maintain detailed records of every stage of its production process, and as it has participated in multiple prior segments of this proceeding, it is aware of this requirement.[99] Additionally, the Department notes that NXGH has participated in prior segments of this case as one of Jacobi's suppliers and stated that it was able to report the full amount of water used in the production of subject merchandise.[100] In this review, Jacobi reported that it was not able to report the full amount of water used in production of subject merchandise, and did not provide even an estimate when the Department gave it an opportunity to correct its reported water usage for NXGH.[101] Therefore, because Jacobi has failed to cooperate to the best of its ability in reporting the total amount of water used in the production of subject merchandise, as requested by the Department, as partial adverse facts available, for these preliminary results the Department is applying the highest single, per-unit consumption of water reported by any of Jacobi's suppliers as the water used by NXGH in the acid washing stage.[102]

Additionally, in their December 10, 2010, comments, Petitioners argued that Jacobi's packing affiliate, Jacobi Tianjin International Trading Co., Ltd. ("Jacobi Tianjin"), improperly accounted for the water used in its administrative offices and laboratory as overhead. Therefore, Petitioners argue that the Department should include the water reported by Jacobi Tianjin, as required by the Department in a supplemental questionnaire, in determining Jacobi Tianjin's total cost of manufacture. However, as Jacobi Tianjin reported that it only uses water in its laboratory, and for these preliminary results, we find that it is properly accounted for as overhead.

Treatment of CCT's Reported By-Products

For these preliminary results, the Department has found that non-activated by-products, such as pressroom powder and non-activated fines, which were reported by CCT as by-products produced during the production of subject merchandise by its unaffiliated producers, are eligible for a byproduct offset. However, one of CCT's unaffiliated producers, Inner Mongolia Taixi Coal Chemical Industry Limited Company ("TX"), has reported that it produces its own anthracite coal, which is then used as an input in the production of subject merchandise. Although it is our general policy to value all of the FOPs used to produce subject merchandise, there are certain exceptions. One such exception is attempting to value the factors used in a production process yielding an intermediate product. This would lead to an inaccurate result because a significant element of cost would not be adequately accounted for in the overall factors buildup. For example, the Department addressed whether to value the respondent's factors used in extracting iron ore, an input to its wire rod factory, in *Steel Wire Rod from Ukraine*.[103] The Department determined that, if it were to use those factors, it would not sufficiently account for the capital costs associated with the iron ore mining operation given that the surrogate used for valuing production overhead did not have mining operations. Therefore, because ignoring this important cost element would distort the calculation, the Department declined to value the inputs used in mining iron ore and valued the iron ore instead. Similarly, in this case, we did not find it appropriate to obtain the factors relevant to the process of mining anthracite coal, and are not valuing

[97] Although India is used as the primary surrogate country for the other FOPs, India is not included in the list of countries used to calculate the industry-specific wage rate because there were no earnings or wage data available from the ILO for the applicable period.

[98] *See* Jacobi's Response to the Supplemental Section D Questionnaire for NXGH and Huahui, dated November 3, 2010, at 11–12.

[99] *See* Letter to the Department from Petitioners; Re: Third Administrative Review of the Antidumping Duty Order on Certain Activated Carbon from the People's Republic of China: Petitioners' Comments on Jacobi Carbons' Recent Supplemental Responses, dated December 10, 2010.

[100] *See Certain Activated Carbon From the People's Republic of China: Final Results and Partial Rescission of Second Antidumping Duty Administrative Review,* 75 FR 70208 (November 17, 2010) and accompanying Issues and Decision Memorandum at Comment 5a.

[101] *See* Jacobi's Response to the Supplemental Section D Questionnaire for NXGH and Huahui, dated November 3, 2010, at 11–12.

[102] For further details, *see* Jacobi Prelim Analysis Memo.

[103] *See Drill Pipe From the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Critical Circumstances,* 76 FR 1966 (January 3, 2011) and accompanying Issues and Decision Memorandum at Comment 12; *see also Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod From Ukraine,* 67 FR 55785 (August 30, 2002) ("*Steel Wire Rod from Ukraine*").

those factors or including them in the cost build-up of subject merchandise.

Additionally, in CCT's questionnaire response for TX, it claimed that there are four products (coal slurry, foam, middlings, and tailings), which are by-products of the production process of anthracite coal. However, it is the Department's practice to only grant by-product credits for by-products that are produced directly as a result of the production process of the subject merchandise.[104] Therefore, for these preliminary results, we are not granting CCT a by-product offset for the four products produced by TX in the production of anthracite coal.[105]

Currency Conversion

Where appropriate, the Department made currency conversions into U.S. dollars, in accordance with section 773A(a) of the Act, based on the exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Bank.

Preliminary Results of Review

TheDepartment preliminarily determines that the following weighted-average dumping margins exist:

Exporter	Margin (dollars per kilogram) [106]
Jacobi Carbons AB [107]	* 0.00
Calgon Carbon (Tianjin) Co., Ltd	0.05
Beijing Pacific Activated Carbon Products Co., Ltd	0.05
Datong Municipal Yunguang Activated Carbon Co., Ltd	0.05
Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd.[108]	0.05
Ningxia Huahui Activated Carbon Co., Ltd.	0.05
Shanxi DMD Corporation	0.05
Shanxi Sincere Industrial Co., Ltd	0.05
Shanxi Industry Technology Trading Co., Ltd	0.05
Tangshan Solid Carbon Co., Ltd	0.05
Tianjin Maijin Industries Co., Ltd	0.05
PRC-Wide Rate [109]	2.42

* (*de minimis*).

Disclosure and Public Hearing

The Department will disclose to parties the calculations performed in connection with these preliminary results within five days of the date of publication of this notice.[110] Interested parties may submit case briefs and/or written comments no later than 30 days after the date of publication of these preliminary results of review.[111] Rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments may be filed no later than five days after the deadline for filing case briefs.[112] Parties who submit case briefs or rebuttal briefs in this proceeding are requested to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[113]

In accordance with 19 CFR 351.301(c)(3)(ii), for the final results of this administrative review, interested parties may submit publicly available information to value FOPs within 20 days after the date of publication of these preliminary results. Interested parties must provide the Department with supporting documentation for the publicly available information to value each FOP. Additionally, pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, Room 1117, within 30 days of the date of publication of this notice. Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs. The Department will issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review. The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review. In accordance with 19 CFR 351.212(b)(1), we calculated exporter/importer (or customer)-specific assessment rates for the merchandise subject to this review. In this and future reviews, we will direct CBP to assess importer-specific assessment rates based on the resulting per-unit (*i.e.,* per-kilogram) rates by the weight in kilograms of each entry of the subject merchandise during the POR. For the companies receiving a separate rate that were not selected for individual review, we will assign an assessment rate based on rates calculated in previous reviews as discussed above.

For those companies for which this review has been preliminarily rescinded, the Department intends to assess antidumping duties at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(2), if the review is rescinded for these companies. The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of this notice.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For the exporters listed above, the cash deposit rate will be established in the final results of this review (except, if the rate is zero or *de minimis, i.e.,* less than 0.5

[104] *See e.g. id* and accompanying Issues and Decision Memorandum at Comment 5; *see also Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China,* 62 FR 61964 (November 20, 1997) and accompanying Issues and Decision Memorandum at Comment 44.

[105] For more detail, *see* CCT Prelim Analysis Memo.

[106] In the second administrative review of this order the Department determined that it would calculate per-unit assessment and cash deposit rates for all future reviews. *See Certain Activated Carbon From the People's Republic of China: Final Results and Partial Rescission of Second Antidumping Duty Administrative Review,* 75 FR 70208 (November 17, 2010).

[107] The Department is assigning this rate to Jacobi Carbons AB and Tianjin Jacobi International Trading Co. Ltd.

[108] In *Activated Carbon AR1,* the Department found Beijing Pacific Activated Carbon Products Co., Ltd., Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd. and Ningxia Guanghua Activated Carbon Co., Ltd. are a single entity and, because there were no changes from the previous review, we continue to find these companies to be part of a single entity. Therefore, we will assign this rate to the companies in the single entity. *See Certain Activated Carbon From the People's Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review and Extension of Time Limits for the Final Results,* 74 FR 21317 (May 7, 2009), unchanged in *First Administrative Review of Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review,* 74 FR 57995 (November 10, 2009).

[109] The PRC–Wide entity includes Datong Juqiang Activated Carbon Co., Ltd.; Datong Yunguang Chemicals Plant; Hebei Foreign Trade and Advertising Corporation; Shanxi Newtime Co., Ltd.; and United Manufacturing International (Beijing) Ltd.

[110] *See* 19 CFR 351.224(b).

[111] *See* 19 CFR 351.309(c)(ii).

[112] *See* 19 CFR 351.309(d).

[113] *See* 19 CFR 351.309(c) and (d).

percent, no cash deposit will be required for that company); (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC-wide rate of $2.42 per kilogram; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporters that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This determination is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221(b)(4).

Dated: April 22, 2011.

Paul Piquado,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 2011–10429 Filed 4–28–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Subsidy Programs Provided by Countries Exporting Softwood Lumber and Softwood Lumber Products to the United States; Request for Comment

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Department) seeks public comment on any subsidies, including stumpage subsidies, provided by certain countries exporting softwood lumber or softwood lumber products to the United States during the period July 1 through December 31, 2010.

DATES: Comments must be submitted within thirty days after publication of this notice.

ADDRESSES: Written comments (original and six copies) should be sent to the Secretary of Commerce, Attn: James Terpstra, Import Administration, APO/Dockets Unit, Room 1870, U.S. Department of Commerce, 14th Street & Constitution Ave., NW., Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: James Terpstra, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–3965.

SUPPLEMENTARY INFORMATION:

Background

On June 18, 2008, section 805 of Title VIII of the Tariff Act of 1930 (the Softwood Lumber Act of 2008) was enacted into law. Under this provision, the Secretary of Commerce is mandated to submit to the appropriate Congressional committees a report every 180 days on any subsidy provided by countries exporting softwood lumber or softwood lumber products to the United States, including stumpage subsidies.

The Department submitted its last subsidy report on December 15, 2010. As part of its newest report, the Department intends to include a list of subsidy programs identified with sufficient clarity by the public in response to this notice.

Request for Comments

Given the large number of countries that export softwood lumber and softwood lumber products to the United States, we are soliciting public comment only on subsidies provided by countries whose exports accounted for at least one percent of total U.S. imports of softwood lumber by quantity, as classified under Harmonized Tariff Schedule code 4407.1001 (which accounts for the vast majority of imports), during the period July 1 through December 31, 2010. Official U.S. import data published by the United States International Trade Commission Tariff and Trade DataWeb indicate that exports of softwood lumber from Canada and Chile each account for at least one percent of U.S. imports of softwood lumber products during that time period. We intend to rely on similar previous six-month periods to identify the countries subject to future reports on softwood lumber subsidies. For example, we will rely on U.S. imports of softwood lumber and softwood lumber products during the period January 1 through June 30, 2011, to select the countries subject to the next report.

Under U.S. trade law, a subsidy exists where a government authority: (i) Provides a financial contribution; (ii) provides any form of income or price support within the meaning of Article XVI of the GATT 1994; or (iii) makes a payment to a funding mechanism to provide a financial contribution to a person, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments, and a benefit is thereby conferred. *See* section 771(5)(B) of the Tariff Act of 1930, as amended.

Parties should include in their comments: (1) The country which provided the subsidy; (2) the name of the subsidy program; (3) a brief (3–4 sentence) description of the subsidy program; and (4) the government body or authority that provided the subsidy.

Submission of Comment

Persons wishing to comment should file a signed original and six copies of each set of comments by the date specified above. The Department will not accept comments accompanied by a request that a part or all of the material be treated confidentially due to business proprietary concerns or for any other reason. The Department will return such comments and materials to the persons submitting the comments and will not include them in its report on softwood lumber subsidies. The Department also requests submission of comments in electronic form to accompany the required paper copies. Comments filed in electronic form should be submitted on CD–ROM with the paper copies or by e-mail to the Webmaster below.

Comments received in electronic form will be made available to the public in Portable Document Format (PDF) on the Import Administration Web site at the following address: *http://ia.ita.doc.gov*. Any questions concerning file formatting, document conversion, access on the Internet, or other electronic filing issues should be addressed to Andrew Lee Beller, Import Administration Webmaster, at (202) 482–0866, e-mail address: *webmaster-support@ita.doc.gov.*

All comments and submissions should be mailed to James Terpstra, Import Administration; Subject: Softwood Lumber Subsidies Bi-Annual Report: Request for Comment; Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, by no later

than 5 p.m., on the above-referenced deadline date.

Dated: April 25, 2011.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–10424 Filed 4–28–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Meeting To Review and Solicit Input on Tests for Inclusion in the Project 25 Compliance Assessment Program

AGENCY: National Institute of Standards and Technology (NIST), Department of Commerce.

ACTION: Notice of public meeting.

SUMMARY: The U.S. Department of Commerce's (DOC) National Institute of Standards and Technology (NIST), Law Enforcement Standards Office (OLES), in partnership with the U.S. Department of Homeland Security (DHS) Office for Interoperability and Compatibility (OIC), will hold a public meeting on May 13, 2011, via teleconference. The purpose of the meeting is to gather input for the development of conformance and interoperability tests for select Project 25 (P25) conventional mode features and functionalities. These tests are developed for the DHS/OIC P25 Compliance Assessment Program (CAP) Governing Board (GB) and will be incorporated into P25 CAP Compliance Assessment Bulletins (CABs).

DATES: The meeting will be held via teleconference at 1 p.m. Eastern Daylight Time on Friday, May 13, 2011. Members of the public wishing to attend the meeting must register by Friday, May 6, 2011. Please see registration instructions in the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: Dereck Orr, Department of Commerce, NIST, 300 Broadway St., Boulder, CO 80305. Telephone: (303) 497–5400. E-mail: *dereck.orr@nist.gov.* More information about DHS/OIC can be found at *http://www.safecomprogram.gov.*

SUPPLEMENTARY INFORMATION: Emergency responders—emergency medical technicians, fire personnel, and law enforcement officers—need to seamlessly exchange communications across disciplines and jurisdictions in order to successfully respond to day-to-day incidents and large-scale emergencies. P25 focuses on developing standards that allow radios and other components to interoperate, regardless of the manufacturer. In turn, these standards enable emergency responders to seamlessly exchange critical communications with other disciplines and jurisdictions.

An initial goal of P25 is to specify formal standards for interfaces between the components of a land mobile radio (LMR) system. LMR systems are commonly used by emergency responders in portable handheld and mobile vehicle-mounted devices. Although formal standards are being developed, no process is currently in place to confirm that LMR equipment advertised as P25-compliant meets all aspects of P25 standards.

To address discrepancies between P25 standards and industry equipment, DHS and NIST established the P25 CAP. The P25 CAP is a partnership between the DHS/OIC; NIST; industry; and the emergency response community.

The P25 CAP provides an independent process for evaluating P25 equipment for standards compliance and interoperability across manufacturers. By providing manufacturers with a method to consistently test their equipment for compliance with P25 standards and consistently report the results of such testing, the P25 CAP helps emergency response officials make informed purchasing decisions.

The P25 CAP requires test laboratories to demonstrate their competence through a rigorous and objective assessment process. Such a process promotes the user community's confidence in, and acceptance of, test results from DHS-recognized laboratories. All equipment suppliers that participate in the P25 CAP must use recognized laboratories to conduct performance, conformance, and interoperability tests on their products. P25 equipment suppliers will release Summary Test Reports and Suppliers' Declarations of Compliance based on testing from laboratories recognized by DHS.

Created by DHS/OIC, CABs describe how the P25 CAP operates and address issues related to the Program. The scope of a CAB can range from policy to guidance, covering issues such as specific test standards to be used for a particular P25 interface, or P25 LMR Request for Proposal guidance.

The purpose of the meeting is to gather input for the development of conformance and interoperability tests for select P25 conventional mode features and functionalities. These tests are developed for the DHS/OIC Project 25 (P25) Compliance Assessment Program (CAP) Governing Board (GB) and will be incorporated into P25 CAP Compliance Assessment Bulletins (CABs).

At the meeting, NIST will accept input on conformance or interoperability tests, or both, for the following, prioritized features and functionalities:

- Conventional squelch.
- Emergency alarm.
- Emergency group voice call.
- Group voice call.
- Radio unit monitoring.
- Transport of Talking Party Identification.
- Late Entry.
- Location Services.
- Radio unit inhibit/uninhibit.
- Unaddressed voice call.
- Encryption.
- Over The Air Rekeying (OTAR).
- Emergency Cancel.
- All Call.

At the May 13 meeting, NIST will also solicit comments on what appropriate criteria should be used for assessing a conformance tests' suitability for inclusion in the P25 CAP. The following criteria are provided as a basis for comment:

- Does the conformance test limit devices in the test environment to the device under test and appropriate, validated test equipment?
- Are all packet types tested that are relevant to the functionality under test?
- Are all call/message types tested relevant to the functionality under test?
- Is packet/message order checked relevant to the functionality under test?
- Are all information and reserved fields tested within message packets relevant to the functionality under test?
- For all information fields relevant to the feature under test, is a linearly independent set of values used across the entire allowable range?
- Where behavior of a product is specified for parameter values outside of the normal or permissible range, are these values tested?
- Is timing between subsequent packets identified?
- Is radio behavior checked if events occur before/after time-out?
- Are repeater inbound and outbound packets "paired" and timing relationship between the two quantified?
- Are all of the different combinations of status bits tested where relevant to a feature under test?
- Does the test standard define the detailed procedural steps necessary for a test operator to perform the test consistently across multiple laboratories?

Additionally, NIST is seeking comment on what appropriate criteria

should be used for assessing an interoperability tests' suitability for inclusion in the P25 CAP. The following criteria are provided as a basis for comment:

- For all information fields relevant to the feature under test, is a linearly independent set of values used across the entire allowable range?
- Is timing between subsequent packets identified related to transmission or reception of voice or message/alarm examined?
- Can functionality already be tested using other P25 CAP-recognized testing criteria?
- Does the interoperability test procedure address and test adverse responses due to configurations of parameter values outside the normal or permissible range?
- Does the test procedure accommodate evaluation of a test article's behavior where multiple defined responses are possible?
- If capable, does each unit under test perform the roles of both transmitter and receiver during the test?
- Does the test provide definitive predictive outcomes (behaviors) for all articles under test?

More information about the P25 CAP is available at *http://www.safecomprogram.gov.* More information about NIST/OLES can be found at *http://www.nist.gov/oles/.*

Registration: Anyone wishing to attend this teleconference must express interest by the close of business on Friday, May 6, 2011. Please submit your name, e-mail address, and phone number to Corey Reynolds, *creynolds@corneralliance.com*, and he will provide logistics information for the call.

To be considered at the meeting, written comments and input on the features and functionalities and conformance and interoperability test criteria should be submitted to Corey Reynolds, *creynolds@corneralliance.com* by Friday, May 6, 2011. Verbal comments will also be heard at the teleconference.

Dated: April 26, 2011.

Katharine B. Gebbie,

Director, Physical Measurement Laboratory.

[FR Doc. 2011–10436 Filed 4–28–11; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Alaska Individual Fishing Quotas (IFQs) for Pacific Halibut and Sablefish

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice (renewal of a currently approved information collection).

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 June 28, 2011.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 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 Patsy A. Bearden, (907) 586–7008 or *patsy.bearden@noaa.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for renewal of a currently approved information collection.

The Pacific Halibut and Sablefish Individual Fishing Quota (IFQ) Program was developed to reduce fishing capacity that had increased during years of management as an open access fishery, while maintaining the social and economic character of the fixed gear fishery that is relied on as a source of revenue for coastal communities in Alaska. The Halibut and Sablefish IFQ Program provides economic stability for the commercial hook-and-line fishery while reducing many of the conservation and management problems commonly associated with open access. The IFQ Program for sablefish and Pacific halibut fixed gear provides each fisherman a catch quota that can be used any time during the open season. Individual shares are intended to allow fishermen to set their own pace and adjust their fishing effort. The IFQ Program is intended to reduce the premium that was traditionally placed on speed, allowing fishermen to pay more attention to efficiency and product quality. The IFQ Program consists of three parts: IFQ halibut and sablefish, Western Alaska Community Development Quota (CDQ) halibut, and Gulf of Alaska (GOA) IFQ community quota share. This action is a request for renewal for the collection-of-information.

II. Method of Collection

Respondents have a choice of either electronic or paper forms. Methods of submittal include e-mail of electronic forms, and mail and facsimile transmission of paper forms.

III. Data

OMB Control Number: 0648–0272.

Form Number: None.

Type of Review: Regular submission (renewal of a currently approved collection).

Affected Public: Business or other for-profit organizations; individuals or households.

Estimated Number of Respondents: 2,478.

Estimated Time per Response: 2 hours for Eligibility to Receive QS/IFQ Application; 30 minutes for IFQ/CDQ Hired Master Permit Application; 30 minutes for IFQ/CDQ Registered Buyer Permit Application; 30 minutes for Application for Replacement of Certificates, Permits, or Licenses Application; 200 hours for Application to Become a Community Quota Entity (CQE); 10 hours for Community Petition to Form Governing Body; 2 hours for Transfer of QS/IFQ Application; 2 hours for Transfer of QS/IFQ by Sweep-up Application; 2 hours for Transfer of QS/IFQ to or from a CQE Application; 30 minutes for Approval of Transfer from Governing Body; 2 hours for QS Holder—Identification of Ownership Interest; 40 hours for CQE Annual Report; 4 hours for Letter of Appeal; 30 minutes for QS/IFQ Beneficiary Designation Form; 30 minutes for Annual Updates on the Status of Corporations and Partnerships QS; 6 minutes for IFQ Administrative Waiver; 12 minutes for Prior Notice of IFQ Landing; 15 minutes for Departure Report; 12 minutes for Transshipment Authorization; and 6 minutes for Dockside Sales Receipt; 18 minutes for Electronic Landing Report; 18 minutes for Manual Landing Report; 2 hours for Military Transfer; 4 hours for Military Transfer Appeal; 2 hours for Emergency Medical Transfer; and 4 hours for Emergency Medical Transfer.

Estimated Total Annual Burden Hours: 20,388.

Estimated Total Annual Cost to Public: $38,776 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: April 26, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–10394 Filed 4–28–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA365

Gulf of Mexico Fishery Management Council; Public Meetings; Correction

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

ACTION: Notice of correction of public meetings.

SUMMARY: The Gulf of Mexico Fishery Management Council will convene Public Hearings on: Amendment 18 to the Fishery Management Plan for Coastal Migratory Pelagic Resources in the Atlantic and Gulf of Mexico; Joint Amendment 10 to the Spiny Lobster Fishery Management Plan for the Gulf of Mexico and South Atlantic; Generic Annual Catch Limits/Accountability Measures Amendment for the Gulf of Mexico Fishery Management Council's Red Drum, Reef Fish, Shrimp, Coral and Coral Reefs, and Stony Crab Fishery Management Plans.

DATES: The public meetings will be held on May 2, 2011, through May 12, 2011, at fourteen locations throughout the Gulf of Mexico. The public hearings will begin at 6 p.m and will conclude no later than 9 p.m. For specific dates, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The public meetings will be held at locations listed in the **SUPPLEMENTARY INFORMATION** section.

Council address: Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607.

FOR FURTHER INFORMATION CONTACT: Dr. Richard Leard, Deputy Executive Director/Senior Fishery Biologist, Dr. Steven Atran, Population Dynamics Statistician and Dr. Carrie Simmons, Fishery Biologist; Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION: The original notice was published in the **Federal Register** on April 14, 2011 (76 FR 20957). There are changes to the dates, locations and agenda; therefore, the notice is being republished in its entirety.

Spiny Lobster

Public hearings will be held on Joint Amendment 10 to the Spiny Lobster Fishery Management Plan for the Gulf of Mexico and South Atlantic. Joint Amendment 10 establishes Annual Catch Limits and Accountability Measures for Caribbean spiny lobster as required by the Magnuson-Stevens Act. This amendment includes additional actions addressing modifications to the Fishery Management Unit, updates to protocol for Enhanced Cooperative Management, regulations regarding the possession of undersized lobsters or "shorts" as attractants for the commercial trap fishery, permit requirements for tailing spiny lobster, sector allocations, limiting spiny lobster fishing areas to protect threatened staghorn and elkhorn corals, and requirements for gear marking of all spiny lobster trap lines.

Reef Fish

Amendment 32: This amendment will establish annual catch limits and annual catch targets for 2012 to 2015 for gag and for 2012 for red grouper, and contains actions to establish a rebuilding plan for gag, set recreational bag limits, size limits and closed seasons for gag/red grouper in 2012, consider a commercial gag and shallow-water grouper quota adjustment to account for dead discards, make adjustment to multi-use IFQ shares in the grouper individual fishing quota program, reduce the commercial gag size limit, modify the offshore time and areas closures, and establish gag, red grouper, and shallow-water grouper accountability measures.

Generic Amendment

Public hearings will also be held to receive comments on the Generic Annual Catch Limits/Accountability measures Amendment for the Gulf of Mexico Fishery Management Council's Red Drum, Reef Fish, Shrimp, Coral and Coral Reefs, and Stone Crab Fishery Management Plans. This amendment contains actions to delegate management of selected species to the other agencies, remove selected species from the fishery management plans, group species for purposes of setting annual catch limits and annual catch targets, establish an acceptable biological catch control rule, establish an annual catch limit/annual catch target control rule, establish a generic framework procedure for implementing management changes, establish the initial specification of annual catch limits and annual catch targets for stocks and stock groups still in need of such specification, establish the apportionment of the black grouper, yellow tail snapper, and mutton snapper stocks between the Gulf and South Atlantic Council jurisdictions, set a commercial and recreational allocation of black grouper within the Gulf Council's jurisdiction, and establish accountability measures to keep catch levels within their annual catch limits or take corrective action if they exceed the limits.

The Public Hearings will begin at 6 p.m. and conclude at the end of public testimony or no later than 9 p.m. at the following locations:

Monday, May 2, 2011

- ACL—Hilton St. Petersburg Carillon Parkway, 950 Lake Carillon Drive, St. Petersburg, FL, telephone: (727) 540–0050; and
- ACL—Clarion Hotel, 12635 South Cleveland Avenue, Fort Myers, FL 33907, telephone: (239) 936–4300.

Tuesday, May 3, 2011

- Amend 32—Hilton St. Petersburg Carillon Parkway, 950 Lake Carillon Drive, St. Petersburg, FL, telephone: (727) 540–0050; and
- Amend 32—Clarion Hotel, 12635 South Cleveland Avenue, Fort Myers, FL 33907, telephone: (239) 936–4300.

Wednesday, May 4, 2011

- Amend 32—Banana Bay Resort, 4590 Overseas Highway, Marathon, FL 33050, telephone: (305) 743–3500.

Thursday, May 5, 2011

• ACL—Banana Bay Resort, 4590 Overseas Highway, Marathon, FL 33050, telephone: (305) 743–3500.

Monday, May 9, 2011

• Spiny Lobster, Sirata Beach Resort, 5300 Gulf Boulevard, St. Pete Beach, FL 33706, telephone: (727) 363–5176;

• ACL/Amend 32—Renaissance Riverview Plaza, 64 South Water Street, Mobile, AL 36602; and

• ACL—Boardwalk—Royal American Beach Getaways, 9400 S. Thomas Drive, Panama City Beach, FL 32408, telephone: (850) 230–4681.

Tuesday, May 10, 2011

• Amend 32/ACL—Hilton, 5400 Seawall Blvd., Galveston, TX 77551, telephone: (409) 744–1757;

• Amend 32/ACL—Best Western, 7921 Lamar Poole Road, Biloxi, MS 39532, telephone: (228) 875–7111; and

• Amend 32—Boardwalk—Royal American Beach Getaways, 9400 S. Thomas Drive, Panama City Beach, FL 32408, telephone: (850) 230–4681.

Wednesday, May 11, 2011

• Amend 32—Harte Research Institute, Conference Room, 6300 Ocean Drive, Corpus Christi, TX 78412–5869, telephone: (361) 825–2000; and

• Amend 32/ACL—Crowne Plaza New Orleans Airport, 2829 Williams Blvd., Kenner, LA 70062, telephone: (504) 467–5611.

Thursday, May 12, 2011

• ACL—Plantation Suites and Conference Center, 1909 Highway 361, Port Aransas, TX 78373, telephone: (361) 749–3866.

Copies of the documents can be obtained by calling (813) 348–1630.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kathy Pereira at the Council (see **ADDRESSES**) at least 5 working days prior to the meeting.

Dated: April 25, 2011.

William D. Chappell,

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

[FR Doc. 2011–10324 Filed 4–28–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA365

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Council to convene public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will convene Public Hearings on: Amendment 18 to the Fishery Management Plan for Coastal Migratory Pelagic Resources in the Atlantic and Gulf of Mexico; Joint Amendment 10 to the Spiny Lobster Fishery Management Plan for the Gulf of Mexico and South Atlantic; Generic Annual Catch Limits/Accountability Measures Amendment for the Gulf of Mexico Fishery Management Council's Red Drum, Reef Fish, Shrimp, Coral and Coral Reefs, and Stony Crab Fishery Management Plans.

DATES: The public meetings will be held on May 2, 2011 through May 12, 2011 at fourteen locations throughout the Gulf of Mexico. The public hearings will begin at 6 p.m. and will conclude no later than 9 p.m. For specific dates see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The public meetings will be held at locations listed in the **SUPPLEMENTARY INFORMATION**.

Council address: Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, Florida 33607.

FOR FURTHER INFORMATION CONTACT: Dr. Richard Leard, Deputy Executive Director/Senior Fishery Biologist, Dr. Steven Atran, Population Dynamics Statistician and Dr. Carrie Simmons, Fishery Biologist; Gulf of Mexico Fishery Management Council; telephone: 813–348–1630.

SUPPLEMENTARY INFORMATION:

Spiny Lobster

Public hearings will be held on Joint Amendment 10 to the Spiny Lobster Fishery Management Plan for the Gulf of Mexico and South Atlantic. Joint Amendment 10 establishes Annual Catch Limits and Accountability Measures for Caribbean spiny lobster as required by the Magnuson-Stevens Act. This amendment includes additional actions addressing modifications to the Fishery Management Unit, updates to protocol for Enhanced Cooperative Management, regulations regarding the possession of undersized lobsters or "shorts" as attractants for the commercial trap fishery, permit requirements for tailing spiny lobster, sector allocations, limiting spiny lobster fishing areas to protect threatened staghorn and elkhorn corals, and requirements for gear marking of all spiny lobster trap lines.

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Amendment 32—This amendment will establish annual catch limits and annual catch targets for 2012 to 2015 for gag and for 2012 for red grouper, and contains actions to establish a rebuilding plan for gag, set recreational bag limits, size limits and closed seasons for gag/red grouper in 2012, consider a commercial gag and shallow-water grouper quota adjustment to account for dead discards, make adjustment to multi-use IFQ shares in the grouper individual fishing quota program, reduce the commercial gag size limit, modify the offshore time and areas closures, and establish gag, red grouper, and shallow-water grouper accountability measures.

Generic Amendment

Public hearings will also be held to receive comments on the Generic Annual Catch Limits/Accountability measures Amendment for the Gulf of Mexico Fishery Management Council's Red Drum, Reef Fish, Shrimp, Coral and Coral Reefs, and Stone Crab Fishery Management Plans. This amendment contains actions to delegate management of selected species to the other agencies, remove selected species from the fishery management plans, group species for purposes of setting annual catch limits and annual catch targets, establish an acceptable biological catch control rule, establish an annual catch limit/annual catch target control rule, establish a generic framework procedure for implementing management changes, establish the initial specification of annual catch limits and annual catch targets for stocks and stock groups still in need of such specification, establish the apportionment of the black grouper, yellow tail snapper, and mutton snapper stocks between the Gulf and South Atlantic Council jurisdictions, set a commercial and recreational allocation of black grouper within the Gulf Council's jurisdiction, and establish accountability measures to keep catch levels within their annual catch limits or take corrective action if they exceed the limits.

The Public Hearings will begin at 6 p.m. and conclude at the end of public

testimony or no later than 9 p.m. at the following locations:

Monday, May 2, 2011, ACL—Hilton St. Petersburg Carillon Parkway, 950 Lake Carillon Drive, St. Petersburg, FL (727) 540–0050, ACL—Clarion Hotel, 12635 South Cleveland Avenue, Fort Myers, FL 33907, (239) 936–4300.

Tuesday, May 3, 2011, Amend 32—Hilton St. Petersburg Carillon Parkway, 950 Lake Carillon Drive, St. Petersburg, FL 727.540.0050, Amend 32—Clarion Hotel, 12635 South Cleveland Avenue, Fort Myers, FL 33907, (239) 936–4300.

Wednesday, May 4, 2011, Amend 32—Banana Bay Resort, 4590 Overseas Highway, Marathon, FL 33050, (305) 743–3500.

Thursday, May 5, 2011, ACL—Banana Bay Resort, 4590 Overseas Highway, Marathon, FL 33050, (305) 743–3500.

Monday, May 9, 2011, Spiny Lobster, Sirata Beach Resort, 5300 Gulf Boulevard, St. Pete Beach, FL 33706, (727) 363–5176, ACL/Amend 32—Renaissance Riverview Plaza, 64 South Water Street, Mobile, AL 36602, ACL—Boardwalk—Royal American Beach Getaways, 9400 S. Thomas Drive, Panama City Beach, FL 32408, 850.230.4681.

Tuesday, May 10, 2011, Amend 32/ACL—Hilton, 5400 Seawall Blvd., Galveston, TX 77551, 409.744.1757, Amend 32/ACL—Four Points Hotel by Sheraton, 940 Beach Blvd., Biloxi, MS 39530, (228) 546–3100, Amend 32—Boardwalk—Royal American Beach Getaways, 9400 S. Thomas Drive, Panama City Beach, FL 32408, 850.230.4681.

Wednesday, May 11, 2011, Amend 32—Harte Research Institute, Conference Room, 6300 Ocean Drive, Corpus Christi, TX 78412–5869, (361) 825–2000, Amend 32/ACL—Crowne Plaza New Orleans Airport, 2829 Williams Blvd., Kenner, LA 70062, 504.467.5611.

Thursday, May 12, 2011, ACL—Plantation Suites and Conference Center, 1909 Highway 361, Port Aransas, TX 78373, 361.749.3866.

Copies of the documents can be obtained by calling 813–348–1630.

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kathy Pereira at the Council (see **ADDRESSES**) at least five working days prior to the meeting.

Dated: April 26, 2011.

Tracey L. Thompson,

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

[FR Doc. 2011–10377 Filed 4–28–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RIN 0648–XA401]

North Pacific Fishery Management Council Public Meeting

ACTION: Notice of public meetings.

SUMMARY: The North Pacific Fishery Management Council (Council) and its advisory committees will hold public meetings, June 6–June 14, 2011 in Nome, AK.

DATES: The Council will begin its plenary session at 8 a.m. on Wednesday, June 8 continuing through Tuesday, June 14. The Council's Advisory Panel (AP) will begin at 8 a.m., Monday, June 6 and continue through Friday, June 10. The Scientific Statistical Committee (SSC) will begin at 8 a.m. on Monday, June 6 and continue through Wednesday, June 8, 2011. All meetings are open to the public, except executive sessions.

ADDRESSES: The AP will meet at the Old Saint Joes Church, 407 Being Street. The SSC will meet at the Pioneer Hall, 110 East Front Street, and the Council will meet at Mini Convention Center, 409 River Street, Nome AK.

Council address: North Pacific Fishery Management Council, 605 W. 4th Avenue, Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: David Witherell, Council staff; telephone: (907) 271–2809.

SUPPLEMENTARY INFORMATION: Council Plenary Session: The agenda for the Council's plenary session will include the following issues. The Council may take appropriate action on any of the issues identified.

Reports

1. Executive Director's Report (halibut prohibited species catch report), NMFS Management Report (update on Steller Sea Lion Research), Alaska Department of Fish & Game Report, NOAA Enforcement Report, United States Coast Guard Report, United States Fish & Wildlife Service Report.

2. Catch Sharing Plan(CSP): Review CSP size limit algorithm.

3. BSAI Crab Draft Stock Assessment Fishery Evaluation report: Review and approve catch specifications for Norton Sound Red King Crab and Aleutian Island Golden King Crab.; review data for Pribilof Blue King Crab.

4. Essential Fish Habitat (EFH): Review habitat conservation area boundary; review report on Northern Bering Sea Research Plan.

5. Gulf of Alaska (GOA) Salmon Issues: Final action of GOA Chinook Salmon Bycatch Pollock fishery.

6. Bering Sea Aleutian Island (BSAI) Salmon Issues: Initial review of BSAI Chum Salmon Bycatch.

7. Miscellaneous Groundfish Issues: Review Pacific cod assessment model (SSC only); discussion paper on Groundfish uncertainty/total catch accounting; review/approve Halibut Mortality on trawlers Exempted Fishing Permit (EFP) (T); review and approve Research Priorities.

8. Staff Tasking: Review Committees and tasking.

9. Other Business.

The SSC agenda will include the following issues:

1. CSP.

2. BSAI Crab.

3. EFH.

4. BSAI Salmon.

5. Miscellaneous Issues.

The Advisory Panel will address most of the same agenda issues as the Council, except #1 reports. 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 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 Fishery Conservation and Management 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 Gail Bendixen at (907) 271–2809 at least 7 working days prior to the meeting date.

Dated: April 26, 2011.

Tracey L. Thompson,

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

[FR Doc. 2011–10374 Filed 4–28–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA400

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Council to convene a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will convene a meeting of the Standing, Special Mackerel and Special Reef Fish Scientific and Statistical Committees (SSC).

DATES: The meeting will convene at 9 a.m. on Tuesday, May 17, 2011 and conclude by 2 p.m. on Thursday, May 19, 2011.

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.

FOR FURTHER INFORMATION CONTACT: Steven Atran, Population Dynamics Statistician; Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION: The Standing and Special Mackerel SSC will meet jointly on Tuesday, May 17, 2011 to review available biological information and reconsider its overfishing limit (OFL) and acceptable biological catch (ABC) recommendations from its March meeting for Gulf group Spanish mackerel and cobia. The remainder of the meeting will be a joint meeting of the Standing and Special Reef Fish SSC. The Standing and Special Reef Fish SSC will discuss the protocols and requirements for transcribing and recording of its meetings. The SSC will then review benchmark assessments of yellowedge grouper and tilefish, and will recommend OFL and ABC based on the assessments and the ABC control rule. The SSC will also review reruns of the projection analyses for the 2009 update assessments of gag, red grouper and red snapper, but will incorporate actual landings data for 2009 and 2010 rather than the original projected landings for those years, and will reconsider its ABC recommendations for 2011 and beyond based on the results of the reruns. Finally, the SSC will review and recommend OFL and ABC using the ABC control rule for several data-poor stocks and stock groupings that resulted from revisions to the proposed stock grouping made at the April Council meeting, including a revised mid-water snapper complex (silk snapper, Wenchman), tilefish complex (tilefish, blueline tilefish, goldface tilefish), shallow-water grouper complex (black grouper, scamp, yellowmouth grouper), deep-water grouper complex (yellowedge grouper, warsaw grouper, snowy grouper, speckled hind), and Cubera snapper. The above actions are to assist the Council in preparing a generic amendment to set annual catch limits and accountability measures for stocks under its management.

Copies of the agenda and other related materials can be obtained by calling (813) 348–1630 or can be downloaded from the Council's ftp site, *ftp.gulfcouncil.org.*

Although other non-emergency issues not on the agenda may come before the Scientific and Statistical Committees 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 Scientific and Statistical Committees will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kathy Pereira at the Council (see **ADDRESSES**) at least 5 working days prior to the meeting.

Dated: April 26, 2011.

Tracey L. Thompson,

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

[FR Doc. 2011–10373 Filed 4–28–11; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Addition

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Addition to the Procurement List.

SUMMARY: This action adds a service to the Procurement List that will be provided by a nonprofit agency employing persons who are blind or have other severe disabilities.

DATES: *Effective Date:* 5/30/2011.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Addition

On 2/25/2011 (76 FR 10571), the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed addition to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agency to provide the service and impact of the addition on the current or most recent contractors, the Committee has determined that the service listed below is suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organization that will provide the service to the Government.

2. The action will result in authorizing small entities to provide the service to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the service proposed for addition to the Procurement List.

End of Certification

Accordingly, the following service is added to the Procurement List:

Service

Service Type/Location: Custodial Service, U.S. Coast Guard Yard—Curtis Bay, Baltimore, MD.

NPA: Melwood Horticultural Training Center, Upper Marlboro, MD.

Contracting Activity: Department of Homeland Security, U.S. Coast Guard, ELC, Baltimore, MD.

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2011–10407 Filed 4–28–11; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletion

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to and deletion from the Procurement List.

SUMMARY: The Committee is proposing to add products and services to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and to delete a service previously furnished by such agency.

Comments Must be Received On or Before: 5/30/2011.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

For Further Information or to Submit Comments Contact: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the products and services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products and services to the Government.

2. If approved, the action will result in authorizing small entities to furnish the products and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products and services proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following products and services are proposed for addition to the Procurement List for production by the nonprofit agencies listed:

Products

Kit, Shelter-In-Place

NSN: 6545–00–NIB–0105.
NPA: Bosma Industries for the Blind, Inc., Indianapolis, IN.
Contracting Activity: Department of Veterans Affairs, NAC, Hines, IL.
Coverage: C–List for 100% of the requirement of the Department of Veterans Affairs as aggregated by the Department of Veterans Affairs National Acquisition Center, Hines, IL.

Strainer, Collapsible

NSN: M.R. 860.
NPA: Industries for the Blind, Inc., West Allis, WI.
Contracting Activity: Military Resale-Defense Commissary Agency, Fort Lee, VA.
Coverage: C–List for the requirements of military commissaries and exchanges as aggregated by the Defense Commissary Agency.

Services

Service Type/Location: Custodial Service, USDA APHIS—Plant Protection and Quarantine & Veterinary Services, 8100 NW 15th Place, Gainesville, FL.
NPA: The Arc of Bradford County, Starke, FL.
Contracting Activity: Dept of Agriculture, Animal and Plant Health Inspection Service, Minneapolis, MN.
Service Type/Location: Custodial Service, US Military Academy Preparatory School, West Point, NY.
NPA: New Dynamics Corporation, Middletown, NY.
Contracting Activity: Dept of the Army, W6QM West Point DOC, West Point, NY.
Service Type/Location: Base Operation Support Service, Department of Public Works (DPW), Fort Sill, OK.
NPAs: Professional Contract Services, Inc., Austin, TX (Prime Contractor), Work Services Corporation, Wichita Falls, TX (Subcontractor).
Contracting Activity: Mission and Installation Contracting Center, Fort Sam Houston, TX

Deletion

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. If approved, the action may result in authorizing small entities to provide the service to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the service proposed for deletion from the Procurement List.

End of Certification

The following service is proposed for deletion from the Procurement List:

Service

Service Type/Location: Janitorial/Custodial Service, Fort Polk: Buildings 1830 and 1807, Buildings 2155, 4050 and 427, Fort Polk, LA.
NPA: Vernon Sheltered Workshop, Inc., Leesville, LA.
Contracting Activity: Dept of the Army, W6QM ft Polk DOC, Fort Polk, LA.

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2011–10408 Filed 4–28–11; 8:45 am]

BILLING CODE 6353–01–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Information Collection; Submission for OMB Review, Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (hereinafter the "Corporation"), has submitted a public information collection request (ICR) entitled AmeriCorps Member Feedback Survey (formerly known as Performance Measurement in AmeriCorps) for review and approval in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, (44 U.S.C. Chapter 35). Copies of this ICR, with applicable supporting documentation, may be obtained by calling the Corporation for National and Community Service, Nathan Dietz, at (202) 606–6633 or

e-mail to *ndietz@cns.gov.* Individuals who use a telecommunications device for the deaf (TTY–TDD) may call (202) 606–3472 between 8:30 a.m. and 5 p.m. Eastern Time, Monday through Friday.

ADDRESSES: Comments may be submitted, identified by the title of the information collection activity, to the Office of Information and Regulatory Affairs, Attn: Ms. Sharon Mar, OMB Desk Officer for the Corporation for National and Community Service, by any of the following two methods within 30 days from the date of publication in the **Federal Register**:

(1) *By fax to:* (202) 395–6974, Attention: Ms. Sharon Mar, OMB Desk Officer for the Corporation for National and Community Service; and

(2) *Electronically by e-mail to: smar@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, 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;
- Propose ways to enhance the quality, utility, and clarity of the information to be collected; and
- Propose 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, e.g., permitting electronic submissions of responses.

Comments

A 60-day public comment Notice was published in the **Federal Register** on December 16, 2010. This comment period ended February 16, 2011. No public comments were received from this Notice.

Description: The Corporation is seeking approval of the Corporation's AmeriCorps Member Feedback Survey (formerly known as AmeriCorps Performance Measurement) which is used by exiting AmeriCorps members to assess members' satisfaction with the experience, training, supervision, etc.

Type of Review: Renewal.

Agency: Corporation for National and Community Service.

Title: AmeriCorps Member Feedback Survey (formerly known as AmeriCorps Performance Measurement).

OMB Number: # 3045–0094.

Agency Number: None.

Affected Public: Exiting AmeriCorps members.

Total Respondents: 2011—115,000 respondents; 2012—140,000 respondents; 2013—170,000 respondents.

Frequency: Annual.

Average Time per Response: Ten minutes.

Estimated Total Burden Hours: 2011—19,167 hours; 2012—23,333 hours; 2013—28,333 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Dated: April 25, 2011.

Heather Peeler,

Chief Strategy Officer, Strategy Office.

[FR Doc. 2011–10472 Filed 4–28–11; 8:45 am]

BILLING CODE 6050–$$–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Federal Advisory Committee; Defense Health Board (DHB) Meeting

AGENCY: Department of Defense (DoD)

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix as amended), the Sunshine in the Government Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, and in accordance with section 10(a)(2) of Public Law, the Defense Health Board (DHB) announces that it will meet on June 14 and 15, 2011. Subject to the availability of space, the meeting is open to the public on June 14 from 9:30 a.m. to 12:45 p.m. and from 1:45 p.m. to 5 p.m.

DATES: The meeting will be held:

June 14, 2011

8 a.m.–9 a.m. (Administrative Working Meeting).
9:30 a.m.–12:45 p.m. (Open Session).
12:45 p.m.–1:45 p.m. (Administrative Working Meeting).
1:45 p.m.–5 p.m. (Open Session).

June 15, 2011

8 a.m.–2 p.m. (Closed Session).

ADDRESSES: The June 14 meeting will be held at the Renaissance Arlington Capital View Hotel, 2800 South Potomac Avenue, Arlington, VA 22202.

The June 15 meeting will be held at the Army National Guard Readiness Center, 111 South George Mason Drive, Arlington, VA 22204.

Written statements may be mailed to the address under **FOR FURTHER INFORMATION CONTACT**, e-mailed to *dhb@ha.osd.mil*, or faxed to (703) 681–3317.

FOR FURTHER INFORMATION CONTACT: Ms. Christine Bader, Director, Defense Health Board, Five Skyline Place, 5111 Leesburg Pike, Suite 810, Falls Church, Virginia 22041–3206, (703) 681–8448 x1215, Fax: (703) 681–3317, *Christine.bader@tma.osd.mil.*

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting:

The purpose of the meeting is to address and deliberate pending and new Board issues and provide briefings for Board members on topics related to ongoing Board business.

Agenda:

On June 14, 2011, the DHB will receive briefings on military health needs and priorities. The following DHB Subcommittees will present updates to the Board: The Psychological Health External Advisory Subcommittee and the Trauma and Injury Subcommittee. Additionally, the Board will receive briefs regarding Department of Defense (DoD) Implementation of Recommendations from the DoD Task Force on the Prevention of Suicide by Members of the Armed Forces, DoD Response to Evidence-Based Metrics, and a briefing from the Joint Task Force National Capital Region Medical regarding Integration of Services. The Board will also vote on issues presented by the Psychological Health External Advisory Subcommittee and the Trauma and Injury Subcommittee.

Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.155, in the interest of national security, the DoD has determined that the meeting on June 15, 2011 will be closed to the public. The Under Secretary of Defense (Personnel and Readiness), in consultation with the Office of the DoD General Counsel, has determined in writing that the public interest requires that the session on June 15, 2011 be closed to public because it will concern matters listed in section 552b(c)(1) of title 5, United States Code. Specifically, the information presented meets criteria established by an executive order to be kept secret in the interest of national defense and foreign policy.

Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.140 through 102–3.165 and subject availability of space, the DHB meeting from 9:30 a.m. to 12:45 p.m. and from 1:45 p.m. to 5 p.m. on June 14, 2011 is open to the public. The public is encouraged to register for the meeting.

Additional information, agenda updates, and meeting registration are available online at the DHB Web site, *http://www.health.mil/dhb/default.cfm.*

Written Statements:

Any member of the public wishing to provide input to the DHB should submit a written statement in accordance with 41 CFR 102–3.140(C) and section 10(a)(3) of the Federal Advisory Committee Act, and the procedures described in this notice. Written statement should be no longer than two type-written pages and must address the following detail: The issue, discussion, and a recommended course of action. Supporting documentation may also be included as needed to establish the appropriate historical context and to provide any necessary background information.

Individuals desiring to submit a written statement may do so through the Board's Designated Federal Officer (DFO) (see **FOR FURTHER INFORMATION CONTACT**) at any point. If the written statement is not received at least 10 calendar days prior to the meeting, which is subject to this notice, then it may not be provided to or considered by the DHB until the next open meeting.

The DFO will review all timely submissions with the DHB President, and ensure they are provided to members of the DHB before the meeting that is subject to this notice. After reviewing the written comments, the President and the DFO may choose to invite the submitter of the comments to orally present their issue during an open portion of this meeting or at a future meeting.

The DFO, in consultation with the DHB President, may, if desired, allot a specific amount of time for members of the public to present their issues for review and discussion by the DHB.

Special Accommodations:

If special accommodations are required to attend (sign language, wheelchair accessibility) please contact Ms. Lisa Jarrett at (703) 681–8448 ext. 1280 by May 28, 2011.

Dated: April 21, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–10367 Filed 4–28–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2011–OS–0046]

Privacy Act of 1974; Systems of Records

AGENCY: Defense Logistics Agency, DoD.

ACTION: Notice to add a system of records.

SUMMARY: The Defense Logistics Agency proposes to add a system of records notice to its existing inventory of records systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on May 31, 2011 unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and/Regulatory Information Number (RIN) and title, by any of the following methods:

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

* *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, OSD Mailroom 3C843, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is of make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Jody Sinkler at (703) 767–5045, or the Privacy Act Officer, Headquarters, Defense Logistics Agency, *Attn:* DGA, 8725 John J. Kingman Road, Stop 16443, Fort Belvoir, VA 22060–6221.

SUPPLEMENTARY INFORMATION: The Defense Logistics Agency systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the **FOR FURTHER INFORMATION CONTACT** address above.

The proposed system reports, as required by 5 U.S.C. 552a (r), of the Privacy Act of 1974, as amended, were submitted on April 22, 2011, to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: April 25, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense

S110.85

SYSTEM NAME:

Mandatory Declassification Review (MDR) Files.

SYSTEM LOCATION:

DLA Information Security Office, 8725 John J Kingman Road, Suite 3533, Fort Belvoir, VA 22060–6221.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who request Mandatory Declassification Review (MDR) or appeal a Mandatory Declassification Review determination. These include DoD, Executive Branch Agencies, public or contractors.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name and address of person making MDR request or appeal, records requested, dates, and summaries of action taken.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

E.O. 13526, Classified National Security Information; DoD Instruction 5200.01, DoD Information Security Program and Protection of Sensitive Compartmented Information.

PURPOSE(S):

To process requests and/or appeals from individuals for the mandatory review of classified documents for the purposes of releasing declassified material to the public; and to provide a research resource of historical data on release of records to ensure consistency in subsequent actions. Data developed from this system is used for the annual report required by the applicable Executive Order(s) governing classified National Security Information. This data also serves management needs, by providing information about the number of requests; the type or category of records requested; and the average processing time.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD "Blanket Routine Uses" apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders.

RETRIEVABILITY:

Retrieved by name of requester and other pertinent information, such as subject material describing the MDR item (including date), or any combination of fields.

SAFEGUARDS:

Records are maintained in a secure, limited access, and monitored work area. Physical entry by unauthorized persons is restricted by the use of locks, guards, and administrative procedures. Access to personal information is restricted to those who require the records in the performance of their official duties. All personnel whose official duties require access to the information are trained in the proper safeguarding and use of the information, and receive both annual Information Assurance Awareness and Privacy Act training.

RETENTION AND DISPOSAL:

Mandatory review for declassification requests files.

(1) Records granting access to all the requested records are destroyed 2 years after date of reply.

(2) Requests responding to nonexistent records; to requesters who provide inadequate descriptions; and to those who fail to pay agency reproduction fees (requests not appealed are destroyed 2 years after date of reply; requests appealed are destroyed 4 years after final determination by agency.

(3) Records denying access to all or part of the records requested (requests not appealed are destroyed 5 years after date of reply; requests appealed are destroyed 4 years after final determination by agency).

Mandatory review for declassification appeals files are destroyed 4 years after final determination by agency.

Mandatory review for declassification control files. Registers or listings are destroyed 5 years after date. Other files are destroyed 5 years after final action by the agency.

Mandatory review for declassification reports files are destroyed when 2 years old.

Mandatory review for declassification administrative files are destroyed when 2 years old.

SYSTEM MANAGER(S) AND ADDRESS:

Director, DLA Intelligence, 8725 John J Kingman Road, Suite 3533, Fort Belvoir, VA 22060–6221.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the DLA HQ FOIA/Privacy Act Office, Defense Logistics Agency Headquarters, *Attn:* DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.

Written requests should include the name and number of this system of records notice along with the individual's name and address at the time the record would have been created and be signed.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system of records should address written inquiries to the DLA HQ FOIA/Privacy Act Office, Defense Logistics Agency Headquarters, *Attn:* DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.

Written requests should include the name and number of this system of records notice along with the individual's name and address at the time the record would have been created and be signed.

CONTESTING RECORD PROCEDURES:

The DLA rules for accessing records, for contesting contents, and appealing initial agency determinations are contained in 32 CFR part 323, or may be obtained from the DLA HQ FOIA/Privacy Act Office, Defense Logistics Agency Headquarters, *Attn:* DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.

RECORD SOURCE CATEGORIES:

The subject individual.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2011–10368 Filed 4–28–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2011–OS–0047]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, DoD.

ACTION: Notice to alter a system of records.

SUMMARY: The Office of the Secretary of Defense proposes to alter a system of records in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action would be effective without further notice on May 31, 2011 unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and/Regulatory Information Number (RIN) and title, by any of the following methods:

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

* *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, OSD Mailroom 3C843, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Cindy Allard at (703) 588–6830, or Chief, OSD/JS Privacy Office, Freedom of Information Directorate, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the **FOR FURTHER INFORMATION CONTACT** address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on April 22, 2011, to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs,

and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, "Federal Agency Responsibilities for Maintaining Records About Individuals," dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: April 25, 2011.

Morgan F. Park,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DoDEA 26

SYSTEM NAME:

Department of Defense Education Activity Educational Records (May 3, 2007, 72 FR 24572).

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with "Primary location: Department of Defense Education Activity (DoDEA) Headquarters office, 4040 North Fairfax Drive, Arlington, VA 22203–1634.

SECONDARY LOCATIONS:

Director, Department of Defense Dependent Schools Pacific, Unit 35007, APO AP 96376–5007.

Director, Department of Defense Dependent Schools Europe, Unit 29649, Box 7000, APO AE 09002–7000.

Domestic Dependent Elementary and Secondary Schools Service Center, 700 Westpark Drive, 3rd Floor, Peachtree City, GA 30269–3554.

Decentralized records are also held at local DoD schools. A list of complete addresses for a specific area (Pacific, Europe or Domestic) may be obtained by writing to the appropriate office above."

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with "Current and former students enrolled in schools operated or funded by DoDEA, world-wide."

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with "The records described in this notice consist of elementary school and secondary school records that pertain directly to individual students enrolled or formerly enrolled in DoDEA schools; to include the former Panama schools and Panama college; and school-based programs funded by DoDEA. Data elements for all records generally include student name and unique student identifier.

CONTEMPORARY SCHOOL FILES:

Attendance and Discipline Files. Information reflecting attendance and disciplinary actions, to include teacher referrals, tardy and/or admission slips, correspondence to and from parents, student and/or witness statements, school disciplinary investigation files, student consequences (punishments), and similar related information.

Health Record Files. Student immunization records, parental permission forms, screening results, sports physicals, physician referrals, medication instructions, consent forms, pertinent family medical history, psychological or mental health and physical assessments and evaluation reports, and/or 504 Accommodation Plans relating to medical or physical disabilities.

School Ancillary Service Files. Non-special education supplemental student services, such as the Gifted Program; English as a Second Language (ESL); Compensatory Education; Reading Improvement; and student counseling and guidance. Records include consultation and referrals, individual student responses to test protocols, assessments and evaluation plans and results, progress and evaluation reports and summaries, teachers' notes, general correspondence, and samples of student's work, and similar related information.

School Mediation Agreement and Hearing Results Files. Material on mediations (limited to records of agreements) and hearings other than those filed in another individual student file such as, a special education file.

School Special Education Files. Student special education programs referrals and referral forms; samples of student's work; Individualized Education Programs and Individualized Family Service Plans; Case Study Committee, test results and protocols; disciplinary records, behavior plans and related information; assessment and evaluation reports; correspondence between teachers, service providers and/or parents; and cross-reference location information; related service-provider reports; teacher notes relevant to the child's special education program or needs; results of special education administration hearings; and similar related information.

School Student Record Files. Information includes student name, Social Security Number (SSN), unique student identifier, enrollment forms and documentation, date of birth, citizenship, photos, passport numbers and expiration dates (for high school students only), student performance, achievements and recognition (academic, citizenship, and athletic), standardized achievement test scores and grades, classroom and course grades, reading records, letters of recommendation, parental correspondence, 504 Accommodation Plans and similar individual student records, and information contained in the student files listed below; records of individual student's sponsor's, including sponsor's SSN, permanent duty address, residence, emergency contact information, parental consents and permissions; and similar related records.

Student Administrative Files. Information pertaining to student involvement in administrative actions such as, serious incident reports, military reports, investigations, compliance reports and similar documents when retrieved by the students name or personal identifier.

Student Record Request and Disclosure Files. Records reflecting individual written requests for access to school files, parent/student consent authorizing disclosure of school files to other individuals or organizations, and records of disclosure of school files when no parent/student consent is required.

HISTORICAL SCHOOL FILES:

Transcript Files. Information consists solely of a student's secondary schools or Panama College permanent records (transcripts) reflecting student name and SSN, unique student ID, grades, course titles, credits, and similar data."

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with "10 U.S.C. 113, Secretary of Defense; 10 U.S.C. 2164, Department of Defense Domestic Dependent Elementary and Secondary Schools; 20 U.S.C. 921–932, Overseas Defense Dependent's Education; 29 U.S.C. 794, Nondiscrimination under Federal Grants and Programs; DoD Directive 1342.20, Department of Defense Education Activity (DoDEA); DoD Directive 1020.1, Nondiscrimination on the Basis of Handicap in Programs and Activities Conducted by the Department of Defense; and E.O. 9397 (SSN), as amended."

PURPOSE(S):

Delete entry and replace with "To maintain educational records necessary to operate a global educational program for authorized students ages 3–21, inclusive. Records may be used to determine enrollment eligibility and tuition status; schedule children for classes and transportation; record attendance, absence and withdrawal; record and monitor student progress, grades, course and grade credits, services, school activities, student awards, special interests,

accomplishments, and discipline; develop an appropriate educational program, services and placement; provide information for enrollment and student financial aid for post-DoDEA education; obtain and preserve school academic and athletic accreditation; to provide directory information to military recruiters; to make emergency contact as necessary; protect student health and welfare; and to perform other related authorized educational duties as required. Also used as a management tool for statistical analysis, tracking, reporting, evaluating program effectiveness, and conducting research."

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Delete entry and replace with "In addition to those disclosures generally permitted under 5 U.S.C.552a(b) of the Privacy Act of 1974, these records may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To a non-DoD school, upon request of the school, when the child is enrolled in the school or receiving services from the school at DoD expense, so long as the disclosure is for purposes related to the student's enrollment or receipt of services.

To public or private entities in connection with financial aid the student has received or for which the student has applied, if the information is necessary to determine the student's eligibility for, or the amount of, or the conditions of the aid.

To appropriate parties, including parents of a student age 18 or over, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other students; and to teachers and school officials in non-DoD schools who have been determined to have a legitimate educational interest in the student, provided that the official making the disclosure maintains a record that documents the articulable and significant threat to the health or safety of a student or other individuals that formed the basis of the disclosure and identifies the parties to whom the information was disclosed.

To accrediting organizations to carry out their accrediting functions.

To State and local social service offices relative to law enforcement inquiries and investigations and child placement/support proceedings.

The DoD 'Blanket Routine Uses' set forth at the beginning of the Office of the Secretary of Defense (OSD) compilation of systems of records notices also apply to this system."

* * * * *

SAFEGUARDS:

Delete entry and replace with "Access is provided on a 'need-to-know' basis and to authorized, authenticated personnel only. Records are maintained in controlled access rooms or areas. Computer terminal access is controlled by use of Common Access Card (CAC) or terminal identification and the password or similar system. Physical access to terminals is restricted to specifically authorized individuals. Password authorization, assignment, and monitoring are the responsibility of the functional managers."

RETENTION AND DISPOSAL:

Delete entry and replace with "Contemporary School Files:

SCHOOL STUDENT RECORD FILES

Destroy/delete files, other than secondary transcripts, of all information except report cards or other records of academic promotion or retention data after 1 year. Destroy or delete all non secondary transcript files 3–5 years after graduation, transfer, withdrawal, or death of student.

ATTENDANCE AND DISCIPLINE FILES:

Cut off at end of school year. Destroy/delete when one year old.

HEALTH RECORD FILES:

Place in student record file upon transfer, withdrawal or death of student.

SCHOOL ANCILLARY SERVICE FILES:

Transfer to student record file upon graduation, transfer, withdrawal or death of student.

SCHOOL MEDIATION AGREEMENT AND HEARING RESULTS FILES:

Cut off after final decision. Destroy/delete when 20 years old.

SCHOOL SPECIAL EDUCATION FILES:

Cut off on graduation, transfer, withdrawal, or death of student. Destroy/delete when 5 years old.

STUDENT ADMINISTRATIVE FILES:

Cut off at end of school year or upon year student transfers. Destroy after 1 year unless needed for further reference.

Student Record Request and Disclosure Files.

Cut off at end of school year. Destroy/delete when 2 years old.

HISTORICAL SCHOOL FILES:

Transcripts. Secondary Schools and Panama college transcripts will be cut off upon transfer, withdrawal, or death of student. Secondary transcript files are destroyed when 50 years old."

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with "Area school district system manager addresses may be obtained from the Office of the Director, Department of Defense Education Activity, 4040 North Fairfax Drive, Arlington, VA 22203–1634."

NOTIFICATION PROCEDURE:

Delete entry and replace with "Individuals seeking to determine whether this system contains information about themselves should address written inquiries to Area or District Systems Managers or the Privacy Act Officer, Department of Defense Education Activity, 4040 North Fairfax Drive, Arlington, VA 22203–1635.

Written requests must contain the full name and signature of the requester. When the requester is not the student, state the requester's relationship to the student and include a student's written authorization to disclose the information or evidence of the parental/legal relationship that establishes the parent's or legal guardian's right to access that information such as a certified copy of a court order, or sufficient information about the requester (SSN, unique student identifier, date of birth) to permit DoDEA to verify custody through the Defense Enrollment Eligibility Reporting System.

The request must state the name used by the student at the time of school attendance, the student's birth date, name, and location of the school(s) attended, and the approximate dates of attendance."

RECORD ACCESS PROCEDURES:

Delete entry and replace with "Parents/legal guardians and personnel acting as a parent, pursuant to appointment by competent authority in the absence of a parent or legal guardian, are authorized access to the student records of their "dependent" student, as defined in DoD Joint Travel Regulation, Volume 2, Appendix A (JTR V. 2, App. A). Access is afforded to either parent, unless DoDEA is provided with evidence that there is a court order such as, but not limited to, a divorce, separation, adoption or custody decree, that specifically revokes these rights.

While a student is currently enrolled in a DoDEA school, the student or the student's parent/legal guardian, and individuals in overseas areas designated as temporary foster parents, may access their student's records maintained at the

student's school by making a request for such access to the student's teachers, registrars and administrators, in accordance with the procedures established at the school, or may request access in writing according to the instructions below.

Individuals may submit written requests for access to student information about themselves, and parents/legal guardians of dependent children may submit written requests about their children to the appropriate Area or District Records Systems Managers, or to the Privacy Act Officer, Department of Defense Education Activity, 4040 North Fairfax Drive, Arlington, VA 22203–1635.

Written requests must contain the full name and signature of the requester. When the requester is not the student, state the requester's relationship to the student and include a student's written authorization to disclose the information or evidence of the parental/legal relationship that establishes the parent's or legal guardian's right to access that information such as, a certified copy of a court order, or sufficient information about the requester (SSN, unique student identifier, date of birth) to permit DoDEA to verify custody through the Defense Enrollment Eligibility Reporting System. The request must also state the name used by the student at the time of school attendance, the student's birth date, the name, and location of the school(s) attended, and the approximate dates of attendance."

* * * * *

RECORD SOURCE CATEGORIES:

Delete entry and replace with "Individuals; parents/guardians, DoDEA staff, including school teachers, principals and administrators, counselors, occupational and physical therapists, and other educational service providers; service providers; other educational facilities; medical facilities and personnel; military commands; and members of and activities in the community."

* * * * *

DoDEA 26

SYSTEM NAME:

Department of Defense Education Activity Educational Records.

SYSTEM LOCATION:

PRIMARY LOCATION:

Department of Defense Education Activity (DoDEA) Headquarters office, 4040 North Fairfax Drive, Arlington, VA 22203–1634.

SECONDARY LOCATIONS:

Director, Department of Defense Dependent Schools Pacific, Unit 35007, APO AP 96376–5007.

Director, Department of Defense Dependent Schools Europe, Unit 29649, Box 7000, APO AE 09002–7000.

Domestic Dependent Elementary and Secondary Schools Service Center, 700 Westpark Drive, 3rd Floor, Peachtree City, GA 30269–3554.

Decentralized records are also held at local DoD schools. A list of complete addresses for a specific area (Pacific, Europe or Domestic) may be obtained by writing to the appropriate office above.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current and former students enrolled in schools operated or funded by DoDEA, world-wide.

CATEGORIES OF RECORDS IN THE SYSTEM:

The records described in this notice consist of elementary school and secondary school records that pertain directly to individual students enrolled or formerly enrolled in DoDEA schools; to include the former Panama schools and Panama college; and school-based programs funded by DoDEA. Data elements for all records generally include student name and unique student identifier.

CONTEMPORARY SCHOOL FILES:

Attendance and Discipline Files. Information reflecting attendance and disciplinary actions, to include teacher referrals, tardy and/or admission slips, correspondence to and from parents, student and/or witness statements, school disciplinary investigation files, student consequences (punishments), and similar related information.

Health Record Files. Student immunization records, parental permission forms, screening results, sports physicals, physician referrals, medication instructions, consent forms, pertinent family medical history, psychological or mental health and physical assessments and evaluation reports, and/or 504 Accommodation Plans relating to medical or physical disabilities.

School Ancillary Service Files. Non-special education supplemental student services, such as the Gifted Program; English as a Second Language (ESL); Compensatory Education; Reading Improvement; and student counseling and guidance. Records include consultation and referrals, individual student responses to test protocols, assessments and evaluation plans and results, progress and evaluation reports and summaries, teachers' notes, general correspondence, and samples of student's work, and similar related information.

School Mediation Agreement and Hearing Results Files. Material on mediations (limited to records of agreements) and hearings other than those filed in another individual student file such as, a special education file.

School Special Education Files. Student special education programs referrals and referral forms; samples of student's work; Individualized Education Programs and Individualized Family Service Plans; Case Study Committee, test results and protocols; disciplinary records, behavior plans and related information; assessment and evaluation reports; correspondence between teachers, service providers and/or parents; and cross-reference location information; related service-provider reports; teacher notes relevant to the child's special education program or needs; results of special education administration hearings; and similar related information.

School Student Record Files. Information includes student name, Social Security Number (SSN), unique student identifier, enrollment forms and documentation, date of birth, citizenship, photos, passport numbers and expiration dates (for high school students only), student performance, achievements and recognition (academic, citizenship, and athletic), standardized achievement test scores and grades, classroom and course grades, reading records, letters of recommendation, parental correspondence, 504 Accommodation Plans and similar individual student records, and information contained in the student files listed below; records of individual student's sponsor's, including sponsor's SSN, permanent duty address, residence, emergency contact information, parental consents and permissions; and similar related records.

Student Administrative Files. Information pertaining to student involvement in administrative actions, such as, serious incident reports, military reports, investigations, compliance reports and similar documents when retrieved by the students name or personal identifier.

Student Record Request and Disclosure Files. Records reflecting individual written requests for access to school files, parent/student consent authorizing disclosure of school files to other individuals or organizations, and records of disclosure of school files when no parent/student consent is required.

HISTORICAL SCHOOL FILES:

Transcript Files. Information consists solely of a student's secondary schools or Panama College permanent records (transcripts) reflecting student name and SSN, unique student ID, grades, course titles, credits, and similar data.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 113, Secretary of Defense; 10 U.S.C. 2164, Department of Defense Domestic Dependent Elementary and Secondary Schools; 20 U.S.C. 921–932, Overseas Defense Dependent's Education; 29 U.S.C. 794, Nondiscrimination under Federal Grants and Programs; DoD Directive 1342.20, Department of Defense Education Activity (DoDEA); DoD Directive 1020.1, Nondiscrimination on the Basis of Handicap in Programs and Activities Conducted by the Department of Defense; and E.O. 9397 (SSN), as amended.

PURPOSE(S):

To maintain educational records necessary to operate a global educational program for authorized students ages 3–21, inclusive. Records may be used to determine enrollment eligibility and tuition status; schedule children for classes and transportation; record attendance, absence and withdrawal; record and monitor student progress, grades, course and grade credits, services, school activities, student awards, special interests, accomplishments, and discipline; develop an appropriate educational program, services and placement; provide information for enrollment and student financial aid for post-DoDEA education; obtain and preserve school academic and athletic accreditation; to provide directory information to military recruiters; to make emergency contact as necessary; protect student health and welfare; and to perform other related authorized educational duties as required. Also used as a management tool for statistical analysis, tracking, reporting, evaluating program effectiveness, and conducting research.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To a non-DoD school, upon request of the school, when the child is enrolled in the school or receiving services from the school at DoD expense, so long as the disclosure is for purposes related to the student's enrollment or receipt of services.

To public or private entities in connection with financial aid the student has received or for which the student has applied, if the information is necessary to determine the student's eligibility for, or the amount of, or the conditions of the aid.

To appropriate parties, including parents of a student age 18 or over, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other students; and to teachers and school officials in non-DoD schools who have been determined to have a legitimate educational interest in the student, provided that the official making the disclosure maintains a record that documents the articulable and significant threat to the health or safety of a student or other individuals that formed the basis of the disclosure and identifies the parties to whom the information was disclosed.

To accrediting organizations to carry out their accrediting functions.

To State and local social service offices relative to law enforcement inquiries and investigations and child placement/support proceedings.

The DoD 'Blanket Routine Uses' set forth at the beginning of the Office of the Secretary of Defense (OSD) compilation of systems of records notices also apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper file folders and electronic storage media.

RETRIEVABILITY:

By student surname, SSN, date of birth, and student number.

SAFEGUARDS:

Access is provided on a 'need-to-know' basis and to authorized, authenticated personnel only. Records are maintained in controlled access rooms or areas. Computer terminal access is controlled by use of Common Access Card (CAC) or terminal identification and the password or similar system. Physical access to terminals is restricted to specifically authorized individuals. Password authorization, assignment, and monitoring are the responsibility of the functional managers.

RETENTION AND DISPOSAL:

CONTEMPORARY SCHOOL FILES:

SCHOOL STUDENT RECORD FILES:

Destroy/delete files, other than secondary transcripts, of all information except report cards or other records of academic promotion or retention data after 1 year. Destroy or delete all non secondary transcript files 3–5 years after graduation, transfer, withdrawal, or death of student.

ATTENDANCE AND DISCIPLINE FILES:

Cut off at end of school year. Destroy/delete when one year old.

HEALTH RECORD FILES:

Place in student record file upon transfer, withdrawal or death of student.

SCHOOL ANCILLARY SERVICE FILES:

Transfer to student record file upon graduation, transfer, withdrawal or death of student.

SCHOOL MEDIATION AGREEMENT AND HEARING RESULTS FILES:

Cut off after final decision. Destroy/delete when 20 years old.

SCHOOL SPECIAL EDUCATION FILES:

Cut off on graduation, transfer, withdrawal, or death of student. Destroy/delete when 5 years old.

STUDENT ADMINISTRATIVE FILES:

Cut off at end of school year or upon year student transfers. Destroy after 1 year unless needed for further reference.

STUDENT RECORD REQUEST AND DISCLOSURE FILES:

Cut off at end of school year. Destroy/delete when 2 years old.

HISTORICAL SCHOOL FILES:

Transcripts. Secondary Schools and Panama college transcripts will be cut off upon transfer, withdrawal, or death of student. Secondary transcript files are destroyed when 50 years old.

SYSTEM MANAGER(S) AND ADDRESS:

Area school district system manager addresses may be obtained from the Office of the Director, Department of Defense Education Activity, 4040 North Fairfax Drive, Arlington, VA 22203–1634.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system contains information about themselves should address written inquiries to Area or District Systems Managers or the Privacy Act Officer, Department of Defense Education Activity, 4040 North Fairfax Drive, Arlington, VA 22203–1635.

Written requests must contain the full name and signature of the requester. When the requester is not the student, state the requester's relationship to the student and include a student's written authorization to disclose the information or evidence of the parental/legal relationship that establishes the parent's or legal guardian's right to access that information such as, a certified copy of a court order, or sufficient information about the requester (SSN, unique student identifier, date of birth) to permit DoDEA to verify custody through the Defense Enrollment Eligibility Reporting System.

The request must state the name used by the student at the time of school attendance, the student's birth date, name, and location of the school(s) attended, and the approximate dates of attendance.

RECORD ACCESS PROCEDURES:

Parents/legal guardians and personnel acting as a parent, pursuant to appointment by competent authority in the absence of a parent or legal guardian, are authorized access to the student records of their "dependent" student, as defined in DoD Joint Travel Regulation, Volume 2, Appendix A (JTR V. 2, App. A). Access is afforded to either parent, unless DoDEA is provided with evidence that there is a court order, such as, but not limited to, a divorce, separation, adoption or custody decree, that specifically revokes these rights.

While a student is currently enrolled in a DoDEA school, the student or the student's parent/legal guardian, and individuals in overseas areas designated as temporary foster parents, may access their student's records maintained at the student's school by making a request for such access to the student's teachers, registrars and administrators, in accordance with the procedures established at the school, or may request access in writing according to the instructions below.

Individuals may submit written requests for access to student information about themselves, and parents/legal guardians of dependent children may submit written requests about their children to the appropriate Area or District Records Systems Managers, or to the Privacy Act Officer, Department of Defense Education Activity, 4040 North Fairfax Drive, Arlington, VA 22203–1635.

Written requests must contain the full name and signature of the requester. When the requester is not the student, state the requester's relationship to the student and include a student's written authorization to disclose the information or evidence of the parental/legal relationship that establishes the parent's or legal guardian's right to access that information such as, a certified copy of a court order, or sufficient information about the requester (SSN, unique student identifier, date of birth) to permit DoDEA to verify custody through the Defense Enrollment Eligibility Reporting System. The request must also state the name used by the student at the time of school attendance, the student's birth date, the name, and location of the school(s) attended, and the approximate dates of attendance.

CONTESTING RECORDS PROCEDURES:

The OSD rules for accessing records, for contesting contents and appealing initial agency determinations are contained in OSD Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Individuals; parents/guardians, DoDEA staff, including school teachers, principals and administrators, counselors, occupational and physical therapists, and other educational service providers; service providers; other educational facilities; medical facilities and personnel; military commands; and members of and activities in the community.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2011–10369 Filed 4–28–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education (ED).

ACTION: Notice of proposed information collection requests.

SUMMARY: The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: An emergency review has been requested in accordance with the Act (44 U.S.C. Chapter 3507 (j)), since public harm is reasonably likely to result if normal clearance procedures are followed. Approval by the Office of Management and Budget (OMB) has been requested by May 5, 2011. A regular clearance process is also beginning. Interested persons are invited to submit comments on or before June 28, 2011.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or e-mailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov*.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Director of OMB provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The Office of Management and Budget (OMB) may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. ED invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on respondents, including through the use of information technology.

Dated: April 26, 2011.

Darrin A. King,

Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

Office of Innovation and Improvement

Type of Review: Reinstatement.

Title: DC School Choice Incentive Program.

OMB #: 1855–0015.

Abstract: The DC School Choice Incentive Program, authorized by the Consolidated Appropriations Act of 2004, awarded a grant to the DC Children and Youth Investment Trust Corporation that will administer scholarships to students who reside in the District of Columbia and come from households whose incomes do not exceed 185% of the poverty line. Priority is given to students who are currently attending schools in need of improvement, as defined by Title I. To assist in the student selection and assignment process, the information to be collected will be used to determine the eligibility of those students who are interested in the available scholarships. Also, since the authorizing statute requires an evaluation we are proposing to collect certain family demographic information because they are important predictors of school success. Finally, we are asking to collect information about parental participation and satisfaction because these are key topics that the statute requires the evaluation to address.

Additional Information: This is a request for emergency clearance to collect basic, time critical information about scholarship applicants for the DC School Choice Incentive Program, and preliminary information for the evaluation. The Program was recently reauthorized on April 15, 2011 through "District of Columbia, Federal Funds, Federal Payment for School Improvement". Speaker Boehner introduced the Scholarships for Opportunity and Results Act which reauthorized the DC School Choice Incentive Program for another five years beginning in FY 2011. Pursuant to 5 CFR 1320.13, the Department requests that OMB review the DC School Choice Incentive data collection tool under its emergency procedures. The request for an emergency clearance is twofold: (1) Public harm is likely to result as more than 1,150 students on the current waiting list must be selected and approved to receive funding by the end of June, a process that requires approximately eight weeks to complete; and (2) receiving funding was an unanticipated event as funding for this program was previously discontinued.

The purpose of the DC School Choice Incentive Program (Program) is to provide low-income parents residing in the District of Columbia with expanded options for the education of their children. The statute for this Program requires scholarships to be awarded to students who reside in the District of Columbia and come from households whose incomes do not exceed 185% of the poverty line. Priority is given to students who are currently attending Title I schools in need of improvement, corrective action or restructuring as defined by Title I. To assist in the student selection and assignment process, the information to be collected as requested under this emergency clearance will be used to determine the eligibility of those students who are interested in the available scholarships. Also, the authorizing statute requires the mandated evaluation to address changes in parents' school involvement and satisfaction and so initial levels of those factors need to be assessed at the time of application.

Failure to collect this information in a timely manner will hinder the grantee's ability to:

(1) Administer scholarships (approximately $15 million) for this fiscal year as required by the statute;

(2) Perform outreach into low income communities to make them aware that new scholarships are available;

(3) Collect and process scholarship applications to determine eligibility;

(4) Administer the student lottery;

(5) Sign-up schools to participate in the program and verify they meet legislatively mandated requirements;

(6) Identify the number of slots by grade available in participating schools;

(7) Collect and disseminate information on participating schools to facilitate parents' school search process;

(8) Facilitate parents' application process to schools and enroll their child(ren);

(9) Place students in school through a student/school match process;

(10) Update scholarship invoicing and payments system to accommodate new legislatively identified scholarship caps and published tuition and fees;

(11) Effectively manage the distribution of scholarships to low-income parents of students; and,

(12) Meet certain evaluation and reporting requirements, as required by the statute.

Frequency: Annually.

Affected Public: Individuals or households.

Reporting and Recordkeeping Hour Burden: Responses: 3,000. Burden Hours: 1,000.

Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4583. When you access the information collection, click on "Download Attachments " to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* 202–260–8916. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2011–10505 Filed 4–28–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Notice of Intent To Prepare an Environmental Impact Statement for the Lake Charles Carbon Capture and Sequestration Project, Lake Charles, LA

AGENCY: Department of Energy.

ACTION: Notice of Intent To Prepare an Environmental Impact Statement and Notice of Proposed Floodplain and Wetlands Involvement.

SUMMARY: The U.S. Department of Energy (DOE) announces its intent to prepare an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality's (CEQ) NEPA regulations (40 CFR parts 1500–1508), and DOE's NEPA implementing procedures (10 CFR Part 1021), to assess the potential environmental impacts of providing financial assistance for the construction and operation of a project proposed by Leucadia Energy, LLC (Leucadia). DOE selected this project for an award of financial assistance through a competitive process under the Industrial Carbon Capture and Sequestration (ICCS) Program.

The Lake Charles Carbon Capture and Sequestration Project (Lake Charles CCS Project) would demonstrate: (1) advanced technologies that capture carbon dioxide (CO_2) emissions at the Lake Charles Cogeneration Gasification Project (the LCC Gasification Project) to

be located on the west bank of the Calcasieu River in southern Calcasieu Parish, Louisiana; and (2) permanent storage of a portion of the CO_2 injected as part of existing enhanced oil recovery (EOR) operations in the Hastings oil field south of Houston, Texas. During the DOE demonstration phase of the project, approximately 4 million tons per year of CO_2 from two Acid Gas Removal (AGR) units would be captured, compressed and transported through a new pipeline connecting to Denbury Onshore, LLC's (Denbury's) existing Green Pipeline. The Green Pipeline is designed to transport approximately 800 million standard cubic feet of CO_2 per day (about 17 million tons per year) and currently transports CO_2 from natural sources to existing EOR operations along the Gulf Coast. A comprehensive research monitoring, verification, and accounting (MVA) program would be implemented on a portion of the existing CO_2 EOR operations at the Hastings field to confirm permanent storage of about one million tons per year during the demonstration period.

The EIS will inform DOE's decision on whether to provide financial assistance to Leucadia for the Lake Charles CCS Project. DOE proposes to provide Leucadia with up to $261.4 million of cost-shared financial assistance. The financial assistance would apply to the planning, designing, permitting, equipment procurement, construction, startup, and demonstration of the CCS technology and MVA program. DOE's contribution of $261.4 million would constitute about 60 percent of the estimated total development and capital cost of the CCS project, which is estimated to be $435.6 million (2010 dollars). The project will further the objective of the ICCS Program by demonstrating advanced technologies that integrate CO_2 capture at industrial sources and monitor the sequestration of CO_2 in underground formations.

DOE is issuing this Notice of Intent (NOI) to: (1) Inform the public about DOE's proposed action and Leucadia's proposed project; (2) announce the public scoping meeting; (3) solicit comments for DOE's consideration regarding the scope and content of the EIS; (4) provide notice that the proposed project may involve impacts to floodplains and wetlands; and (5) invite those agencies with jurisdiction by law or special expertise to participate as cooperating agencies in the preparation of this EIS. DOE does not have regulatory jurisdiction over the Lake Charles CCS Project or its connected action, the LCC Gasification Project. DOE's decisions are limited to whether and under what circumstances it would provide financial assistance to the project. As part of the EIS process, DOE will consult with interested Native American Tribes and Federal, state, regional and local agencies.

DATES: DOE invites comments on the proposed scope and content of the EIS from all interested parties. Comments must be received within 30 days after publication of this NOI in the **Federal Register** to ensure consideration. In addition to receiving comments in writing, by e-mail, telephone, or fax [See **ADDRESSES** below], DOE will conduct two public scoping meetings in which government agencies, private-sector organizations, and individuals are invited to present oral and written comments or suggestions with regard to DOE's proposed action, alternatives, and potential impacts. DOE will consider these comments during the development of the EIS. The scoping meetings will be held at Pearland Junior High, 4719 Bailey Road, Pearland, TX, on May 16, 2011, and at Westlake City Hall, 1001 Mulberry Street, Westlake, Louisiana, on May 17, 2011. Oral comments will be heard during the formal portion of the scoping meeting beginning at 7 p.m. [See Public Scoping Process below]. The public is also invited to provide comments and learn more about the project and the proposed action at informal sessions at the same locations beginning at 5 p.m. Various displays and other information about DOE's proposed action and the Lake Charles CCS Project will be available at the scoping meetings. Representatives from DOE and Leucadia will be present at the informal sessions to discuss the proposed project and the EIS process.

ADDRESSES: Written comments on the scope of the EIS and requests to participate in the public scoping meeting should be addressed to: Ms. Pierina Fayish, U.S. Department of Energy, National Energy Technology Laboratory, 626 Cochrans Mill Road, P.O. Box 10940, Pittsburgh, PA 15236. Individuals and organizations who would like to provide oral or electronic comments should contact Ms. Fayish by telephone (412–386–5428 or toll-free 1–888–322–7436, ext. 5428); fax (412–386–4604); electronic mail *(LeucadiaEIS@NETL.DOE.GOV),* or formal mail submitted to the address given above.

FOR FURTHER INFORMATION CONTACT: For further information about this project, contact Ms. Pierina Fayish, as described above. For general information on the DOE NEPA process, please contact Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance (GC–54), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585; telephone (202–586–4600); fax (202–586–7031); or leave a toll-free message (1–800–472–2756).

SUPPLEMENTARY INFORMATION:

Background

In Section 703 of the Energy Independence and Security Act of 2007 (Pub. L. 110–140), Congress directed DOE to "carry out a program to demonstrate technologies for the large-scale capture of carbon dioxide from industrial sources." DOE subsequently sought applications in a funding opportunity announcement (FOA) entitled "Carbon Capture and Sequestration from Industrial Sources and Innovative Concepts for Beneficial CO_2 Use" on June 8, 2009 (Financial Assistance Funding Opportunity Number DE–FOA–0000015, amended July 17, 2009). Congress appropriated funding for ICCS in the American Recovery and Reinvestment Act of 2009, Public Law 111–5 (Recovery Act) in order to stimulate the economy and reduce unemployment in addition to furthering DOE's existing carbon capture and sequestration objectives.

Projects funded under this ICCS program are cost-shared collaborations between the government and industry to increase investment in clean industrial technologies and carbon capture and sequestration projects. Under the ICCS funding opportunity, industrial firms proposed projects to meet their needs and those of their customers while furthering the national goals and objectives of DOE. The successful development of advanced technologies and innovative concepts that reduce emissions of CO_2 is a key objective of the nation's effort to help mitigate the effects of climate change.

The projects are funded, in whole or in part, with funds appropriated by the Recovery Act. The purposes of the Recovery Act are to stimulate the economy and to create and retain jobs. Accordingly, special consideration was given to projects that promote job creation, preservation, and economic recovery in an expeditious manner.

DOE's two specific objectives identified in the FOA were Technology Area 1—Large-Scale Industrial CCS Projects from Industrial Sources; and Technology Area 2—Innovative Concepts for Beneficial CO_2 Use. The Lake Charles CCS Project was one of three projects DOE selected under Technology Area 1, which focuses on the demonstration of advanced technologies that capture and sequester CO_2 emissions from industrial sources

into underground formations or put the CO_2 to beneficial use in a manner that permanently prevents it from entering the atmosphere. Technology Area 1 includes expanding CO_2 use in EOR and obtaining information on the cost and feasibility of deployment of sequestration technologies. Therefore, under the FOA, DOE sought projects with technologies that have progressed beyond the research and development stage to a point of readiness for operation at a scale that, if successful, could be readily replicated and deployed into commercial practice within the industry.

Purpose and Need for Agency Action

The purpose and need for DOE action is to advance the ICCS program by selecting projects that have the best chance of achieving the program's objectives as established by Congress: demonstrating the next generation of technologies that will capture CO_2 emissions from industrial sources and either sequester them or beneficially reuse them.

Leucadia's Proposed Project

Site of Proposed Project: Lake Charles, Louisiana and Brazoria County, Texas

The Lake Charles CCS Project would involve the capture and sequestration of the CO_2 from the LCC Gasification Project, a petroleum coke gasification plant to be constructed by Lake Charles Cogeneration, LLC, in Calcasieu Parish, adjacent to the Port of Lake Charles, Louisiana. As part of this project, the CO_2 would be captured, compressed, and transported for use in existing independent CO_2 EOR operations. Approximately 4 million tons per year of CO_2 from two AGR units would be compressed and delivered via a new connecting pipeline to the existing Green Pipeline for transport and use in existing EOR operations along the Gulf Coast. A research MVA program would be conducted over a portion of the existing EOR operations at the Hastings oil field to confirm permanent storage of about one million tons per year during the demonstration period. The MVA activities would supplement on-going monitoring activities conducted in conjunction with existing EOR operations at the Hastings field.

Proposed CO_2 Capture and Compression Facilities

The CCS project involves the design, procurement, installation, and testing of the AGR units, CO_2 compressors and buildings, metering station, and specific ancillary equipment. The CO_2 capture facility would consist of two Lurgi Rectisol Selective AGR units in which CO_2 is separated from the process gas. The compression facilities would include two compressors, the buildings in which the compressors are housed (each approximately 80 feet by 140 feet), and a meter station to monitor the volume of CO_2 that is exported.

Ancillary equipment and systems supporting the CO_2 capture and compression facilities would consist of: the electrical system switchgear supplying the AGR units and CO_2 compressors, load commutated inverters for starting the compressors, a chilled water supply system, two regenerative thermal oxidizers to allow environmentally compliant venting of CO_2 when required, and a propylene refrigeration system for cooling within the AGR units. All other ancillary systems such as cooling water, remote controls, external fire protection system, and instrument air would be provided through capacity expansion or infrastructure modification prepared in advance of installation of the CO_2 capture and compression facilities.

Proposed CO_2 Pipeline and Associated Ancillary Equipment

As part of the Lake Charles CCS Project, an affiliate of Denbury would construct, own, and operate approximately 11 miles of CO_2 pipeline and associated ancillary equipment. This pipeline would connect to Denbury's existing Green Pipeline. The new pipeline would include a 16-inch outside diameter pipeline and associated valves and meter stations. The pipeline route would include a permanent right-of-way approximately 11 miles long and 50 feet wide that would parallel existing rights-of-way, such as roadways, pipelines, railroads and transmission lines to the extent practicable. The CO_2 pipeline would cross under the Houston River and Interstate Highway I–10 and connect with the existing Green Pipeline near Buhler, Louisiana.

Proposed CO_2 Sequestration and Research Monitoring, Verification and Accounting

MVA activities would be designed and implemented to demonstrate the permanent storage of approximately 1 million tons per year of the CO_2 injected in existing wells located on a portion of the Hastings oil field. This oil field is located between Alvin and Pearland, Texas, near State Highway 35. During the DOE demonstration phase of the project, the proposed research MVA program would supplement privately-funded, ongoing MVA activities conducted in conjunction with Denbury's commercial EOR operations at the Hastings field. While this oil field covers approximately 25 square miles, the MVA program would be limited to approximately 2.8 square miles, or slightly more than 10% of the field. The following MVA activities would be conducted:

- Well Integrity Testing—Logging of existing idle production wells and testing of plugged and abandoned wells to detect CO_2 migration through non-sealing well bores.
- Flood Conformance Testing—Augmentation of measurements to observe and model movement of CO_2 in subsurface formations during the EOR operations.
- Above-zone Monitoring—Monitoring of pressures and geochemical parameters in the formations above the confining layer to detect CO_2 migration beyond the injection zone.

Proposed Project Schedule

Leucadia proposes to construct the connected LLC Gasification Project over an approximate 3-year period projected beginning in the first quarter of 2012. The gasification project is currently undergoing site preparation, including clearing and grading. The CO_2 capture and compression facilities for the Lake Charles CCS project would be constructed simultaneously with the gasification project. Leucadia has obtained the environmental permits and approvals for construction and operation of the gasification project.

The schedule for the CCS Project is contingent on receiving the necessary environmental permits and regulatory approvals for the new connecting CO_2 pipeline, as well as financial closing on all the necessary funding sources for the Lake Charles CCS Project as a whole, including DOE's financial assistance. DOE's decision to provide financial assistance for detailed design, procurement of equipment, construction, and operations will be made after completion of the NEPA process and issuance of the EIS.

Connected and Cumulative Actions

Under the cooperative agreement between DOE and Leucadia, DOE would share in the cost of the planning, designing, permitting, equipment procurement, construction, startup, and demonstration of the Lake Charles CCS Project. As part of the EIS, DOE will also evaluate and consider the impacts associated with the larger gasification project, which is considered a connected action.

The LCC Gasification Project will use a state-of-the-art process in which

petroleum coke is converted into synthesis gas (syngas) that will then be converted into methanol. The gasification project would consume 2.6 million tons per year (tpy) of petroleum coke to produce over 2.2 million tpy of methanol. The gasification project would consist of five General Electric (GE) Quench Gasifiers and two trains of syngas processing, two Lurgi Rectisol Selective AGR units, a methanol unit, and Haldor Topsoe wet sulfuric acid production. At design plant capacity, four GE Quench Gasifiers would operate at their design rate, which allows one gasifier to be on hot standby or shut down for maintenance. The syngas processing includes a catalyst to convert carbon monoxide and water into hydrogen and CO_2. Hydrogen sulfide, carbonyl sulfide and CO_2 will be selectively removed from the syngas in the AGR units.

Steam created by the gasification process will generate electricity via turbines and would provide a significant portion of the energy needs of the LCC Gasification Project. Petroleum coke would be transferred from the Port of Lake Charles to the gasification project site via a conveyor system. Raw water would be supplied by pipeline from the Sabine River. The water from the Sabine River Authority (SRA) would be provided through interconnection to the existing SRA intake structure on the Sabine River Diversion Canal. LCC Gasification has received a Louisiana Pollution Discharge Elimination System permit to discharge non-contact cooling water associated with operation of the CO_2 compression system.

DOE will also analyze the cumulative impacts of both the proposed project and any other reasonably foreseeable actions. The cumulative impacts analysis will include analysis of greenhouse gas emissions and global climate change, other air emissions, and cumulative impacts on other resources. Cumulative impacts are the impacts on the environment resulting from the incremental impacts of the proposed action when added to other past, present, and reasonably foreseeable actions.

Alternatives, Including the Proposed Action

NEPA requires that an EIS evaluate the range of reasonable alternatives to an agency's proposed action. The range of reasonable alternatives encompasses those alternatives that would satisfy the underlying purpose and need for agency action. The technologies included in the ICCS program are those that best represent advanced CCS projects that are ready for operation at a demonstration scale. Once demonstrated, those technologies would be ready for deployment at a commercial scale.

DOE's NEPA regulations include a process for identifying and analyzing reasonable alternatives in the context of providing financial assistance through competitive selection of projects proposed by entities outside the Federal government. The range of reasonable alternatives in competitions for grants, loans, loan guarantees and other financial support is defined initially by the range of responsive proposals received by DOE. Unlike projects undertaken by DOE itself, the Department cannot mandate what outside entities propose, where they propose to locate their project, or how they propose to operate their project beyond expressing basic requirements in the funding opportunity announcement; and these express requirements must be limited to those that further the program's objectives. DOE's decision is then limited to selecting among the applications that meet the ICCS goals.

Section 216 of DOE's NEPA implementing regulations requires the Department to prepare an "environmental critique" that assesses the environmental impacts and issues relating to each of the proposals that the DOE selecting official considers for an award (see 10 CFR 1021.216). This official considers these impacts and issues, along with other aspects of the proposals (such as technical merit and financial ability) and the program's objectives, in making awards. DOE prepared a critique of the proposals that were deemed suitable for selection in this round of awards for the ICCS program.

After DOE selects a project for an award, the range of reasonable alternatives becomes the project as proposed by the applicant, any alternatives still under consideration by the applicant or that are reasonable within the confines of the project as proposed (e.g., the particular location of the processing units, pipelines, and injection sites on land proposed for the project) and a "no action" alternative.

DOE currently plans to evaluate the project as proposed by Leucadia (with and without any mitigating conditions that DOE may identify as reasonable and appropriate), alternatives still under consideration, and the no action alternative. The EIS will briefly describe alternatives previously considered by Leucadia in developing the proposed project; however, DOE does not plan to analyze these alternatives in detail because they are no longer under consideration by Leucadia and because they were not part of the proposal that Leucadia offered and DOE accepted. DOE also will consider other reasonable alternatives suggested during the scoping period.

Under the no action alternative, DOE would not provide funding to Leucadia. In the absence of financial assistance from DOE, Leucadia could reasonably pursue several options: the LCC Gasification Project would not go forward; the LCC Gasification Project would go forward without the use of CO_2 for sequestration and EOR; or both the LCC Gasification Project and Lake Charles CCS Project would proceed without monitoring of the sequestered CO_2. For the purpose of making a meaningful comparison between the impacts of DOE providing and withholding financial assistance, DOE will analyze the impacts under these three options as sub-alternatives of the no-action alternative. Consequently, in the absence of DOE funding Denbury would continue to conduct its ongoing EOR operations.

Floodplains and Wetlands

Sections of the connected LCC Gasification Project site are within 100-year or 500-year floodplains. Site development activities include the addition of fill material that would result in elevations significantly above the local 100-year and 500-year base flood elevations. The U.S. Army Corps of Engineers (COE) conducted a jurisdictional wetland determination, and the Port of Lake Charles mitigated impacts to 26.2 acres of the wetlands through agreement with the COE and Stream Wetland Services, LLC. A COE permit to develop the LCC Gasification Plant site was issued on October 18, 2008.

With respect to the Lake Charles CCS Project, temporary and localized floodplains and wetlands impacts may occur during the construction of stream and wetlands crossings associated with pipeline construction. Wetlands also may be impacted by development of the 50-foot-wide right-of-way. Several small isolated wetlands have been identified in the U.S. Fish and Wildlife Service National Wetland Inventory (USFWS, 2010) within the Hastings MVA project area.

Potential impacts to floodplains and wetlands for all aspects of the proposed Lake Charles CCS Project and any connected actions would be evaluated in the EIS. If potential impacts are identified, DOE will include a floodplain and wetland assessment in the EIS, in accordance with its

regulations in 10 CFR part 1022, *Compliance with Floodplain and Wetland Environmental Review Requirements.*

Preliminary Identification of Environmental Issues

DOE intends to address the issues listed below when considering the potential impacts resulting from the construction and operation of the Lake Charles CCS Project and any connected actions. This list is neither intended to be all-inclusive, nor to be a predetermined set of potential impacts. The list is presented to facilitate public comment on the planned scope of the EIS. Additions to or deletions from the list may occur as a result of this scoping process. The preliminary list of potentially affected resources or activities and their related environmental issues includes:

- *Air quality resources:* potential air quality impacts from emissions during construction and operation of the proposed project and connected actions on local sensitive receptors, local environmental conditions, and special-use areas, including impacts to smog and haze and impacts from dust and any significant vapor plumes, including greenhouse gas emissions;
- *Climate change:* potential impacts on climate as a result of CO_2 and other greenhouse gas emissions.
- *Water resources:* potential impacts from water use and consumption, wastewater discharges, and releases to streams during construction and operation of the proposed project and connected actions;
- *Infrastructure and land use:* potential environmental and socioeconomic impacts associated with the proposed project and connected actions, including delivery of materials and distribution of products (e.g., access roads, pipelines);
- *Solid wastes:* pollution prevention and waste management issues (generation, treatment, transport, storage, disposal or use), including potential impacts from the proposed project and connected actions on the generation, treatment, storage and management of hazardous materials and other solid wastes;
- *Ecological resources:* potential on-site and off-site impacts to vegetation, wildlife, threatened or endangered species and ecologically sensitive habitats from the proposed project and connected actions;
- *Floodplains and wetlands:* potential wetland and floodplain impacts from construction and operation of the proposed project, pipelines and connected actions;
- *Transportation and traffic:* potential impacts from the construction and operation of the proposed project, pipeline and connected actions, including changes in local traffic patterns, roads and rail lines, traffic hazards and traffic controls;
- *Historic and cultural resources:* potential impacts related to development of the site for the proposed project and connected actions and pipeline construction;
- *Geology and soils:* potential impacts to existing geologic and soil resources from construction and operation of the proposed project and connected actions;
- *Public health and safety issues:* potential construction-related safety, process safety and impacts associated with CO_2 capture and transport to and usage in EOR at the sequestration site;
- *Socioeconomics:* potential impacts on public services and infrastructure (e.g. schools, utilities), the creation of jobs, use of community resources and state and local tax incentives associated with the proposed project and connected actions;
- *Environmental justice:* potential disproportionate adverse impacts on minority and low-income populations associated with the proposed project and connected actions;
- *Noise:* potential impacts from construction, transportation of materials and facility operations for the proposed project and connected actions;
- *Cumulative effects:* incremental impacts of the proposed project and connected actions when added to other past, present and reasonably foreseeable future projects, including emissions of greenhouse gases and global climate change;
- *Compliance with regulatory and environmental permitting requirements:* environmental compliance and monitoring plans associated with the carbon capture equipment, pipeline construction, CO_2 sequestration activities and connected actions.

Public Scoping Process

This Notice of Intent initiates the scoping process under NEPA, which will guide the development of the Draft EIS. To ensure identification of issues related to DOE's Proposed Action and Leucadia's Proposed Project, DOE seeks public input to define the scope of the EIS. The public scoping period will end 30 days after publication of this NOI in the **Federal Register**. Interested government agencies, private-sector organizations and individuals are encouraged to submit comments or suggestions concerning the content of the EIS, issues and impacts that should be addressed, and alternatives that should be considered. Scoping comments should clearly describe specific issues or topics that the EIS should address. Written, e-mailed, or faxed comments should be received by May 29, 2011 (see **ADDRESSES**).

DOE will conduct two public scoping meetings, to be held at Pearland Junior High, 4719 Bailey Road, Pearland, TX, on May 16, 2011, and at Westlake City Hall, 1001 Mulberry Street, Westlake, LA, on May 17, 2011. Oral comments will be heard during the formal portion of the scoping meeting beginning at 7 p.m. The public is also invited to provide comments and learn more about the project at informal sessions at these locations beginning at 5 p.m. DOE requests that anyone who wishes to provide oral comments at this public scoping meeting should contact Ms. Pierina Fayish, either by phone, e-mail, fax, or postal mail (see **ADDRESSES**).

Those who do not arrange in advance to speak may register at the meeting (preferably at the beginning of the meeting) and may be given an opportunity to speak after previously scheduled speakers. Speakers will be given approximately 5 minutes to present their comments. Those speakers who want more than 5 minutes should indicate the length of time desired in their request. Depending on the number of speakers, DOE may need to limit all speakers to 5 minutes initially and provide second opportunities as time permits. Individuals may also provide written materials in lieu of, or supplemental to, their presentations. Oral and written comments will be given equal consideration.

DOE will begin the formal meeting with an overview of Leucadia's project. The meeting will not be conducted as an evidentiary hearing, and speakers will not be cross-examined. However, speakers may be asked questions to help ensure that DOE fully understands the comments or suggestions. A presiding officer will establish the order of speakers and provide any additional procedures necessary to conduct the meeting. A stenographer will record the proceedings, including all oral comments received.

Issued in Washington, DC, this 26th day of April 2011.

Victor K. Der,

Acting Assistant Secretary, Office of Fossil Energy.

[FR Doc. 2011–10448 Filed 4–28–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 308–005]

PacifiCorp Energy; Notice of Intent to File License Application, Filing of Pre-Application Document (PAD), Commencement of Pre-Filing Process, and Scoping; Request For Comments On the Pad and Scoping Document, and Identification of Issues and Associated Study Requests

a. *Type of Filing:* Notice of Intent to File License Application for a New License and Commencing Pre-filing Process.

b. *Project No.:* 308–005.

c. *Date Filed:* February 23, 2011.

d. *Submitted By:* PacifiCorp Energy.

e. *Name of Project:* Wallowa Falls Hydroelectric Project.

f. *Location:* On the East and West Forks of the Wallowa River and Royal Purple Creek in Wallowa County, Oregon. The project occupies 12.1 acres of federal lands under the jurisdiction of the Forest Service.

g. *Filed Pursuant to:* 18 CFR Part 5 of the Commission's Regulations.

h. *Applicant Contact:* Russ Howison, Licensing Project Manager, PacifiCorp Energy, 825 NE Multnomah, Suite 1500, Portland, OR 97232.

i. *FERC Contact:* Matt Cutlip at (503) 552–2762 or e-mail at *matt.cutlip@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 described in item o, 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. With this notice, we are initiating informal consultation with: (a) The U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR part 402 and (b) the 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.

l. With this notice, we are designating PacifiCorp Energy as the Commission's non-federal representative for carrying out informal consultation, pursuant to section 7 of the Endangered Species Act and section 106 of the National Historic Preservation Act.

m. PacifiCorp Energy filed with the Commission a Pre-Application Document (PAD; including a proposed process plan and schedule), pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD is 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, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in paragraph h.

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.

o. With this notice, we are soliciting comments on the PAD and Commission staff's Scoping Document 1 (SD1), as well as study requests. All comments on the PAD and SD1, and study requests should be sent to the address above in paragraph h. In addition, all comments on the PAD and SD1, study requests, requests for cooperating agency status, and all communications to and from Commission staff related to the merits of the potential application must be filed with the Commission. 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/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: 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 (Wallowa Falls Hydroelectric Project) and number (P–308–005), and bear the appropriate heading: "Comments on Pre-Application Document," "Study Requests," "Comments on Scoping Document 1," "Request for Cooperating Agency Status," or "Communications to and from Commission Staff." Any individual or entity interested in submitting study requests, commenting on the PAD or SD1, and any agency requesting cooperating status must do so by June 23, 2011.

p. Although our current intent is to prepare an environmental assessment (EA), there is the possibility that an Environmental Impact Statement (EIS) will be required. Nevertheless, this meeting will satisfy the NEPA scoping requirements, irrespective of whether an EA or EIS is issued by the Commission.

Scoping Meetings

Commission staff will hold two scoping meetings in the vicinity of the project at the time and place noted below. The daytime meeting will focus on resource agency, Indian tribes, and non-governmental organization concerns, while the evening meeting is primarily for receiving input from the public. We invite all interested individuals, organizations, and agencies to attend one or both of the meetings, and to assist staff in identifying particular study needs, as well as the scope of environmental issues to be addressed in the environmental document. The times and locations of these meetings are as follows:

Daytime Scoping Meeting

Date: Tuesday, May 24, 2011,

Time: 10:30 a.m. Pacific Daylight Time.

Location: Best Western Rama Inn & Suites, 1200 Highland Avenue, Enterprise, OR 97828.

Phone: (541) 426–2000.

Evening Scoping Meeting

Date: Tuesday, May 24, 2011.

Time: 7 p.m.

Location: Best Western Rama Inn & Suites, 1200 Highland Avenue, Enterprise, OR 97828.

Phone: (541) 426–2000.

Scoping Document 1 (SD1), which outlines the subject areas to be addressed in the environmental document, was mailed to the individuals and entities on the Commission's mailing list. Copies of SD1 will be available at the scoping meetings, or may be viewed on the Web at *http://www.ferc.gov*, using the "eLibrary" link. Follow the directions for accessing information in paragraph n. Based on all oral and written comments, a Scoping Document 2 (SD2) may be issued. SD2 may include a

revised process plan and schedule, as well as a list of issues, identified through the scoping process.

Environmental Site Review

An environmental site review is typically held in conjunction with the scoping meeting. However, anticipating that access to some project facilities would be limited by adverse weather and access conditions, the licensee hosted a project environmental site review on September 16, 2010. The environmental site review was noticed by the Commission on August 18, 2010, and attended by Commission staff on September 16, 2010. For these reasons, the Commission will not host its own environmental site review in conjunction with its NEPA scoping meeting.

Meeting Objectives

At the scoping meetings, staff will: (1) Initiate scoping of the issues; (2) review and discuss existing conditions and resource management objectives; (3) review and discuss existing information and identify preliminary information and study needs; (4) review and discuss the process plan and schedule for pre-filing activity that incorporates the time frames provided for in Part 5 of the Commission's regulations and, to the extent possible, maximizes coordination of federal, state, and tribal permitting and certification processes; and (5) discuss the appropriateness of any federal or state agency or Indian tribe acting as a cooperating agency for development of an environmental document.

Meeting participants should come prepared to discuss their issues and/or concerns. Please review the PAD in preparation for the scoping meetings. Directions on how to obtain a copy of the PAD and SD1 are included in item n. of this document.

Meeting Procedures

The meetings will be recorded by a stenographer and will be placed in the public records of the project.

Dated: April 22, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–10313 Filed 4–28–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 13437–001, 13438–001, 14118–000, 14119–000]

Free Flow Power Corporation; Notice of Intent To File License Application, Filing of Pre-Application Document, and Approving Use of the Traditional Licensing Process

a. *Type of Filing:* Notice of Intent To File License Application and Request to Use the Traditional Licensing Process.

b. *Project Nos.:* P–13437–001, P–13438–001, P–14118–000 and P–14119–000.

c. *Dated Filed:* March 25, 2011.

d. *Submitted by:* Free Flow Power Corporation (Free Flow Power), on behalf of its subsidiaries FFP Iowa 1, LLC and FFP Iowa 2, LLC.

e. *Name of Projects:* Mississippi River Lock and Dam No. 12 Project, P–13438–001; Mississippi River Lock and Dam No. 12—Auxiliary Lock Water Power Project, P–14118–000; Mississippi River Lock and Dam No. 13 Project, P—13437–001; Mississippi River Lock and Dam No. 13—Auxiliary Lock Water Power Project, P–14119–000.

f. *Location:* At existing locks and dams owned and operated by the U.S. Army Corps of Engineers on the Mississippi River in Iowa and Illinois (see table below for specific project locations). The projects would occupy United States lands administered by the U.S. Army Corps of Engineers.

Project No.	Projects	County(s)/state(s)	Township name(s)
P–13438/P–14118	Mississippi River Lock and Dam No. 12 Project; Mississippi River Lock and Dam No. 12—Auxiliary Lock Water Power Project.	Jo Daviess, IL, Jackson, IA	Hanover, IL, Bellevue, IA.
P–13437/P–14119	Mississippi River Lock and Dam No. 13 Project; Mississippi River Lock and Dam No. 13—Auxiliary Lock Water Power Project.	Whiteside, IL, Clinton, IA	Fulton, IL, Elk River, IA.

g. *Filed Pursuant to:* 18 CFR 5.3 of the Commission's regulations.

h. *Potential Applicant Contact:* Ramya Swaminathan, Chief Operating Officer, Free Flow Power, 239 Causeway Street, Boston, MA 02114–2130; (978) 283–2822; or e-mail at *rswaminathan@free-flow-power.com.*

i. *FERC Contact:* Lesley Kordella at (202) 502–6406; or e-mail at *Lesley.Kordella@ferc.gov.*

j. Free Flow Power filed its request to use the Traditional Licensing Process on March 25, 2011. Free Flow Power provided public notice of its request on December 23, 27, and 29, 2010. In a letter dated April 20, 2011, the Director of the Office of Energy Projects approved Free Flow Power's request to use the Traditional Licensing Process.

k. With this notice, we are initiating informal consultation with: (a) The U.S. Fish and Wildlife Service and NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR, Part 402; (b) NOAA Fisheries under section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and implementing regulations at 50 CFR 600.920; and (c) the Illinois and Iowa State Historic Preservation Officers, as required by section 106, National Historic Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating Free Flow Power as the Commission's non-federal representative for carrying out informal consultation, pursuant to section 7 of the Endangered Species Act, section 305 of the Magnuson-Stevens Fishery Conservation and Management Act, and section 106 of the National Historic Preservation Act.

m. Free Flow Power filed a Pre-Application Document (PAD; including a proposed process plan and schedule) with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD is 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, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in paragraph h.

o. 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.

Dated: April 22, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–10316 Filed 4–28–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. P–13338–001; P–14148–000

Free Flow Power Corporation; Notice of Intent To File License Application, Filing of Pre-Application Document, and Approving Use of the Traditional Licensing Process

a. *Type of Filing:* Notice of Intent To File License Application and Request to Use the Traditional Licensing Process.

b. *Project Nos.:* 13338–001 and 14148–000.

c. *Date Filed:* March 25, 2011.

d. *Submitted by:* Free Flow Power Corporation (Free Flow Power), on behalf of its subsidiary FFP Kansas 1 LLC d/b/a FFP Lock and Dam No. 9.

e. *Name of Projects:* Mississippi Lock & Dam No. 9 Project, P–13338–001 and Mississippi Lock & Dam No. 9—Auxiliary Lock Water Power Project, P–14148–000.

f. *Location:* At an existing lock and dam owned and operated by the U.S. Army Corps of Engineers on the Upper Mississippi River in Crawford County, Wisconsin and Allamakee County, Iowa. The project would occupy United States lands administered by the U.S. Army Corps of Engineers.

g. *Filed Pursuant to:* 18 CFR 5.3 of the Commission's regulations.

h. *Potential Applicant Contact:* Ramya Swaminathan, Chief Operating Officer, Free Flow Power, 239 Causeway Street, Boston, MA 02114–2130; (978) 283–2822; or e-mail at *rswaminathan@free-flow-power.com.*

i. *FERC Contact:* Aaron Liberty at (202) 502–6862; or e-mail at *aaron.liberty@ferc.gov.*

j. Free Flow Power filed its request to use the Traditional Licensing Process on March 25, 2011. Free Flow Power provided public notice of its request on December 29, 2010. In a letter dated April 20, 2011, the Director of the Office of Energy Projects approved Free Flow Power's request to use the Traditional Licensing Process.

k. With this notice, we are initiating informal consultation with: (a) The U.S. Fish and Wildlife Service and NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR Part 402; (b) NOAA Fisheries under section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and implementing regulations at 50 CFR 600.920; and (c) the Wisconsin and Iowa State Historic Preservation Officers, as required by section 106, National Historic Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating Free Flow Power as the Commission's non-federal representative for carrying out informal consultation, pursuant to section 7 of the Endangered Species Act, section 305 of the Magnuson-Stevens Fishery Conservation and Management Act, and section 106 of the National Historic Preservation Act.

m. Free Flow Power filed a Pre-Application Document (PAD; including a proposed process plan and schedule) with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD is 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, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in paragraph h.

o. 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.

Dated: April 22, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–10314 Filed 4–28–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13872–000]

Renew Hydro, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On October 19, 2010, Renew Hydro, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Hepburn Street Dam Hydroelectric Project to be located on the West Branch of the Susquehanna River in the vicinity of South Williamsport in Lycoming County, Pennsylvania. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would utilize the existing State of Pennsylvania's Hepburn Street Dam and would consist of the following: (1) Six very low head turbines rated at 500-kilowatts each; (2) a new powerhouse; (3) a crest-mounted walkway carrying hydraulic and electrical conduits; (4) one 600-foot-long and one 300-foot-long transmission line; and (5) appurtenant facilities. The estimated annual generation of the Hepburn Street Dam Hydroelectric Project would be 15,768,000 kilowatt-hours.

Applicant Contact: John E. Marciszewski, General Manager, Renew Hydro, LLC, 1800 Route 34, Suite 101, Wall, NJ 07719, phone: (908) 420–2369, e-mail: *john@renewhydro.com.*

FERC Contact: Brandi Sangunett (202) 502–8393.

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. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. 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 *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, 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–13872–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: April 22, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–10309 Filed 4–28–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13570–001]

Warmsprings Irrigation District; Notice of Intent To File License Application, Filing of Pre-Application Document, and Approving Use of the Traditional Licensing Process

a. *Type of Filing:* Notice of Intent To File License Application and Request To Use the Traditional Licensing Process.

b. *Project No.:* 13570–001.

c. *Dated Filed:* February 28, 2011.

d. *Submitted by:* Warmsprings Irrigation District.

e. *Name of Project:* Warmsprings Dam Hydroelectric Project.

f. *Location:* On the Warmsprings dam and reservoir, in Malheur and Harney Counties, Oregon. The project occupies United States lands administered by the U.S. Bureau of Reclamation and the U.S. Bureau of Land Management.

g. *Filed Pursuant to:* 18 CFR 5.3 of the Commission's regulations.

h. *Potential Applicant Contact:* Randy Kinney, Warmsprings Irrigation District, 334 Main Street North, Vale, OR 97918; (541) 473–3951.

i. *FERC Contact:* Kelly Wolcott at (202) 502–6480; or e-mail at *kelly.wolcott@ferc.gov.*

j. Warmsprings Irrigation District filed its request to use the Traditional Licensing Process on February 28, 2011. Warmsprings Irrigation District provided public notice of its request on March 31, 2011. In a letter dated April 22, 2011, the Director of the Division of Hydropower Licensing approved Warmsprings Irrigation District's request to use the Traditional Licensing Process.

k. With this notice, we are initiating informal consultation with: (a) The U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR, Part 402; (b) NOAA Fisheries under section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and implementing regulations at 50 CFR 600.920; and (c) the Oregon 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.

l. Warmsprings Irrigation District filed a Pre-Application Document (PAD; including a proposed process plan and schedule) with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

m. A copy of the PAD is 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, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in paragraph h.

n. 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.

Dated: April 22, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–10307 Filed 4–28–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–24–000]

Ryckman Creek Resources, LLC; Notice of Availability of the Environmental Assessment for the Proposed Ryckman Creek Storage Field Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) for the Ryckman Creek Storage Field Project proposed by Ryckman Creek Resources, LLC (Ryckman) in the above-referenced docket. Ryckman requests authorization to construct and operate the Project, which involves converting an existing partially depleted oil field, known as the Ryckman Creek (Nugget Unit), into a new interstate natural gas storage field. The Project is located approximately 15 miles northeast of Evanston in Uinta County, Wyoming.

Concurrent with the development of the gas storage field, Ryckman proposes to initiate enhanced oil recovery (EOR) operations of the oil reserves remaining in the Nugget Unit. The construction and operation of the EOR facilities would be under the jurisdiction of the Wyoming Oil and Gas Conservation Commission, as well as subject to the regulations of the U.S. Bureau of Land Management (BLM), where applicable.

The EA assesses the potential environmental effects of the construction and operation of the Ryckman Creek Storage Field Project in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA). The FERC staff concludes that approval of the proposed project, with appropriate mitigating measures, would not constitute a major federal action significantly affecting the quality of the human environment.

The BLM participated as a cooperating agency in the preparation of the EA. Cooperating agencies have jurisdiction by law or special expertise with respect to resources potentially affected by the proposal and participate in the NEPA analysis. The BLM has participated as a cooperating agency in the preparation of the EA to satisfy its respective NEPA and planning responsibilities since the Project would cross federal land under the jurisdiction of the Kemmerer Field Office in Wyoming. Under sections 17 and 28 of the Mineral Leasing Act of 1920, (30 U.S.C. 185(f) and 226(m)) the BLM has the authority to issue underground gas storage agreements and right-of-way

grants for all affected federal lands. This would be in accordance with Title 43 Code of Federal Regulations (CFR) Parts 2800, 2880, and 5105.5 subsequent 2800, 2880, and 3160–11 Manuals, and Handbook 2801–1. As a cooperating agency, the BLM would adopt the EA per Title 40 CFR 1506.3 to meet its responsibilities under NEPA in considering Ryckman Creek's application for a Right-of-Way Grant and Temporary Use Permit for the portion of the Project on federal land, by the Kemmerer Field Office, High Desert District; and the issuance of an Underground Gas Storage Agreement by the Wyoming State Office, Reservoir Management Group, Casper, Wyoming. The decision record will be signed following the FERC determination of public convenience and necessity for this project, and posted on the BLM NEPA Web site at *http://www.blm.gov/wy/st/en/info/NEPA/documents/kfo.html.*

The proposed Ryckman Creek Storage Field Project includes the following:

- Drill and complete up to six horizontal injection/withdrawal (I/W) wells;
- Re-enter up to two well for use as observation wells;
- Re-enter/re-complete up to two saltwater disposal wells;
- Modify the existing Canyon Creek Compressor Station and its ancillary facilities modified by the addition of up to eight new electric motor-driven compressors with up to 33,000 horsepower (hp) for a total of up to 55,000 hp of compression;
- Install three bi-directional meters for the interconnections with the Kern River, Questar, and Overthrust pipelines;
- Construct a central gas/liquids separation and storage facility (Ryckman Plant) where all of the pipelines meet, containing oil, water and gas handling, and natural gas liquids (NGL) storage equipment; and it would also contain a small electric-drive compressor to compress casinghead gas for use in the (EOR) operations;
- Construct approximately 4.03 mile 16-inch diameter header pipeline to connect the Ryckman Plant to the Canyon Creek Compressor Station;
- Construct approximately 4.8 miles of new 8-inch diameter storage field flowlines;
- Install amine, triethylene glycol (TEG) and mole sieve dehydration, NGL extraction, hydrocarbon dew point control and nitrogen rejection unit (NRU) process equipment at the Canyon Creek Compressor Station;
- Re-enter/re-complete up to 12 existing vertical production wells for use in the EOR operations;
- Re-use existing production well gathering system for use in the EOR operations;
- Construct an approximately 0.9 mile 3-inch diameter NGL pipeline from the Canyon Creek Compression Station to a third-party liquids pipeline.
- Construct a 4.03-mile-long electric power line from the 138 kV electric substation at the Canyon Creek Compressor Station to the Ryckman Plant; and
- Use of temporary laydown and support facilities and ancillary facilities necessary to operate and maintain the Project.

The EA 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 EA 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.

Copies of the EA have been mailed to Federal, State, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners and other interested individuals and groups; newspapers and libraries in the project area; and parties to this proceeding.

Any person wishing to comment on the EA may do so. 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 properly recorded and considered prior to a Commission decision on the proposal, it is important that the FERC receives your comments in Washington, DC on or before May 23, 2011.

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 number (CP11–24–000) 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 *eComment* feature, which is located on the Commission's Web site at *http://www.ferc.gov* under the link to *Documents and Filings.* An eComment is an easy method for interested persons to submit brief, 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.* With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on "*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.

Although your comments will be considered by the Commission, simply filing comments will not serve to make the commenter a party to the proceeding. Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.214).[1] Only intervenors have the right to seek rehearing of the Commission's decision.

Affected landowners and parties with environmental concerns may be granted intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which would not be adequately represented by any other parties. You do not need intervenor status to have your comments considered.

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 (*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.,* CP11–24–000). 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.

[1] Interventions may also be filed electronically via the Internet in lieu of paper. See the previous discussion on filing comments electronically.

In addition, the Commission 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.*

Dated: April 22, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–10308 Filed 4–28–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR10–62–001]

Pelico Pipeline, LLC; Notice of Filing

Take notice that on April 18, 2011, Pelico Pipeline, LLC filed supplemental information to comply with a Commission Order issued on February 18, 2011 in Docket No. PR10–62–000.

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 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 the date as indicated below. Anyone filing a protest must serve a copy of that document on the Applicant.

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 7 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.

Comment Date: 5 p.m. Eastern Time on Tuesday, May 3, 2011.

Dated: April 22, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–10312 Filed 4–28–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14146–000]

Storage Development Partners, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On April 1, 2011, Storage Development Partners, LLC, filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Vandenberg #3 Project (project) to be located on Vandenberg Air Force Base, in Santa Barbara County, California. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would be a pumped storage project and consist of the following: (1) A new 30-foot-high earthen dam with a crest length of 3,359 feet; (2) an upper reservoir having a total storage capacity of 4,831 acre-feet at a normal maximum operating elevation of 1,900 feet mean sea level (msl); (3) four 15,100-foot-long, 25-foot-diameter steel lined penstocks extending between the upper reservoir's inlet/outlet and the pump/turbines below; (4) a breakwater area within the Pacific Ocean, serving as the lower reservoir; (5) an underground powerhouse with approximate dimensions of 250-feet-long by 75-feet-wide by 100-feet-high and containing four reversible pump/turbine-motor/generator units with a rated capacity of 284,148 kW each; (6) an 800-foot-long, 667-foot-wide concrete lined tailrace connecting the pump/turbine draft tubes with the lower inlet/outlet; (7) a lower inlet/outlet structure 100-feet below msl; (8) a 30-mile-long, 230-kilovolt (kV) transmission line extending from the powerhouse to an existing substation; and (9) appurtenant facilities. The estimated annual generation of the Vandenberg #3 Project would be 3,321 gigawatt-hours.

Applicant Contact: Mr. James Petruzzi, Managing Partner, Storage Development Partners, LLC., 4900 Woodway, Suite 745, Houston, Texas 77056; Telephone: 713–840–9994.

FERC Contact: Kenneth Hogan 202–502–8434.

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. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. 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 *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, 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–14146) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: April 22, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–10310 Filed 4–28–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14147–000]

Storage Development Partners, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On April 1, 2011, Storage Development Partners, LLC, filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Camp Pendleton Project (project) to be located at Camp Pendleton Marine Corps Base, in San Diego County, California. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would be a pumped storage project and consist of the following: (1) A new 30-foot-high earthen dam with a crest length of 3,881 feet; (2) an upper reservoir having a total storage capacity of 5,399 acre-feet at a normal maximum operating elevation of 1,700 feet mean sea level (msl); (3) five 10,500-foot-long, 25-foot-diameter steel lined penstocks extending between the upper reservoir's inlet/outlet and the pump/turbines below; (4) a breakwater area within the Pacific Ocean, serving as the lower reservoir; (5) an underground powerhouse with approximate dimensions of 250-feet-long by 75-feet-wide by 100-feet-high and containing five reversible pump/turbine-motor/generator units with a rated capacity of 254,237 kW each; (6) an 1,000-foot-long, 800-foot-wide concrete lined tailrace connecting the pump/turbine draft tubes with the lower inlet/outlet; (7) a lower inlet/outlet structure 100-feet-below msl; (8) a 5-mile-long, 230-kilovolt (kV) transmission line extending from the powerhouse to an existing substation; and (9) appurtenant facilities. The estimated annual generation of the proposed Camp Pendleton Project would be 3,714 gigawatt-hours.

Applicant Contact: Mr. James Petruzzi, Managing Partner, Storage Development Partners, LLC., 4900 Woodway, Suite 745, Houston, Texas 77056; Telephone: 713–840–9994.

FERC Contact: Kenneth Hogan 202–502–8434.

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. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. 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 *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, 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–14147) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: April 22, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–10311 Filed 4–28–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

National Nuclear Security Administration

Notice of Availability of the Draft Supplemental Environmental Impact Statement for the Nuclear Facility Portion of the Chemistry and Metallurgy Research Building Replacement Project at Los Alamos National Laboratory, Los Alamos, NM

AGENCY: National Nuclear Security Administration, U.S. Department of Energy.

ACTION: Notice of availability and public hearings.

SUMMARY: The National Nuclear Security Administration (NNSA) announces the availability of the *Draft Supplemental Environmental Impact Statement for the Nuclear Facility Portion of the Chemistry and Metallurgy Research Building Replacement Project at Los Alamos National Laboratory, Los Alamos, New Mexico* (Draft CMRR–NF SEIS) (DOE/EIS–0350–S1), and the dates and locations for public hearings to receive comments on the Draft CMRR–NF SEIS. The Draft CMRR–NF SEIS analyzes the potential environmental impacts of alternatives for constructing and operating the nuclear facility (NF) portion of the Chemistry and Metallurgy Research Building Replacement (CMRR) Project. The CMRR Project was first analyzed in the 2003 *Final Environmental Impact Statement for the Proposed Chemistry and Metallurgy Research Building Replacement Project at Los Alamos National Laboratory, Los Alamos, NM* (the CMRR EIS) (DOE/EIS–0350), and NNSA issued a Record of Decision for the CMRR Project in February 2004 (68 FR 6420) announcing its decision to construct and operate a two building CMRR facility within Technical Area-55 (TA–55) at Los Alamos National Laboratory (LANL) in order to meet its need to sustain mission-critical specialized nuclear chemistry and metallurgy capabilities at LANL in a safe, secure and environmentally sound manner. Since that time, NNSA has constructed one of the two buildings for the CMRR Project (the Radiological Laboratory/Utility/Office Building, also called the RLUOB), and has engaged in project planning and design processes for the second building, the CMRR–NF. The planning and design processes for the CMRR–NF have identified the need for various changes to the original design for the structure and additional project elements not envisioned in the 2003 NEPA analyses. These proposed changes, identified subsequent to the ROD, are the subject of the CMRR–NF SEIS analyses.

The Draft CMRR–NF SEIS considers a No Action Alternative (the 2004 CMRR–NF), and two action alternatives (the Modified CMRR–NF Alternative, and the Continued Use of CMR Building Alternative). Under the No Action Alternative, NNSA analyzes construction and operation of the CMRR–NF as it was originally envisioned in 2004, although it has been determined that the structural design in this alternative would not meet current nuclear facility design safety requirements. Thus, this alternative no longer meets NNSA's purpose and need.

The Modified CMRR–NF Alternative incorporates currently identified construction and operational requirements for the CMRR–NF, and meets NNSA's purpose and need. The Continued Use of CMR Building Alternative analyzes continued use of the CMR Building for as long as it may be safe to do so, together with the RLUOB, although this alternative would not fully meet NNSA's purpose and need. The Modified CMRR Alternative is NNSA's preferred alternative.

DATES: NNSA invites stakeholders and members of the public to submit comments on the Draft CMRR–NF SEIS during the public comment period, which starts with the publication of the Environmental Protection Agency's Notice of Availability in the **Federal Register** and extends for 45 days until June 13, 2011. NNSA will consider comments received after this date to the extent practicable as it prepares the Final CMRR–NF SEIS.

NNSA will hold three public hearings on the Draft CMRR–NF SEIS at the following dates, times, and locations:

- Tuesday, May 24, 2011, at 5 p.m. to 9 p.m., Holiday Inn Express, 60 Entrada Drive, Los Alamos, NM.
- Wednesday, May 25, 2011, at 5 p.m. to 9 p.m., Santa Claran Hotel, 464 N. Riverside Drive, Española, NM.
- Thursday, May 26, 2011, at 5 p.m. to 9 p.m., Santa Fe Community College, Jemez Rooms, 6401 Richards Avenue, Santa Fe, NM.

The first half hour of each hearing will be conducted as an open house-style session with subject matter experts available to discuss the project and answer questions; the remainder of the hearing will be devoted to receiving oral and written comments.

ADDRESSES: The Draft CMRR–NF SEIS and its reference material are available for review on the NNSA NEPA Web site at: *http://nnsa.energy.gov/nepa/cmrrseis*. Copies of the Draft CMRR–NF SEIS are also available for review at: the Los Alamos National Laboratory, Oppenheimer Study Center, Building TA3–207, West Jemez Road, Los Alamos, New Mexico; the Office of the Northern New Mexico Citizens Advisory Board, 1660 Old Pecos Trail, Suite B, Santa Fe, New Mexico; and the Zimmerman Library, University of New Mexico, Albuquerque, New Mexico. The Draft CMRR–NF SEIS or its Summary may be obtained upon request by leaving a message on the Los Alamos Site Office (LASO) CMRR–NF SEIS Hotline at (toll free) 1–877–427–9439; or by writing to: U.S. Department of Energy, National Nuclear Security Administration, Los Alamos Site Office, 3747 West Jemez Road, TA–3 Building 1410, Los Alamos, New Mexico, 87544, Attn: Mr. John Tegtmeier, CMRR–NF SEIS Document Manager; or by facsimile ((505) 667–5948); or by e-mail at: *NEPALASO@doeal.gov.*

Questions or Comments concerning the Draft CMRR–NF SEIS can be submitted to the NNSA Los Alamos Site Office at the same postal and electronic addresses given above. Additionally, the LASO CMRR–NF SEIS Hotline will have instructions on how to record comments. Please mark all envelopes, faxes and e-mail: "Draft CMRR–NF SEIS Comments".

For general information about the DOE NEPA process, please contact: Ms. Carol Borgstrom, Director, Office of NEPA Policy and Compliance (GC–54), U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–4600, or leave a message at 1–800–472–2756. Additional information regarding DOE NEPA activities and access to many of DOE's NEPA documents are available on the Internet through the DOE NEPA Web site at *http://nepa.energy.gov.*

SUPPLEMENTARY INFORMATION: The NNSA has prepared the Draft CMRR SEIS in accordance with the National Environmental Policy Act (NEPA), the Council on Environmental Quality (CEQ) regulations that implement the procedural provisions of NEPA (40 CFR parts 1500–1508), and DOE regulations implementing NEPA (10 CFR 1021). These regulations require the preparation of a supplement to an environmental impact statement (EIS) when there are substantial changes to a proposal or when there or significant new circumstances or information relevant to environmental concerns. An agency may also supplement an EIS to further the purposes of NEPA.

Background. LANL is located in north-central New Mexico, 60 miles north-northeast of Albuquerque, 25 miles northwest of Santa Fe, and 20 miles southwest of Española in Los Alamos and Santa Fe Counties. It is located between the Jemez Mountains to the west and the Sangre de Cristo Mountains and Rio Grande to the east. LANL occupies an area of about 40 square miles (104 square kilometers). It is a multidisciplinary, multipurpose institution engaged in theoretical and experimental research and development. LANL performs scientific research and development, and production mission support activities that are critical to the accomplishment of the NNSA's national security objectives as reflected in previous NEPA decisions based on the *Stockpile Stewardship and Management Programmatic EIS* (DOE/EIS–0236) and the *Complex Transformation Supplemental Programmatic EIS* (SPEIS) (DOE/EIS–0236–S4). LANL's role in NNSA mission objectives includes a wide range of scientific and technological capabilities that support nuclear materials handling, processing and fabrication; stockpile management; materials and manufacturing technologies; nonproliferation programs; research and development support for national defense and homeland security programs; and DOE waste management activities.

The CMR facility, located in TA–3 at LANL, houses unique analytical chemistry (AC) and material characterization (MC) support capabilities needed to execute NNSA mission activities. However, CMR is nearly 60 years old. A 1998 seismic study identified two small parallel faults beneath the northernmost portion of the CMR Building. The presence of these faults has given rise to operational and safety concerns related to the structural integrity of the building should a seismic event affecting LANL take place. CMR Building operations and capabilities are currently restricted in scope due to both safety and security constraints; it cannot be operated to the full extent needed to meet NNSA operational requirements. In the late 1990s, NNSA began to develop plans to relocate the CMR Building capabilities elsewhere at LANL to ensure its ability to provide AC and MC support for national security and other NNSA missions. The CMRR EIS was prepared and issued in 2003, followed by a ROD in 2004.

The RLUOB portion of the CMRR project has been completely planned and constructed at TA–55 over the past 7 years. During this same time period, project planning and design for the CMRR–NF has progressed. The CMRR–NF planning process has identified several project requirements that were not envisioned when the CMRR EIS was prepared and issued in 2003. Various facility modifications to address current DOE and NNSA nuclear facility design requirements and sustainable design principals have been identified by NNSA. Several ancillary and support project requirements in addition to those previously analyzed in the CMRR EIS have also been identified. The modifications to the proposed CMRR–NF structural design would allow the building to be operated to the full extent needed to meet NNSA objectives for the CMRR Facility.

NNSA conducted a public scoping process that began with the publication

of a Notice of Intent (NOI) in the **Federal Register** on October 1, 2010, in which NNSA announced its intention to prepare the CMRR–NF SEIS and invited public comment on the scope of the NEPA analysis. The NOI also announced the schedule for public scoping meetings that were held on October 19, 2010, and on October 20, 2010, in White Rock and Pojoaque, New Mexico, respectively. In addition to the public meetings, the public was encouraged to provide comments via mail, e-mail, and fax. All scoping comments received were considered by NNSA in preparing the Draft CMRR SEIS.

Alternatives. The Draft CMRR–NF SEIS analyzes the following three alternatives:

No Action Alternative. The No Action Alternative (also referred to as the 2004 CMRR–NF) reflects the CMRR–NF as it was described and analyzed in the 2003 CMRR EIS and selected in the 2004 ROD (69 FR 6967) and the 2008 Complex Transformation SPEIS ROD (73 FR 77656).

This alternative also includes two additional project activities that were not included in the 2003 CMRR EIS but were analyzed in the 2008 *Final Site-Wide Environmental Impact Statement for Continued Operation of Los Alamos National Laboratory, Los Alamos, New Mexico* (the LANL SWEIS, DOE/EIS –0380), which analyzed the CMRR Facility as part of on-going and future LANL operations. These additional project elements are the transportation and storage of up to 150,000 cubic yards (115,000 cubic meters) per year of excavated soil and spoils from the construction site, and the installation of a new 115-kilovolt electric substation on the existing power distribution loop in TA–50. The 2004 CMRR–NF would have been constructed at TA–55, adjacent to the RLUOB. It is now known, however, that the 2004 CMRR–NF design would not be able to be constructed to meet the nuclear facility design standards required for NNSA to safely conduct the full suite of AC and MC mission work needed by NNSA and DOE. Under the No Action Alternative, the 2004 CMRR–NF would have been constructed as a two-storied building with one above ground level and one below ground level, together with connecting tunnels, material storage vaults, utility structures and trenches, security structures, parking area(s) and a variety of other support areas (such as material laydown areas, concrete batch plant, and equipment storage and parking areas). The building would have comprised about 200,000 square feet (18,600 square meters) of solid floor space, while the total amount of laboratory workspace where mission-related AC and MC operations would be performed would have been about 22,500 square feet (2,100 square meters) in size.

Modified CMRR–NF Alternative. The Modified CMRR–NF would be constructed at the same TA–55 location adjacent to the RLUOB which is identified for the No Action Alternative and would enable NNSA to safely conduct the full suite of AC and MC mission work needed by NNSA and DOE. The Modified CMRR–NF would be constructed with additional structural and reinforcing concrete and steel; additional soil excavation, soil stabilization, and foundation work would also be necessary. The building would comprise about 344,000 square feet (31,000 square meters) of useable floor space divided between four stories and a partial roof level. The total amount of laboratory workspace where mission-related AC and MC operations would be performed would be about 22,500 square feet (2,100 square meters) in size. Additionally, a set of dedicated fire suppression water storage tanks would be located within the Modified CMRR–NF building. This proposed project would differ from the 2004 CMRR–NF in that it would include facility modifications to address DOE and NNSA nuclear facility design standards including seismic safety, nuclear safety basis requirements, security needs, and sustainable design principals and would also include certain additional infrastructure enhancements and construction support activities.

The Modified CMRR–NF Alternative includes two construction options, the Deep Excavation Option and the Shallow Excavation Option. The two construction options consider excavation depths that would allow NNSA to construct the building either below or above a layer of poorly welded volcanic tuff (ash) present at the TA–55 site. The Modified CMRR Alternative is NNSA's preferred alternative; however, NNSA has not identified a preferred construction option at this time.

Continued Use of CMR Building Alternative. Under this alternative, NNSA would continue to carry out laboratory operations in the existing CMR Building at TA–3, with radiological laboratory and administrative support operations moving into the newly constructed RLUOB at TA–55. The continued operation of the CMR Building over an extended period of time would result in continued reduction of laboratory space as operations are further consolidated, or eliminated. It may also include further reductions in operations that could be identified as necessary over time based on the limited ability of the CMR Building to be safely operated and maintained in a physically prudent fashion. This alternative would not meet NNSA's need to carry out AC and MC operations at a level that would support the entire range of DOE and NNSA mission needs.

Public Hearings and Invitation to Comment. NNSA will hold three public hearings on the Draft CMRR–NF SEIS as described in this Notice under **DATES.** Individuals who would like to present comments orally at these hearings must register upon arrival at the hearing. Speaking time will be allotted by the hearing moderator to each individual wishing to speak so as to ensure that as many people as possible have the opportunity to speak. NNSA representatives will be available during the open house portion of these hearings to discuss the Draft CMRR–NF SEIS and the analyses in it. Following the plenary session, the public will have an opportunity to provide oral and written comments.

Following the end of the public comment period on the Draft CMRR–NF SEIS described above, the NNSA will consider and respond to the comments received during the comment period on the Draft CMRR–NF SEIS in the Final CMRR–NF SEIS, and issue the Final CMRR–NF SEIS. NNSA decision-makers will consider the environmental impact analysis presented in the Final CMRR–NF SEIS, along with other information, in making decisions related to CMRR–NF.

Signed in Washington, DC, on April 21, 2011.

Thomas P. D'Agostino,

Administrator, National Nuclear Security Administration.

[FR Doc. 2011–10406 Filed 4–28–11; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9293–7]

Cross-Media Electronic Reporting: Authorized Program Revision Approval, State of Illinois

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's approval of the State of Illinois' request to revise its EPA-authorized program to allow electronic reporting.

DATES: EPA's approval is effective April 29, 2011.

FOR FURTHER INFORMATION CONTACT: Evi Huffer, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 566–1697, *huffer.evi@epa.gov,* U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, or Karen Seeh, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 566–1175, *seeh.karen@epa.gov.*

SUPPLEMENTARY INFORMATION: On October 13, 2005, the final Cross-Media Electronic Reporting Rule (CROMERR) was published in the **Federal Register** (70 FR 59848) and codified as Part 3 of title 40 of the CFR. CROMERR establishes electronic reporting as an acceptable regulatory alternative to paper reporting and establishes requirements to assure that electronic documents are as legally dependable as their paper counterparts. Under Subpart D of CROMERR, state, tribe or local government agencies that receive, or wish to begin receiving, electronic reports under their EPA-authorized programs must apply to EPA for a revision or modification of those programs and obtain EPA approval. Subpart D also provides standards for such approvals based on consideration of the electronic document receiving systems that the state, tribe, or local government will use to implement the electronic reporting. Additionally, in § 3.1000(b) through (e) of 40 CFR part 3, subpart D provides special procedures for program revisions and modifications to allow electronic reporting, to be used at the option of the state, tribe or local government in place of procedures available under existing program-specific authorization regulations. An application submitted under the Subpart D procedures must show that the state, tribe or local government has sufficient legal authority to implement the electronic reporting components of the programs covered by the application and will use electronic document receiving systems that meet the applicable Subpart D requirements.

On July 8, 2010, the Illinois Environmental Protection Agency's (ILEPA) submitted an application for its Electronic Discharge Monitoring Report (eDMR) document receiving system for revision of its EPA-authorized program under title 40 CFR. EPA reviewed ILEPA's request to revise its EPA-authorized program and, based on this review, EPA determined that the application met the standards for approval of authorized program revisions set out in 40 CFR part 3, subpart D. In accordance with 40 CFR 3.1000(d), this notice of EPA's decision to approve Illinois' request for revision to its 40 CFR part 123—National Pollutant Discharge Elimination System (NPDES) State Program Requirements EPA-authorized program for electronic reporting of discharge monitoring report information submitted under 40 CFR part 122 is being published in the **Federal Register**.

ILEPA was notified of EPA's determination to approve its application with respect to the authorized program listed above.

Dated: April 6, 2011.

Andrew Battin,

Director, Office of Information Collection.

[FR Doc. 2011–10433 Filed 4–28–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–8996–6]

Environmental Impacts Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–1399 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental. Impact Statements Filed 04/18/2011 Through 04/22/2011.

Pursuant to 40 CFR 1506.9.

NOTICE:

In accordance with Section 309(a) of the Clean Air Act, EPA is required to make its comments on EISs issued by other Federal agencies public. Historically, EPA met this mandate by publishing weekly notices of availability of EPA comments, which includes a brief summary of EPA's comment letters, in the **Federal Register**. Since February 2008, EPA has included its comment letters on EISs on its website at: *http://www.epa.gov/compliance/nepa/eisdata.html.* Including the entire EIS comment letters on the website satisfies the Section 309(a) requirement to make EPA's comments on EISs available to the public. Accordingly, on March 31, 2010, EPA discontinued the publication of the notice of availability of EPA comments in the **Federal Register**.

EIS No. 20110128, Revised Draft EIS, USFS, CO, Colorado Roadless Areas Rulemaking, Proposal To Establish Regulatory Direction for Managing Approximately 4.2 million Acres of Roadless Areas, Arapaho and Roosevelt; Grand Mesa, Uncompahgre, and Gunnison; Manti-La Sal (portion in Colorado); Pike and San Isabel; Rio Grande; Routt; San Juan; and White River National Forests, CO, Comment Period Ends: 07/14/2011, Contact: Pam Skeels 303–275–5152

EIS No. 20110129, Final EIS, USFS, ID, Robo Elk Project, Proposes Watershed Improvement, Timber Harvest, Fuel Treatments, and Recreation Activities, Palouse Ranger District, Clearwater National Forest, Clearwater County, ID, Review Period Ends: 05/31/2011, Contact: Susan Shaw 208–875–1131

EIS No. 20110130, Draft Supplement, NNSA, NM, Nuclear Facility of the Chemistry and Metallurgy Research Replacement Project, To Address New Geologic Information Regarding Seismic Conditions at the Site, Los Alamos National Laboratory, Los Alamos, NM, Comment Period Ends: 06/13/2011, Contact: John Tegtmeier 505–665–0113

EIS No. 20110131, Draft EIS, BOR, CA, San Joaquin River Restoration Program, A Comprehensive Long-Term Effort to Restore Flows to the San Joaquin River from Friant Dam to the Confluence of Merced River and Restore a Self-Sustaining Chinook Salmon Fishery in the River while Reducing or Avoiding Adverse Water Supply Impacts from Interim and Restoration Flows, Implementation, CA, Comment Period Ends: 06/13/2011, Contact: Michelle Banonis 916–978–5457

EIS No. 20110132, Final EIS, USFWS, HI, Palmyra Atoll National Wildlife Refuge Rat Eradication Project, Proposing to Restore and Protect the Native Species and Habitats, Implementation, Northern Line Islands, Honolulu, HI, Review Period Ends: 05/31/2011, Contact: Ben Harrison 503–231–6177

Amended Notices

EIS No. 20110004, Draft EIS, NPS, CA, Golden Gate National Recreation Area Project, Proposed Dog Management Plan, Implementation, San Francisco, CA, Comment Period Ends: 05/30/2011, Contact: Sherwin Smith 415–561–4947 Revision to FR Notice Published 01/14/2011: Extending Comment Period from 04/13/2011 to 05/30/2011

EIS No. 20110047, Draft Supplement, USN, CA, Hunters Point (Former) Naval Shipyard Disposal and Reuse, Supplement Information on the 2000 FEIS, Implementation, City of San

Francisco, San Francisco County, CA, Comment Period Ends: 05/06/2011, Contact: Ronald Bochenek 619–532–0906 Revision of FR Notice Published 02/25/2011: Extending Comment Period from 04/12/2011 to 05/06/2011

Dated: April 26, 2011.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2011–10411 Filed 4–28–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA—New England Region I–EPA–R01–OW–2011–0364; FRL–9299–6]

Massachusetts Marine Sanitation Device Standard—Receipt of Petition

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice—receipt of petition.

SUMMARY: Notice is hereby given that a petition has been received from the Commonwealth of Massachusetts requesting a determination by the Regional Administrator, U.S. Environmental Protection Agency, that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the waters of Chatham, Orleans, Eastham, Wellfleet, Truro, and Provincetown, collectively termed the Outer Cape Cod for the purpose of this notice.

DATES: Comments must be submitted by May 31, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R01–OW–2011–0364, by one of the following methods: *http://www.regulations.gov,* Follow the on-line instructions for submitting comments.

- E-mail: *rodney.ann@epa.gov.*
- Fax: (617) 918–0538

Mail and hand delivery: U.S. Environmental Protection Agency—New England Region, Five Post Office Square, Suite 100, OEP06–1, Boston, MA 02109–3912. Deliveries are only accepted during the Regional Office's normal hours of operation (8 a.m.–5 p.m., Monday through Friday, excluding legal holidays), and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R01–OW–2011–0364. 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 *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.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the U.S. Environmental Protection Agency—New England Region, Five Post Office Square, Suite 100, OEP06–01, Boston, MA 02109–3912. Such deliveries are only accepted during the Regional Office's normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office is open from 8 a.m.–5 p.m., Monday through Friday, excluding legal holidays. The telephone number is (617) 918–1538.

FOR FURTHER INFORMATION CONTACT: Ann Rodney, U.S. Environmental Protection Agency—New England Region, Five Post Office Square, Suite 100, OEP06–01, Boston, MA 02109–3912. Telephone: (617) 918–1538, Fax number: (617) 918–0538; e-mail address: *rodney.ann@epa.gov.*

SUPPLEMENTARY INFORMATION:

Notice is hereby given that a petition has been received from the Commonwealth of Massachusetts requesting a determination by the Regional Administrator, U.S. Environmental Protection Agency, pursuant to Section 312(f)(3) of Public Law 92–500 as amended by Public Law 95–217 and Public Law 100–4, that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the Outer Cape Cod area.

The Outer Cape Cod No Discharge Area will encompass the tidal waters for Chatham, Orleans, Eastham, Wellfleet, Truro, and Provincetown, and from mean high water out to the State/Federal boundary. Within Nauset Harbor, the NDA covers all tidal waters and all embayments including: Nauset Bay, Salt Pond, Salt Pond Bay, Woods Cove, Rachel Cove, and Mill Pond.

The proposed No Discharge Area for the Outer Cape Cod:

Waterbody/general area	From longitude	From latitude	To longitude	To latitude
The westernmost landward boundary of the NDA starting on the south side of Chatham is an imaginary line drawn between the western part of the outlet of Stage Harbor and the northern tip of Monomoy Island (All state waters east of Monomoy Island are included in this NDA).	69°59′0″ W	41°39′26″ N	69°59′0″ W	41°37′20″ N
The southwestern boundary then continues from the southern tip of Monomoy Island through two navigational aids to the state/federal waters boundary.	70°0′36″ W	41°32′30″ N	70°0′11″ W	41°29′15″ N
The landward boundary of the NDA follows the mean high water line from Chatham to Provincetown except at an imaginary line drawn between: (This imaginary line is across the mouth of Pleasant Bay, which is already an NDA).	69°56′36″ W	41°39′40″ N	69°56′6″ W	41°40′56″ N

Waterbody/general area	From longitude	From latitude	To longitude	To latitude
The westernmost boundary on the northern side of Cape Cod is an imaginary line drawn from three miles off shore to the mean high water line in Provincetown (This imaginary line is contiguous with the Cape Cod Bay NDA). The eastern edge of the boundary is contiguous with the state/federal line also known as the Submerged Lands Act boundary line and Territorial Sea boundary.	70°10′0″ W	42°7′59″ N	70°10′0″ W	42°4′47″ N

The boundaries were chosen based on easy line-of-sight locations and generally represent all navigational waters.

There is only one harbor within the proposed Outer Cape Cod NDA, which is Nauset Harbor. Small skiffs owned by the residents of the area are the primary users of Nauset Harbor. Other vessels that would use the harbor would most likely come from Provincetown Harbor, Pleasant Bay, or Chatham Harbor, all of which are currently NDAs and have pumpout facilities for these boaters. Massachusetts has certified that there is one landside pumpout facility at Goose Hummock Marine in Orleans within the proposed area available to the boating public. The location, contact information, hours of operation, and water depth are provided at the end of this petition.

Massachusetts has provided documentation indicating that the total vessel population is estimated to be 519 in the proposed area. It is estimated that 91 of the total vessel population may have a Marine Sanitation Device (MSD) of some type.

The majority of coastline of the proposed area is the Cape Cod National Seashore, a 43,500 acre park established by Congress in 1961 to, "preserve the nationally significant and special cultural and natural features, distinctive patterns of human activity, and ambience that characterize the Outer Cape, along with the associated scenic, cultural, historic, scientific, and recreational values", and to, "provide opportunities for current and future generations to experience, enjoy, and understand these features and values."

The various beaches, marshes, and harbors and their recreational opportunities attract thousands of visitors to Cape Cod every year. On the eastern shore of Cape Cod, from Chatham to Provincetown there are 24 bathing beaches covering over thirty miles of coastline.

The area contains known habitat for soft shelled clam, surf clam, sea scallop, quahog, ocean quahog, and blue mussel; all important recreational and commercial species.

PUMPOUT FACILITY WITHIN PROPOSED NO DISCHARGE AREA

[Outer Cape Cod]

Name	Location	Contact info.	Hours	Mean low water depth
Goose Hummock Marine, Nauset Harbor	13 Old County Rd, Orleans, MA.	508–255–2620 VHF 16	On call	3 ft.

Dated: April 20, 2011.

Ira W. Leighton,

Acting Regional Administrator, New England Region.

[FR Doc. 2011–10347 Filed 4–28–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than May 16, 2011.

A. *Federal Reserve Bank of Richmond* (A. Linwood Gill, III, Vice President) 701 East Byrd Street, Richmond, Virginia 23261–4528:

1. *Mark A. Snyder,* Kittanning, Pennsylvania; individually, to acquire voting shares of Nextier, Inc., Butler, Pennsylvania, and thereby indirectly acquire voting shares of Nextier Bank N.A., Evans City, Pennsylvania.

Dated: Board of Governors of the Federal Reserve System, April 26, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–10395 Filed 4–28–11; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the

proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 26, 2011.

A. *Federal Reserve Bank of St. Louis* (Glenda Wilson, Community Affairs Officer) P.O. Box 442, St. Louis, Missouri 63166–2034:

1. *First Security Bancorp,* Searcy, Arkansas; to acquire an additional 3.96 percent, for a total of 9.9 percent, of the voting shares of Crossfirst Holdings, LLC, Leawood, Kansas, and thereby indirectly acquire additional voting shares of Crossfirst Bank Leawood, Leawood, Kansas, and Crossfirst Bank, Overland Park, Kansas.

Dated: Board of Governors of the Federal Reserve System, April 26, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–10396 Filed 4–28–11; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 23, 2011.

A. *Federal Reserve Bank of Atlanta* (Clifford Stanford, Vice President) 1000 Peachtree Street, NE., Atlanta, Georgia 30309:

1. *Sequatchie Valley Bancshares, Inc., Dunlap, Tennessee* to acquire 100 percent of the outstanding shares of The Citizens Bank of Spencer, Spencer, Tennessee.

Board of Governors of the Federal Reserve System, April 25, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–10295 Filed 4–28–11; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

[Docket Number OP–1418]

Request for Information Relating to Studies Regarding the Resolution of Financial Companies Under the Bankruptcy Code

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice and request for information.

SUMMARY: Section 216 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") requires the Board, in consultation with the Administrative Office of the United States Courts (the "AOUSC"), to conduct a study regarding the resolution of financial companies under Chapter 7 or Chapter 11 of the United States Bankruptcy Code (Title 11, U.S. Code) (the "Bankruptcy Code"). Section 217 of the Dodd-Frank Act requires the Board, in consultation with the AOUSC, to conduct a study regarding international coordination relating to the resolution of systemic financial companies under the Bankruptcy Code and applicable foreign law. Section 216 and Section 217 of the Dodd-Frank Act each identifies specific issues that are to be studied under the relevant section. The Board is issuing this request for information through public comment to assist the Board in conducting these studies.

DATES: *Comment due date:* May 31, 2011.

ADDRESSES: You may submit comments, identified by Docket No. OP–1418, by any of the following methods:

- *Agency Web Site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: regs.comments@federalreserve.gov.* Include the docket number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Address to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments will be made available on the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Sophia Allison, Senior Counsel (202/452–3565), or Gillian Burgess, Senior Attorney (202/736–5564), Legal Division; for users of Telecommunications Device for the Deaf (TDD) only, contact (202/263–4869); Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551.

SUPPLEMENTARY INFORMATION:

I. Background

The Dodd-Frank Act was enacted on July 21, 2010. Under Section 216 of the Dodd-Frank Act, the Board is required to conduct a study, in consultation with the AOUSC, regarding the resolution of financial companies under Chapter 7 or Chapter 11 of the Bankruptcy Code (the "Section 216 Study"). Section 216 specifies five specific issues that are to be included in the Section 216 Study (124 Stat. 1519) Pub. Law 111–203, JULY 21, 2010. These issues generally are: (1) The effectiveness of the Bankruptcy Code in resolving systemic financial companies, (2) whether a special resolution court or panel for financial companies should be established, (3) whether amendments should be made to the Bankruptcy Code for dealing with financial companies, (4) whether the way that qualified financial contracts (QFCs) of financial companies in resolution are treated should be changed; and (5) whether a special chapter of the Bankruptcy Code for

dealing with financial companies should be created.

Section 217 of the Dodd-Frank Act requires the Board, in consultation with the AOUSC, to conduct a study regarding international coordination relating to the resolution of systemic financial companies under the Bankruptcy Code and applicable foreign law (the "Section 217 Study"). Section 217 specifies four specific issues that are to be included in the Section 217 Study. These issues generally are: (1) Whether international coordination exists, (2) the facilitation of such international coordination; (3) the barriers to such coordination; and (4) the ways to improve such coordination.

II. Solicitation for Comments on the Bankruptcy Studies

To assist the Board in conducting the Section 216 Study and the Section 217 Study, the Board seeks public comment on the following questions:

1. With respect to the Section 216 Study, how should the Board address the following areas, taking into account among other things the enactment of Title II of the Dodd-Frank Act?

(i) The effectiveness of chapter 7 and chapter 11 of the Bankruptcy Code in facilitating the orderly resolution or reorganization of systemic financial companies;

(A) The key factors and considerations that should be taken into account in assessing the "effectiveness" of the Bankruptcy Code in facilitating the orderly resolution or reorganization of systemic financial companies;

(B) The key factors and considerations that should be taken into account in assessing whether the Bankruptcy Code is effective in facilitating the "orderly" resolution or reorganization of systemic financial companies;

(C) The extent to which the effectiveness of the Bankruptcy Code in facilitating the orderly resolution or reorganization of "systemic financial companies" differs from the effectiveness of the Bankruptcy Code in facilitating the orderly resolution or reorganization of non-systemic financial companies;

(ii) Whether a special financial resolution court or panel of special masters or judges should be established to oversee cases involving financial companies to provide for the resolution of such companies under the Bankruptcy Code, in a manner that minimizes adverse impacts on financial markets without creating moral hazard;

(A) The "adverse impacts on financial markets" that would be minimized by the establishment of such a court or panel;

(B) How establishing such a court or panel would minimize "moral hazard;"

(C) The key factors and considerations that should be taken into account in assessing whether the establishment of such a court or panel would minimize such adverse impacts without creating such moral hazard;

(iii) Whether amendments to the Bankruptcy Code should be adopted to enhance the ability of the Code to resolve financial companies in a manner that minimizes adverse impacts on financial markets without creating moral hazard;

(A) The "adverse impacts on financial markets" that would be minimized by amendments to the Bankruptcy Code;

(B) How such amendments would minimize "moral hazard;"

(C) The specific amendments to the Bankruptcy Code that would minimize such adverse impacts without creating such moral hazard;

(D) The key factors and considerations that should be taken into account in assessing whether such amendments to the Bankruptcy Code would minimize such adverse impacts without creating such moral hazard;

(iv) Whether amendments should be made to the Bankruptcy Code, the Federal Deposit Insurance Act, and other insolvency laws to address the manner in which qualified financial contracts of financial companies are treated;

(A) The specific amendments to the Bankruptcy Code, the Federal Deposit Insurance Act, and other insolvency laws that might be made to address the manner in which qualified financial contracts of financial companies are treated;

(B) The key factors and considerations that should be taken into account in assessing whether such amendments to the Bankruptcy Code, the Federal Deposit Insurance Act, and other insolvency laws should be made;

(C) The key factors and considerations that should be taken into account in assessing the likely outcome of making or not making such amendments;

(v) The implications, challenges, and benefits to creating a new chapter or subchapter of the Bankruptcy Code to deal with financial companies;

(A) The key factors and considerations that should be taken into account in assessing whether a new chapter or subchapter of the Bankruptcy Code should be created to deal with financial companies;

(B) The benefits that might result from the creation of a new chapter or subchapter of the Bankruptcy Code to deal with financial companies;

(C) The extent to which such benefits would not be likely to be obtained without creating such a new chapter or subchapter;

(D) The challenges that might be faced by creating a new chapter or subchapter of the Bankruptcy Code to deal with financial companies; and

(E) The key factors and considerations that should be taken into account in assessing the likely outcome of creating or not creating a new chapter or subchapter of the Bankruptcy Code to deal with financial companies.

2. With respect to the Section 217 Study, how should the Board address the following areas?

(i) The extent to which international coordination currently exists;

(ii) Current mechanisms and structures for facilitating international cooperation;

(iii) Barriers to effective international coordination; and

(iv) ways to increase and make more effective international coordination of the resolution of financial companies, so as to minimize the impact on the financial system without creating moral hazard.

3. With respect to both the Section 216 Study and the Section 217 Study:

(i) Any studies, research, empirical data or other information supporting any comments on any of the foregoing questions, where available; and

(ii) Any additional factors or considerations that should be taken into account in either the Section 216 Study or the Section 217 Study.

By order of the Board of Governors of the Federal Reserve System, April 20, 2011.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2011–9986 Filed 4–28–11; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0155; Docket 2011–0079; Sequence 13]

Information Collection; Prohibition on Acquisition of Products Produced by Forced or Indentured Child Labor

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35), the Regulatory Secretariat (MVCB) will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement regarding prohibition on acquisition of products produced by forced or indentured child labor.

DATES: Submit comments on or before: June 28, 2011.

ADDRESSES: Submit comments identified by Information Collection 9000–0155 by any of the following methods:

- Regulations.gov: *http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting "Information Collection 9000–0155" under the heading "Enter Keyword or ID" and selecting "Search". Select the link "Submit a Comment" that corresponds with "Information Collection 9000–0155". Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "Information Collection 9000–0155" on your attached document.
- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street, NE., Washington, DC 20417. ATTN: Hada Flowers/IC 9000–0155.

Instructions: Please submit comments only and cite Information Collection 9000–0155, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Clare McFadden, Procurement Analyst, Acquisition Policy Division, GSA (202) 501–0044 or e-mail *clare.mcfadden@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

This information collection complies with Executive Order 13126, Prohibition on Acquisition of Products Produced by Forced or Indentured Child Labor, signed by the President on June 12, 1999. Executive Order 13126 requires that this prohibition be enforced within the federal acquisition system by means of: (1) A provision that requires the contractor to certify to the contracting officer that the contractor or, in the case of an incorporated contractor, a responsible official of the contractor has made a good faith effort to determine whether forced or indentured child labor was used to mine, produce, or manufacture any product furnished under the contract and that, on the basis of those efforts, the contractor is unaware of any such use of child labor; and (2) A provision that obligates the contractor to cooperate fully in providing reasonable access to the contractor's records, documents, persons, or premises if reasonably requested by authorized officials of the contracting agency, the Department of the Treasury, or the Department of Justice, for the purpose of determining whether forced or indentured child labor was used to mine, produce, or manufacture any product furnished under the contract.

The information collection requirements of the Executive Order are evidenced via the certification requirements delineated at FAR 22.1505, 52.212–3, 52.222–18, and 52.222–19.

To eliminate some of the administrative burden on offerors who must submit the same information to various contracting offices, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) decided to amend the Federal Acquisition Regulation (FAR) to require offerors to submit representations and certifications electronically via the Business Partner Network (BPN), unless certain exceptions apply. Online Representations and Certifications Application (ORCA) is the specific application on the BPN to replace the paper based Representations and Certifications (Reps and Certs) process. The change to the FAR is being accomplished by FAR Case 2002–024. The clearance associated with this case referenced this OMB Control No. 9000–0155 and reduced the hours of burden by 35%—attributable to mandated use of ORCA. This reduction is already reflected in the figures below.

B. Annual Reporting Burden

Respondents: 500.
Responses per Respondent: 1.
Hours per Response: 0.325.
Total Burden Hours: 162.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat Branch (MVCB), 1275 First Street, NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 9000–0155, Prohibition on Acquisition of Products Produced by Forced or Indentured Child Labor, in all correspondence.

Dated: April 19, 2011.

Millisa Gary,

Acting Director, Office of Governmentwide Acquisition Policy.

[FR Doc. 2011–10289 Filed 4–28–11; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0025; Docket 2011–0079; Sequence 10]

Federal Acquisition Regulation; Information Collection; Trade Agreements Certificate

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35), the Regulatory Secretariat (MVCB) will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning trade agreements certificate.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before June 28, 2011.

ADDRESSES: Submit comments identified by Information Collection 9000–0025 by any of the following methods:

- Regulations.gov: *http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting "Information Collection 9000–

0025" under the heading "Enter Keyword or ID" and selecting "Search". Select the link "Submit a Comment" that corresponds with "Information Collection 9000–0025". Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "Information Collection 9000–0025" on your attached document.

- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street, NE., Washington, DC 20417. ATTN: Hada Flowers/IC 9000–0025.

Instructions: Please submit comments only and cite Information Collection 9000–0025, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Cecelia Davis, Procurement Analyst, Acquisition Policy Division, GSA (202) 219–0202 or e-mail *Cecelia.davis@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

Under the Trade Agreements Act of 1979, unless specifically exempted by statute or regulation, agencies are required to evaluate offers over a certain dollar limitation not to supply an eligible product without regard to the restrictions of the Buy American program. Offerors identify excluded end products on this certificate.

The contracting officer uses the information to identify the offered items which are domestic end products. Items having components of unknown origin are considered to have been mined, produced, or manufactured outside the United States, a designated country, Caribbean Basin country or Free Trade Agreement Country.

B. Annual Reporting Burden

Respondents: 1,140.
Responses per Respondent: 10.
Total Responses: 11,400.
Hours per Response: .109.
Total Burden Hours: 1,243.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street, NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 9000–0025, Trade Agreements Certificate, in all correspondence.

Dated: April 18, 2011.

Millisa Gary,

Acting Director, Office of Governmentwide Acquisition Policy.

[FR Doc. 2011–10290 Filed 4–28–11; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0024; Docket 2011–0079; Sequence 9]

Federal Acquisition Regulation; Information Collection; Buy American Act Certificate

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35), the Regulatory Secretariat (MVCB) will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning the Buy American Act certificate.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before June 28, 2011.

ADDRESSES: Submit comments identified by Information Collection 9000–0024 by any of the following methods:

- Regulations.gov: *http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting "Information Collection 9000–0024" under the heading "Enter Keyword or ID" and selecting "Search". Select the link "Submit a Comment" that corresponds with "Information Collection 9000–0024". Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "Information Collection 9000–0024" on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street, NE., Washington, DC 20417. ATTN: Hada Flowers/IC 9000–0024.

Instructions: Please submit comments only and cite Information Collection 9000–0024, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Cecelia Davis, Procurement Analyst, Acquisition Policy Division, GSA (202) 219–0202 or e-mail *cecelia.davis@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

The Buy American Act requires that only domestic end products be acquired for public use unless specifically authorized by statute or regulation, provided that the cost of the domestic products is reasonable.

The Buy American Act Certificate provides the contracting office with the information necessary to identify which products offered are domestic end products and which are of foreign origin. Components of unknown origin are considered to have been supplied from outside the United States.

B. Annual Reporting Burden

Respondents: 3,125.
Responses per Respondent: 15.
Total Responses: 46,875.
Hours per Response: .109.
Total Burden Hours: 5,109.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street, NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 9000–0024, Buy American Act Certificate, in all correspondence.

Dated: April 18, 2011.

Millisa Gary,

Acting Director, Office of Governmentwide Acquisition Policy.

[FR Doc. 2011–10291 Filed 4–28–11; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60-Day 11–0138]

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 Carol Walker, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS D–74, 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

Pulmonary Function Testing Course Approval Program, 29 CFR 1910.1043 (OMB No. 0920–0138)—Extension—The National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

NIOSH has the responsibility under the Occupational Safety and Health Administration's Cotton Dust Standard, 29 CFR 1920.1043, for approving courses to train technicians to perform pulmonary function testing in the cotton industry. Successful completion of a NIOSH-approved course is mandatory under the Standard. To carry out its responsibility, NIOSH maintains a Pulmonary Function Testing Course Approval Program. The program consists of an application submitted by potential sponsors (universities, hospitals, and private consulting firms) who seek NIOSH approval to conduct courses, and if approved, notification to NIOSH of any course or faculty changes during the approval period, which is limited to five years. The application form and added materials, including an agenda, curriculum vitae, and course materials are reviewed by NIOSH to determine if the applicant has developed a program which adheres to the criteria required in the Standard. Following approval, any subsequent changes to the course are submitted by course sponsors via letter or e-mail and reviewed by NIOSH staff to assure that the changes in faculty or course content continue to meet course requirements. Course sponsors also voluntarily submit an annual report to inform NIOSH of their class activity level and any faculty changes. Sponsors who elect to have their approval renewed for an additional 5 year period submit a renewal application and supporting documentation for review by NIOSH staff to ensure the course curriculum meets all current standard requirements. Approved courses that elect to offer NIOSH-Approved Spirometry Refresher Courses must submit a separate application and supporting documents for review by NIOSH staff. Institutions and organizations throughout the country voluntarily submit applications and materials to become course sponsor and carry out training. Submissions are required for NIOSH to evaluate a course and determine whether it meets the criteria in the Standard and whether technicians will be adequately trained as mandated under the Standard.

There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Initial Application	3	1	3.5	11
Annual Report	35	1	30/60	18
Report for Course Changes	12	1	45/60	9
Renewal Application	13	1	6.0	78
Refresher Course Application	10	1	8.0	80
Total				196

Dated: April 25, 2011.

Carol Walker,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2011–10378 Filed 4–28–11; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30 Day–11–0445]

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

School Health Policies and Practices Study 2012 (formerly titled School Health Policies and Programs Study, OMB No. 0920–0445, exp. 11/30/2008)—Reinstatement with Changes—

National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

CDC has previously examined the role that schools play in addressing the health risk behaviors through the School Health Policies and Programs Study (SHPPS, OMB No. 0920–0445), a series of data collections conducted at the state, district, school, and classroom levels in 1994 (OMB. No. 0920–0340, exp. 1/31/1995), in 2000 (OMB No. 0920–0445, exp. 10/31/2002), and in 2006 (OMB No. 0920–0445, exp. 11/30/2008).

Clearance is being requested for one year for CDC to conduct SHPPS 2012. The purpose of the study is to collect updated information to assess the characteristics of eight components of school health programs at the elementary, middle, and high school levels. The components are: Health education, physical education, health services, mental health and social services, nutrition services, healthy and safe school environment, faculty and staff health promotion, and family and community involvement. Twenty-two questionnaires will be used: Six at the state level, seven at the district level, seven at the school level, and two at the classroom level. Data collection at the state and district levels will be self-administered via the Internet. Data collection at the school and classroom levels will be conducted via computer-assisted personal interviews. SHPPS 2012 also will include vending machine observations in the schools.

SHPPS 2012 data will have significant implications for policy and program development for school health programs nationwide. The data will also be used to provide the only national source of data to measure 14 Healthy People 2020 national health objectives, and will provide the only nationally representative dataset of snack and beverage offerings available to students through school vending machines.

There are no costs to respondents other than their time. The total estimated burden hours are 13,262.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number responses per respondent	Average burden per response (in hours)
State Officials	State Health Education	51	1	30/60
	State Physical Education and Activity	51	1	30/60
	State Health Services	51	1	30/60
	State Nutrition Services	51	1	30/60
	State Healthy and Safe School Environment	51	1	30/60
	State Mental Health and Social Services	51	1	30/60
	State Recruitment Script	51	1	1
District Officials	District Health Education	685	1	30/60
	District Physical Education and Activity	685	1	40/60
	District Health Services	685	1	40/60
	District Nutrition Services	685	1	30/60
	District Healthy and Safe School Environment.	685	1	1
	District Mental Health and Social Services	685	1	30/60
	District Faculty and Staff Health Promotion	685	1	20/60
	District Recruitment Script	1006	1	1
School Officials	School Recruitment Script	1409	1	1
	School Health Education	1043	1	20/60
	School Physical Education and Activity	1043	1	40/60
	School Health Services	1043	1	50/60
	School Nutrition Services	1043	1	40/60
	Healthy and Safe School Environment	1043	1	75/60
	School Mental Health and Social Services	1043	1	30/60
	School Faculty and Staff Health Promotion	1043	1	20/60
Classroom Teachers	Classroom Health Education	2002	1	50/60
	Classroom Physical Education and Activity	2002	1	40/60

Dated: April 25, 2011.

Carol Walker,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2011–10391 Filed 4–28–11; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day–11–11EM]

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 Carol Walker, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS D–74, 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

National Survey of Primary Care Policies for Managing Patients with High Blood Pressure, High Cholesterol, or Diabetes—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Cardiovascular disease is a leading cause of death for men and women in the United States, among the most costly health problems facing our nation today, and among the most preventable. Heart disease and stroke also contribute significantly to disability, with nearly three million American people reporting disability from these causes. Additionally, over 50% of diabetics have high blood pressure, high cholesterol, or both conditions. To reduce the burden of cardiovascular disease, the federal Centers for Disease Control and Prevention (CDC) works with a broad array of public- and private-sector stakeholders, including state and local health departments, community-based organizations, professional organizations, and health care practitioners.

In 2005, CDC's Division for Heart Disease and Stroke Prevention (DHDSP) began developing evaluation indicators that reflect evidence-based outcomes from policy, systems, and environmental changes for heart disease and stroke prevention. These indicators are needed to provide common measures that CDC, CDC-funded state Heart Disease and Stroke Prevention programs, and other partners can use to show progress toward achieving outcomes in heart disease and stroke prevention and control efforts. Many of the indicators that reflect outcomes of short-term policy and systems changes do not have readily available data sources. This is particularly true for outcomes related to health care systems changes.

In 2011, CDC proposes to conduct the first cycle of data collection for the National Survey of Primary Care Policies for Managing Patients with High Blood Pressure, High Cholesterol, or Diabetes (NSPCP). The web-based survey will collect information on physician practices' use of evidence-based systems, including multidisciplinary team approaches for chronic disease treatment, electronic health records (EHR) with features appropriate for treating patients with chronic disease (e.g., clinical decision supports, patient registries), and patient follow-up mechanisms. A follow-up questionnaire will be distributed two years after completion of the baseline survey. Information from both cycles of data collection will be compared to monitor changes in health systems uptake and dissemination of health systems technology. The survey will be pretested with approximately 16 respondents before dissemination.

The target population for the NSPCP is practice managers of non-federally run primary care physician practices that include at least one Family Practitioner or at least one physician specializing in internal medicine. Respondents will be drawn from a nationally representative sample of physician practices. OMB approval is requested for three years. Approximately 900 physicians will participate in the first cycle of web-based data collection, and 900 physicians will participate in the two-year follow-up survey. An average of 600 respondents per year will participate in the NSPCP.

Results will be used by CDC to improve services to partners through development of translation pieces or technical assistance aids that address gaps in the use of evidence-based interventions. Most importantly, the study will provide primary care practices with information that can be used to inform their systems for managing patients with chronic conditions and to improve the quality of care delivered.

Participation is voluntary, and all responses will be de-identified. There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Avg. burden per response (in hr)	Total burden (in hr)
Physician	Cognitive Testing Protocol	5	1	75/60	6
Medical Secretary	NSPCP Screener	1,333	1	5/60	111
Physician	NSPCP	600	1	20/60	200
Total					317

Dated: April 25, 2011.

Carol Walker,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention

[FR Doc. 2011–10384 Filed 4–28–11; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Funding Opportunity Announcement GH11–002, Initial Review

Correction: This notice was published in the **Federal Register** on April 12, 2011, Volume 76, Number 70, Page 20355. The contact person for the aforementioned meeting has been changed to the following:

Contact Person for More Information: Diana Bartlett, M.P.H., Scientific Review Officer, CDC, 1600 Clifton Road, NE., Mailstop D–72, Atlanta, Georgia 30333, Telephone: (404) 639–4938.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the

Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: April 21, 2011.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2011–10385 Filed 4–28–11; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, National Center for Environmental Health/Agency for Toxic Substances and Disease Registry (BSC, NCEH/ATSDR)

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:

Times and Dates:
8:30 a.m.–4:45 p.m., May 18, 2011.
8:30 a.m.–3:15 p.m., May 19, 2011.

Place: CDC, 4770 Buford Highway, Atlanta, Georgia 30341.

Status: Open to the public, limited only by the space available. The meeting room accommodates approximately 75 people.

Purpose: The Secretary, Department of Health and Human Services (HHS) and by delegation, the Director, CDC and Administrator, NCEH/ATSDR, are authorized under Section 301 (42 U.S.C. 241) and Section 311 (42 U.S.C. 243) of the Public Health Service Act, as amended, to: (1) Conduct, encourage, cooperate with, and assist other appropriate public authorities, scientific institutions, and scientists in the conduct of research, investigations, experiments, demonstrations, and studies relating to the causes, diagnosis, treatment, control, and prevention of physical and mental diseases and other impairments; (2) assist states and their political subdivisions in the prevention of infectious diseases and other preventable conditions and in the promotion of health and well being; and (3) train state and local personnel in health work. The BSC, NCEH/ATSDR provides advice and guidance to the Secretary, HHS; the Director, CDC and Administrator, ATSDR; and the Director, NCEH/ATSDR, regarding program goals, objectives, strategies, and priorities in fulfillment of the agency's mission to protect and promote people's health. The board provides advice and guidance that will assist NCEH/ATSDR in ensuring scientific quality, timeliness, utility, and dissemination of results. The board also provides guidance to help NCEH/ATSDR work more efficiently and effectively with its various constituents and to fulfill its mission in protecting America's health.

Matters To Be Discussed: The agenda items for the BSC Meeting on May 18–19, 2011 will include NCEH/ATSDR Office of the Director updates; Program Response to BSC Program Peer Review of the Division of Environmental Hazards and Health Effects; presentation on NCEH/ATSDR Internal Clearance and External Peer Review Policies and Procedures on Scientific Documents; presentation on Public Health Priority Level [GAO Table 2]; an update on The National Conversation; an overview of CDC's public health activities related to imported drywall; a review of literature for Toxicological Profiles; a presentation on experimental approaches to risk assessment, and an update on CDC's Response to earthquake, tsunami and radiation release in Japan.

Agenda items are subject to change as priorities dictate.

Supplementary Information: The public comment period is scheduled on Wednesday, May 18, 2011 from 4:15 p.m. until 4:30 p.m., and Thursday, May 19, 2011 from 2:15 p.m. until 2:30 p.m.

Contact Person for More Information: Sandra Malcom, Committee Management Specialist, NCEH/ATSDR, 4770 Buford Highway, Mail Stop F–61, Chamblee, Georgia 30345; telephone 770/488–0575, Fax: 770/488–3377; E-mail: *smalcom@cdc.gov.* The deadline for notification of attendance is May 9, 2011.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: April 21, 2011.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 2011–10393 Filed 4–28–11; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Initial Review

The meeting announced below concerns Strategies to Improve Vaccination Coverage of Children in Child Care Centers (CCCs) and Preschools, Funding Opportunity Announcement (FOA) IP11–006; Strategies to Increase Health Care Providers Use of Population-Based Immunization Information Systems, FOA IP11–008; and Effectiveness in an Intervention to Promote a Targeted Vaccination program in the Obstetrician-Gynecologist Setting, FOA IP11–009, initial review.

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 aforementioned meeting:

Time and Date:
8 a.m.–5 p.m., June 13, 2011 (Closed).

Place: Sheraton Gateway Hotel Atlanta Airport, 1900 Sullivan Road, Atlanta, Georgia 30337, Telephone: (770) 997–1100.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c) (4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the initial review, discussion, and evaluation of applications received in response to "Strategies to Improve Vaccination Coverage of Children in Child Care Centers (CCCs) and Preschools, FOA IP11–006; Strategies to Increase Health Care providers Use of Population-Based Immunization Information Systems, FOA IP11–008; Effectiveness in an Intervention to Promote a Targeted Vaccination Program in the Obstetrician-Gynecologist Setting; FOA IP11–009, initial review."

Contact Person for More Information: Gregory Anderson, M.S., M.P.H., Scientific Review Officer, CDC, 1600 Clifton Road, NE., Mailstop E00, Atlanta, Georgia 30333, Telephone: (404) 498–2293. The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention, and the Agency for Toxic Substances and Disease Registry.

Dated: April 21, 2011.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2011–10390 Filed 4–28–11; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, Office of Infectious Diseases (BSC, OID)

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: 8 a.m.–4:30 p.m., May 18, 2011.

Place: CDC, Global Communications Center, 1600 Clifton Road, NE., Building 19, Auditorium B, Atlanta, Georgia 30333.

Status: Open to the public, limited only by the space available.

Purpose: The BSC, OID, provides advice and guidance to the Secretary, Department of Health and Human Services; the Director, CDC; the Director, OID; and the Directors of the National Center for Immunization and Respiratory Diseases, the National Center for Emerging and Zoonotic Infectious Diseases, and the National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention, CDC, in the following areas: Strategies, goals, and priorities for programs; research within the national centers; and overall strategic direction and focus of OID and the national centers.

Matters To Be Discussed: In addition to program updates, the meeting will include a focused discussion on "Transitioning Infectious Disease Prevention Programs in an Era of Change."

Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Robin Moseley, M.A.T., Designated Federal Officer, OID, CDC, 1600 Clifton Road, NE., Mailstop D10, Atlanta, Georgia 30333, Telephone: (404) 639–4461.

The Director, Management and Analysis Services Office, has been delegated the authority to sign the **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both the Centers for Disease Control and Prevention, and the Agency for Toxic Substances and Disease Registry.

Dated: April 21, 2011.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2011–10386 Filed 4–28–11; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10371 and CMS–10370]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Service, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Cooperative Agreement to Support Establishment of State-Operated Health Insurance Exchanges; *Use:* All States (including the 50 States, consortia of States, and the District of Columbia herein referred to as States) that received a State Planning and Establishment Grant for Affordable Care Act's Exchanges are eligible for the Cooperative Agreement to Support Establishment of State Operated Insurance Exchanges. Section 1311(b) of the Affordable Care Act provides the opportunity for each State to establish an Exchange no later than January 1, 2014. The State of Alaska did not apply for a Planning grant. Because Alaska did not receive funding under Section 1311 for planning and establishment of an Exchange within one year of the enactment of the Affordable Care Act, by Statute, the state will not be eligible for Section 1311 Exchange planning and establishment money in the future. Section 1311 of the Affordable Care Act provides for grants to States for the planning and establishment of these Exchanges. Given the innovative nature of Exchanges and the statutorily-prescribed relationship between the Secretary and States in their development and operation, it is critical that the Secretary work closely with States to provide necessary guidance and technical assistance to ensure that States can meet the prescribed timelines, federal requirements, and goals of the statute.

In order to provide appropriate and timely guidance and technical assistance, the Secretary must have access to timely, periodic information regarding State progress. Consequently, the information collection associated with these grants is essential to facilitating reasonable and appropriate federal monitoring of funds, providing statutorily-mandated assistance to States to implement Exchanges in accordance with Federal requirements, and to ensure that States have all necessary information required to proceed, such that retrospective corrective action can be minimized.

There are two levels of awards for States to apply for the Establishment grants. Each level is based on grantee readiness. Level One Establishment grants are open to States that received federal funding for Exchange Planning activities and awardees of the Cooperative Agreements to Support Innovative Exchange Information Technology Systems. Level One Establishment cooperative agreements provide one year of funding to States that are ready to initiate establishment activities having made progress under their Exchange Planning grant. Level Two Establishment cooperative agreements are open to States that received federal funding for Exchange Planning activities and awardees of the Cooperative Agreements to Support Innovative Exchange Information Technology Systems. Level Two Establishment grants are designed to provide funding to applicants who have made significant progress in meeting specific benchmarks in the Exchange establishment process. Level One Establishment grantees may apply for additional funding under Level Two Establishment grants once they have achieved the benchmarks identified in the Level Two Establishment review criteria. There will be four opportunities for Level One Establishment applicants to apply for funding and there will be six opportunities for Level Two Establishment applicants to apply for funding. HHS anticipates Level One Establishment applications will be due: March 30, 2011; June 30, 2011; September 30, 2011; and December 30, 2011 with anticipated Notices of Grant Award made May 16, 2011; August 15, 2011; November 15, 2011; February 16, 2012. HHS anticipates Level Two Establishment applications will be due: March 30, 2011; June 30, 2011; September 30, 2011; December 30, 2011; March 30, 2012, June 29, 2012 with expected Notices of Grant Award made May 16, 2011; August 15, 2011; November 15, 2011; February 15, 2012; May 15, 2012, August 13, 2012. The Period of Performance for Level One Establishment grants is one year after date of award. The Period of Performance for Level Two Establishment grants is through December 31, 2014. HHS anticipates that the Funding Opportunity Announcement will be released on January 20, 2011. *Form Number:* CMS–10371 (OCN: 0938–1119); *Frequency:* Occasionally; *Affected Public:* State, Local or Tribal Governments; *Number of Respondents:* 50; *Number of Responses:* 94; *Total Annual Hours:* 564 hours. (For policy questions regarding this collection contact Leslie Shah at 301–

492–4452. For all other issues call 410–786–1326.)

2. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Territory Cooperative Agreement for the Affordable Care Act's Exchanges; *Use:* On March 23, 2010, the President signed into law the Patient Protection and Affordable Care Act. On March 30, 2010, the Health Care and Education Reconciliation Act of 2010 was signed into law. The two laws are collectively referred to as the Affordable Care Act. The Affordable Care Act includes a wide variety of provisions designed to expand coverage, provide more health care choices, enhance the quality of health care for all Americans, hold insurance companies more accountable, and lower health care costs.

The Affordable Care Act provides each State with the option to set up a State-operated Health Benefits Exchange. An Exchange is an organized marketplace to help consumers and small businesses buy health insurance in a way that permits easy comparison of available plan options based on price, benefits, and quality. By pooling people together, reducing transaction costs, and increasing price and quality transparency, Exchanges create more efficient and competitive health insurance markets for individuals and small employers. The Exchange will carry out a number of functions as required by the Affordable Care Act, including certifying qualified health plans, administering premium tax credits and cost-sharing reductions, responding to consumer requests for assistance, and providing an easy-to-use website and written materials that individuals can use to assess eligibility and enroll in health insurance coverage, and coordinating eligibility for and enrollment in other state health subsidy programs, including Medicaid and CHIP.

Section 1311 of the Affordable Care Act provides for grants to States for the planning and establishment of American Health Benefit Exchanges. The Secretary is planning to disburse funds in at least three phases: First, for planning; second, for early information technology development; and third, for implementation. $5 million was made available for Territories Exchange early implementation. Five Territories were eligible to receive a Notice of Grant Award; four applied and have been awarded funds. The Commonwealth of the Northern Mariana Islands did not apply for this funding opportunity announcement. States and Territories are eligible for up to $1 million each from this grant announcement, which will extend for up to twelve months. *Form Number:* CMS–10370 (OCN: 0938–1118); *Frequency:* Occasionally; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 4; *Number of Responses:* 40; *Total Annual Hours:* 18,706 hours. (For policy questions regarding this collection, contact Katherine Harkins at (301) 492–4445. For all other issues call (410) 786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web site at *http://www.cms.gov/PaperworkReductionActof1995/PRAL/list.asp#TopOfPage* or email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office at 410–786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by June 28, 2011:

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov.* Follow the instructions for "Comment or Submission" or "More Search Options" to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: April 26, 2011.

Martique Jones,

Director, Regulations Development Group, Division B, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2011–10430 Filed 4–28–11; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10388]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* New collection; *Title of Information Collection:* Section 1115 Demonstration HIV and AIDS Application Template; *Use:* Section 1115 of the Social Security Act (the Act) allows the Secretary of the Department of Health and Human Services (the Secretary) to waive selected provisions of section 1902 of the Act for experimental, pilot, or demonstration projects (demonstrations), and to provide Federal Financial Participation (FFP) for demonstration costs which would not otherwise be considered as expenditures under the Medicaid State plan, when the Secretary finds that the demonstrations are likely to assist in promoting the objectives of Medicaid. While some States have applied for section 1115 demonstrations, many have not because the process is long and often tenuous. The purpose of the application template is to streamline the process by collecting the minimally acceptable amount of information required to appropriately review a demonstration request. The template will minimize the amount of time the State spends preparing a demonstration request and it should shorten the review process because the required information should be present. *Form*

Number: CMS–10388 (OMB#: 0938–NEW); *Frequency:* Once; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 56; *Total Annual Responses:* 6; *Total Annual Hours:* 270; (For policy questions regarding this collection contact Robin Preston at 410–786–3420. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web site at *http://www.cms.gov/PaperworkReductionActof1995/PRAL/list.asp#TopOfPage* or email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office at 410–786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by June 28, 2011:

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov.* Follow the instructions for "Comment or Submission" or "More Search Options" to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: April 25, 2011.

Martique Jones,

Director, Regulations Development Group, Division B, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2011–10370 Filed 4–28–11; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10224]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the Agency's function; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Revision of currently approved collection; *Title of Information Collection:* Healthcare Common Procedure Coding System (HCPCS); *Use:* In October 2003, the Secretary of Health and Human Services delegated the Center for Medicare and Medicaid Services (CMS) authority to maintain and distribute HCPCS Level II Codes. As a result, the National Panel was delineated and CMS continued with the decision-making process under its current structure, the CMS HCPCS Workgroup (herein referred to as "the Workgroup". CMS' HCPCS Workgroup is an internal workgroup comprised of representatives of the major components of CMS, and private insurers, as well as other consultants from pertinent Federal agencies. Currently the application intake is paper-based. However, the process has grown and the HCPCS staff is exploring electronic processes for the collection and storage of applications. We have received feedback on the nature of the application; and have streamlined the form into a user-friendly application. The content of the material is the same, but the questions have been refined in accordance with comments received from industry members; and the level of necessity of the information required to render quality coding decision as determined by the CMS workgroup. The information on the form is used to update the HCPCS code set. All information is received and distributed to CMS' HCPCS workgroup and is reviewed and discussed at workgroup meetings. In turn, CMS' HCPCS workgroup reaches a decision as to whether a change should be made to codes in the HCPCS code set. The respondent who submits the application form can be anyone who has an interest in obtaining a code or modifying an existing code. However, respondents are usually manufacturers of products, or consultants on behalf of the manufacturer. *Form Number:* CMS–10224 (OMB#: 0938–1042); *Frequency:* Occasionally; *Affected Public:* Private sector, business and other for-profit and not-for-profit institutions; *Number of Respondents:* 300; *Total Annual Responses:* 300; *Total Annual Hours:* 3300. (For policy questions regarding this collection contact Felicia Eggleston at 410–786–9287 or Lori Anderson at 410–786–6190. For all other issues call 410–786–1326.)

To be assured consideration, comments and recommendations for the proposed information collections must be received by the OMB desk officer at the address below, no later than 5 p.m. on May 31, 2011.

OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395–6974, E-mail: *OIRA_submission@omb.eop.gov.*

Dated: April 25, 2011.

Martique Jones,

Director, Regulations Development Group, Division B, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2011–10366 Filed 4–28–11; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–E–0087]

Determination of Regulatory Review Period for Purposes of Patent Extension; CONVENIA

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for CONVENIA and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that animal drug product.

ADDRESSES: Submit electronic comments to *http://www.regulations.gov.* Submit written petitions along with three copies and written comments to the Division of Dockets Management (HFA–305), Food

and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6222, Silver Spring, MD 20993–0002, 301–796–3602.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these Acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For animal drug products, the testing phase begins on the earlier date when either a major environmental effects test was initiated for the drug or when an exemption under section 512(j) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360b(j)) became effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the animal drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of Patents and Trademarks may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for an animal drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(4)(B).

FDA approved for marketing the animal drug product CONVENIA (cefovecin sodium). CONVENIA is indicated for the treatment of skin infections (wounds and abscesses) caused by susceptible strains of *Pasteurella multocida* in cats; and the treatment of skin infections (secondary superficial pyoderma, abscesses and wounds) caused by susceptible strains of *Staphylococcus intermedius* and *Streptococcus canis* (Group G) in dogs. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for CONVENIA (U.S. Patent No. 6,020,329) from Pfizer, Inc., and the Patent and Trademark Office requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated September 2, 2009, FDA advised the Patent and Trademark Office that this animal drug product had undergone a regulatory review period and that the approval of CONVENIA represented the first permitted commercial marketing or use of the product. Thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for CONVENIA is 2,841 days. Of this time, 2,801 days occurred during the testing phase of the regulatory review period, while 40 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 512(j) of the FD&C Act became effective:* July 17, 2000. The applicant claims November 16, 1999, as the date the investigational new animal drug application (INAD) became effective. However, the date that a major health or environmental effects test is begun or the date on which the Agency acknowledges the filing of a notice of claimed investigational exemption for a new animal drug, whichever is earlier, is the effective date for the INAD. According to FDA records, July 17, 2000, is the effective date for the INAD.

2. *The date the application was initially submitted with respect to the animal drug product under section 512 of the FD&C Act:* March 17, 2008. The applicant claims March 15, 2008, as the date the new animal drug Application (NADA) for CONVENIA (NADA 141–285) was initially submitted. However, a review of FDA records reveals that the date of FDA's official acknowledgement letter assigning a number to NADA 141–285 was March 17, 2008, which is considered to be the initially submitted date for NADA 141–285.

3. *The date the application was approved:* April 25, 2008. FDA has verified the applicant's claim that NADA 141–285 was approved on April 25, 2008. This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,462 days of patent term extension.

Anyone with knowledge that any of the dates as published are incorrect may submit to the Division of Dockets Management (*see* **ADDRESSES**) either electronic or written comments and ask for a redetermination by June 28, 2011. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by October 26, 2011.

To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See *H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.*) Petitions should be in the format specified in 21 CFR 10.30.

Comments and petitions should be submitted to the Division of Dockets Management. Three copies of any mailed information are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Comments and petitions may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: April 15, 2011.

Jane A. Axelrad,

Associate Director for Policy, Center for Drug Evaluation and Research.

[FR Doc. 2011–10379 Filed 4–28–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0381]

Generic Drug User Fee; Public Meeting; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting; request for comments.

The Food and Drug Administration (FDA) is announcing a public meeting to provide a public update and to gather additional stakeholder input on the development of a generic drug user fee program. A user fee program could provide necessary supplemental funding, in addition to current Congressional appropriations, to facilitate the timely review of human generic drug applications by FDA, and FDA is currently in negotiations with the regulated industry aimed at providing a consensus proposal for congressional consideration. In the interest of transparency, and to assure that all interested stakeholders' views are heard and considered, whether they are present at the negotiations or not, FDA is holding a public meeting to

provide an update on the current process and to gather additional input on such a program.

Date and Time: The public meeting will be held on May 10, 2011, from 2 p.m. to 3:30 p.m.

Location: The public meeting will be held at FDA's White Oak Campus, 10903 New Hampshire Ave., Bldg. 1, Conference Rooms 4101, 4103, and 4105, Silver Spring, MD 20993–0002.

Contact Person: Mari Long, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, rm. 4237, Silver Spring, MD 20993–0002, 301–796–7574, Fax 301–847–3541, *mari.long@fda.hhs.gov;* or

Peter C. Beckerman, Office of Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, rm. 4238, Silver Spring, MD 20993–0002, 301–796–4830, Fax 301–847–3541, *peter.beckerman@fda.hhs.gov.*

Registration and Requests for Oral Presentations: If you wish to attend and/or present at the meeting, please e-mail your registration information to *GDUFA_Meeting2@fda.hhs.gov* by May 3, 2011. Your e-mail should contain complete contact information for each attendee, including name, title, affiliation, address, e-mail address, and telephone number. Registration is free and will be on a first-come, first-served basis. Early registration is recommended because seating is limited. FDA may limit the number of participants from each organization as well as the total number of participants, based on space limitations. Registrants will receive confirmation once they have been accepted. Onsite registration on the day of the meeting will be based on space availability. We will try to accommodate all persons who wish to make a presentation. The time allotted for presentations may depend on the number of persons who wish to speak, and if the entire meeting time is not needed for presentations, FDA reserves the right to terminate the meeting early.

If you need special accommodations because of disability, please contact Mari Long or Peter Beckerman (*see Contact Person*) at least 7 days before the meeting.

Comments: Regardless of attendance at the public meeting, interested persons may submit either electronic or written comments regarding this document by June 10, 2011. To ensure consideration, all comments must be received by June 10, 2011. Submission of comments prior to the meeting is strongly encouraged. Submit any comments that you plan to present at the public meeting to the docket by the date of the public meeting, but note that either electronic or written comments generally may be submitted until June 10, 2011.

Submit electronic comments to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments 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.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing its intention to hold a public meeting related to generic drug user fees. The Agency continues to solicit comment on whether to seek a user fee program that would provide additional resources for the review of human generic drug applications, as well as what such a program should look like. New legislation would be required for FDA to establish and collect user fees for generic drugs, and FDA is currently engaged in negotiations with industry over aspects of a joint proposal for a generic drug user fee program, including fees and performance goals. Because FDA can only negotiate with trade organizations, not individual companies, but remains interested in hearing from non-affiliated companies in addition to patient and consumer stakeholders, the Agency will hold a public meeting. The public meeting will provide a status update and seek input from stakeholders on generic drug user fees. In addition, FDA continues to encourage all interested stakeholders to submit either electronic or written comments to the docket (*see Comments*).

II. What information should you know about the public meeting, when and where will the public meeting occur, and what format will FDA use?

Through this notice, we are announcing a public meeting to update stakeholders and hear stakeholder views on what features FDA should propose for a generic drug user fee program. We will conduct the meeting on May 10, 2011, from 2 p.m. to 3:30 p.m. at FDA's White Oak Campus, 10903 New Hampshire Ave., Bldg. 1, Conference Rooms 4101, 4103, and 4105, Silver Spring, MD 20993–0002. In general, the meeting format will include a presentation by FDA and presentations by stakeholders and members of the public who have registered in advance to present at the meeting. The amount of time available for presentations will be determined by the number of people who register to make a presentation. We will also provide an opportunity for organizations and individuals to submit either electronic or written comments to the docket after the meeting (*see Comments*). FDA policy issues are beyond the scope of this initiative. Accordingly, the presentations should focus on process and funding issues, and not focus on policy.

Dated: April 26, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–10382 Filed 4–28–11; 8:45 am]

BILLING CODE 4160–01–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, Brain Disorders Pathology and Treatment.

Date: May 26, 2011.

Time: 11 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Dan D. Gerendasy, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3218, MSC 7843, Bethesda, MD 20892. 301–408–9164. *gerendad@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Cancer Biology and Therapeutics.

Date: June 1–2, 2011.

Time: 11 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting.)

Contact Person: Malaya Chatterjee, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6192, MSC 7804, Bethesda, MD 20892. (301) 806–2515. *chatterm@csr.nih.gov*.

Name of Committee: Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group, Clinical Molecular Imaging and Probe Development.

Date: June 1–2, 2011.

Time: 7 p.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Valencia Riverwalk, 150 East Houston Street, San Antonio, TX 78205.

Eileen W. Bradley, DSC, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5100, MSC 7854, Bethesda, MD 20892. (301) 435–1179. *bradleye@csr.nih.gov*.

Name of Committee: Musculoskeletal, Oral and Skin Sciences Integrated Review Group, Musculoskeletal Tissue Engineering Study Section.

Date: June 6–7, 2011.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Jean D. Sipe, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4106, MSC 7814, Bethesda, MD 20892. 301/435–1743. *smithbf@auburn.edu*.

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group, Somatosensory and Chemosensory Systems Study Section.

Datea: June 7–8, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Latham Hotel, 3000 M Street, NW., Washington, DC 20007.

Contact Person: M. Catherine Bennett, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5182, MSC 7846, Bethesda, MD 20892. 301–435–1766. *bennettc3@csr.nih.gov*.

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group, Biomedical Computing and Health Informatics Study Section.

Date: June 7–8, 2011.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Sheraton Delfina Santa Monica Hotel, 530 West Pico Boulevard, Santa Monica, CA 90405.

Contact Person: Melinda Jenkins, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3156, MSC 7770, Bethesda, MD 20892. 301–437–7872. *jenkinsml2@mail.nih.gov*.

Name of Committee: Digestive, Kidney and Urological Systems Integrated Review Group, Pathobiology of Kidney Disease Study Section.

Date: June 7–8, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Fairmont San Francisco Hotel, 950 Mason Street, San Francisco, CA 94108.

Contact Person: Atul Sahai, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2188, MSC 7818, Bethesda, MD 20892. 301–435–1198. *sahaia@csr.nih.gov*.

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group, Sensorimotor Integration Study Section.

Date: June 7, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: One Washington Circle Hotel, One Washington Circle, NW., Washington, DC 20037.

John Bishop, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5182, MSC 7844, Bethesda, MD 20892. (301) 408–9664. *bishopj@csr.nih.gov*.

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group, Pregnancy and Neonatology Study Section.

Date: June 7, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Michael Knecht, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6176, MSC 7892, Bethesda, MD 20892. (301) 435–1046. *knechtm@csr.nih.gov*.

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group, Genetics of Health and Disease Study Section.

Date: June 7–8, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Fairmont Washington, DC, 2401 M Street, NW., Washington, DC 20037.

Contact Person: Richard Panniers, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2212, MSC 7890, Bethesda, MD 20892. (301) 435–1741. *pannierr@csr.nih.gov*.

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group, Nursing and Related Clinical Sciences Study Section.

Date: June 7–9, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Sheraton Delfina Santa Monica Hotel, 530 West Pico Boulevard, Santa Monica, CA 90405.

Contact Person: Priscah Mujuru, RN, DRPH, COHNS, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3139, MSC 7770, Bethesda, MD 20892. 301–594–6594. *mujurup@mail.nih.gov*.

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group, Dissemination and Implementation Research in Health Study Section.

Date: June 7, 2011.

Time: 8:30 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Sheraton Delfina Santa Monica Hotel, 530 West Pico Boulevard, Santa Monica, CA 90405.

Contact Person: Jacinta Bronte-Tinkew, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3164, MSC 7770, Bethesda, MD 20892. (301) 806–0009. *brontetinkewjm@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Collaborative Applications in Child Psychopathology.

Date: June 7, 2011.

Time: 11 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Washington, 1515 Rhode Island Avenue, NW., Washington, DC 20005.

Contact Person: Jane A. Doussard-Roosevelt, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3184, MSC 7848, Bethesda, MD 20892. (301) 435–4445. *doussarj@csr.nih.gov*.

Name of Committee: Digestive, Kidney and Urological Systems Integrated Review Group, Xenobiotic and Nutrient Disposition and Action Study Section.

Date: June 8, 2011.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Sir Francis Drake Hotel, 450 Powell Street, San Francisco, CA 94102.

Contact Person: Patricia Greenwel, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2172, MSC 7818, Bethesda, MD 20892. 301–435–1169. *greenwep@csr.nih.gov*.

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group, Community Influences on Health Behavior.

Date: June 8–9, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Sheraton Delfina Santa Monica Hotel, 530 West Pico Boulevard, Santa Monica, CA 90405.

Contact Peson: Wenchi Liang, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3150, MSC 7770, Bethesda, MD 20892. 301–435–0681. *liangw3@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: April 22, 2011.

Anna P. Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–10297 Filed 4–28–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2011–0012]

Agency Information Collection Activities: Proposed Collection; Comment Request, 1660–NEW; Level 1 Assessment and Level III Evaluations for the Center for Domestic Preparedness (CDP)

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 60-day notice and request for comments; new information collection; OMB No. 1660–NEW; FEMA Form 092–0–2, Level 1 Assessment Form; FEMA Form 092–0–2A, Level 3 Evaluation Form for Students; FEMA Form 092–0–2B, Level 3 Evaluation Form for Supervisors.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a proposed new information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning course evaluations for the Center for Domestic Preparedness.

DATES: Comments must be submitted on or before June 28, 2011.

ADDRESSES: To avoid duplicate submissions to the docket, please use only one of the following means to submit comments:

(1) *Online.* Submit comments at *http://www.regulations.gov* under Docket ID FEMA–2011–0012. Follow the instructions for submitting comments.

(2) *Mail.* Submit written comments to Docket Manager, Office of Chief Counsel, DHS/FEMA, 500 C Street, SW., Room 835, Washington, DC 20472–3100.

(3) *Facsimile.* Submit comments to (703) 483–2999.

(4) *E-mail.* Submit comments to *FEMA-POLICY@dhs.gov.* Include Docket ID FEMA–2011–0012 in the subject line.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Linda S. Pressley, Assistant Director of Analysis and Evaluation, Center for Domestic Preparedness, 256–847–2685 for additional information. You may contact the Records Management Division for copies of the proposed collection of information at facsimile number (202) 646–3347 or e-mail address: *FEMA-Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Center for Domestic Preparedness (CDP) is required by Congress to identify, develop, test, and deliver training to State, local, and Tribal emergency response providers, provide on-site and mobile training at the performance and management and planning levels, and facilitate the delivery of training by the training partners of the Department of Homeland Security pursuant to Section 1204 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Public Law 110–53, 121 Stat. 266, August 3, 2007 (codified at 6 U.S.C. 1102). The collection of this data will help facilitate that Congressional mandate.

Collection of Information

Title: Level 1 Assessment and Level III Evaluations for the Center for Domestic Preparedness (CDP).

Type of Information Collection: New information collection.

OMB Number: OMB No. 1660–NEW.

Form Titles and Numbers: FEMA Form 092–0–2, Level 1 Assessment Form; FEMA Form 092–0–2A, Level 3 Evaluation Form for Students; FEMA Form 092–0–2B, Level 3 Evaluation Form for Supervisors.

Abstract: The forms in this collection of information will be used to survey the Center for Domestic Preparedness (CDP) students (and their supervisors) enrolled in CDP courses. The survey will collect information regarding quality of instruction, course material, and impact of training on their professional employment.

Affected Public: State, local or Tribal government.

Estimated Total Annual Burden Hours: 18,000 hours.

ANNUAL HOUR BURDEN

Data collection activity/instrument	Number of respondents	Frequency of responses	Hour burden per response	Annual responses	Total annual burden hours
Level 1 Assessment Form, FEMA Form 092–0–2	52,000	1	15 minutes (.25 hours)	52,000	13,000
Level 1 Assessment Form, FEMA Form 092–0–2	13,000	1	15 minutes (.25 hours)	13,000	3,250
Level 3 Evaluation Form for Students, FEMA Form 092–0–2A.	1,500	1	15 minutes (.25 hours)	1,500	375
Level 3 Evaluation Form for Students, FEMA Form 092–0–2A.	2,000	1	15 minutes (.25 hours)	2,000	500
Level 3 Evaluation Form for Supervisors, FEMA Form 092–0–2B.	1,500	1	15 minutes (.25 hours)	1,500	375
Level 3 Evaluation Form for Supervisors, FEMA Form 092–0–2B.	2,000	1	15 minutes (.25 hours)	2,000	500
Level 1 Assessment Form, FEMA Form 092–0–2	52,000	1	15 minutes (.25 hours)	52,000	13,000
Total	72,000				18,000

Estimated Cost: There are no annual start-up or capital costs.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) 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; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) 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.

Dated: April 19, 2011.

Lesia M. Banks,

Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2011–10399 Filed 4–28–11; 8:45 am]

BILLING CODE 9111–53–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2011–0011]

Agency Information Collection Activities: Proposed Collection; Comment Request, 1660–0061; Federal Assistance to Individuals and Households Programs

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 60-day notice and request for comments; extension, without change of a currently approved collection; OMB No. 1660–0061; FEMA Form 010–0–11 (previously FEMA Form 90–153), Administrative Option Agreement for the Other Needs provision of Individuals and Households Program, (IHP); FEMA Form 010–0–12, Request for Continued Assistance (Application for Continued Temporary Housing Assistance).

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a proposed extension, without change, of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning the need to continue collecting information from individuals and States in order to provide and/or administer disaster assistance through the Federal Assistance to Individuals and Households Programs.

DATES: Comments must be submitted on or before June 28, 2011.

ADDRESSES: To avoid duplicate submissions to the docket, please use only one of the following means to submit comments:

(1) *Online.* Submit comments at *http://www.regulations.gov* under Docket ID FEMA–2011–0011. Follow the instructions for submitting comments.

(2) *Mail.* Submit written comments to Docket Manager, Office of Chief Counsel, DHS/FEMA, 500 C Street, SW., Room 835, Washington, DC 20472–3100.

(3) *Facsimile.* Submit comments to (703) 483–2999.

(4) *E-mail.* Submit comments to *FEMA-POLICY@dhs.gov*. Include Docket ID FEMA–2011–0011 in the subject line.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Mark Misczak, Acting Individual Assistance Director, Individual Assistance Division, FEMA, (202) 212–1000, for additional information. You may contact the Records Management Division for copies of the proposed collection of information at facsimile number (202) 646–3347 or e-mail address: *FEMA-Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION: Section 206(a) of the Disaster Mitigation Act of 2000 (DMA 2000) (Public Law 106–390) consolidated the "Temporary Housing Collection of Information Assistance" and the "Individual and Family Grant Programs" into a single program called "Federal Assistance to Individuals and Households" (IHP) at section 408 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Pub. L. 93–288, as amended). To implement this consolidation, which is intended to streamline the provision of assistance to disaster applicants, FEMA published regulations at 44 CFR 206.110 through 206.120. Pursuant to these regulations, applicants are able to request approval of late registrations, request continued assistance, and appeal program decisions. Similarly, States can partner with FEMA for delivery of disaster assistance under the "Other Needs" provision of the IHP through Administrative Option Agreements and Administration Plans addressing the level of managerial and resource support necessary.

Collection of Information

Title: Federal Assistance to Individuals and Households Programs.

Type of Information Collection: Extension, without change of a currently approved collection.

OMB Number: 1660–0061.

Form Titles and Numbers: FEMA Form 010–0–11 (previously FEMA Form 90–153), Administrative Option Agreement for the Other Needs provision of Individuals and Households Program, (IHP); FEMA Form 010–0–12, Request for Continued Assistance (Application for Continued Temporary Housing Assistance).

Abstract: The Federal Assistance to Individuals and Households Program (IHP) enhances applicants' ability to request approval of late applications, request continued assistance, and appeal program decisions. Similarly, it allows States to partner with FEMA for delivery of disaster assistance under the "Other Needs" provision of the IHP through Administrative Option Agreements and Administration Plans addressing the level of managerial and resource support necessary.

Affected Public: Individuals or households; State, Local or Tribal Government.

Estimated Total Annual Burden Hours: 500,803 hours.

ESTIMATED ANNUALIZED BURDEN HOURS AND COSTS

Type of respondent	Form name/Form No.	Number of respondents	Number of responses per respondent	Total Number of responses	Avg. burden per response (in hours)	Total annual burden (in hours)	Avg. hourly wage rate	Total annual respondent cost
Individuals or Households	Request for Approval of Late Registration/No Form.	6,389	1	6,389	0.75 (45 mins.)	4,792	$31.30	$149,989.60
Individuals or Households	Request for Continued Assistance/FEMA Form 010–0–12.	80,000	4	320,000	1	320,000	31.30	10,016,000.00
Individuals or Households	Appeal of Program Decision/No Form.	234,591	1	234,591	0.75 (45 mins.)	175,943	31.30	5,507,015.90
State, Local or Tribal Government.	Administrative Option Agreement (for the other needs provision of IHP)/FEMA Form 010–0–11 (previously FF 90–153).	56	1	56	1	56	36.96	2,069.76
State, Local or Tribal Government.	Development of State Administrative Plan for the other needs provision of IHP/No Form.	6	1	6	2	12	36.96	443.52
Total		321,042		561,042		500,803		$15,675,517.00

Estimated Cost: There are no capital, start-up, operation or maintenance costs associated with this collection.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) 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; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) 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.

Dated: April 19, 2011.

Lesia M. Banks,

Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2011–10444 Filed 4–28–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1969–DR; Docket ID FEMA–2011–0001]

North Carolina; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of North Carolina (FEMA–1969–DR), dated April 19, 2011, and related determinations.

DATES: *Effective Date:* April 19, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated April 19, 2011, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"), as follows:

I have determined that the damage in certain areas of the State of North Carolina resulting from severe storms, tornadoes, and flooding on April 16, 2011, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"). Therefore, I declare that such a major disaster exists in the State of North Carolina.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide assistance for debris removal and emergency protective measures (Categories A and B), including direct Federal assistance, under the Public Assistance program and Individual Assistance in the designated areas, and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and Other Needs Assistance will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Michael Bolch, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of North Carolina have been designated as adversely affected by this major disaster:

Bertie, Bladen, Cumberland, Halifax, Harnett, Johnston, Lee, Onslow, Wake, and Wilson for Individual Assistance.

Bertie, Bladen, Craven, Cumberland, Currituck, Greene, Halifax, Harnett, Hertford, Hoke, Johnston, Lee, Onslow, Pitt, Robeson, Sampson, Wake, and Wilson Counties for debris removal and emergency protective measures (Categories A and B), including direct Federal assistance, under the Public Assistance program.

All counties within the State of North Carolina are eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–10337 Filed 4–28–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5484–N–15]

Notice of Proposed Information Collection: Comment Request; HUD Housing Counseling Program—Agency Performance Review

AGENCY: Office of the Assistant Secretary for Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* June 28, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, Room 9120 or the number for the Federal Information Relay Service (1–800–877–8339).

FOR FURTHER INFORMATION CONTACT: Program Contact, Ruth Román, Director, Program Support Division, Office of Single Family Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room B–133, Plaza 2206, Washington, DC 20410, telephone (202) 402–2209 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: HUD Housing Counseling Program—Agency Performance Review.

OMB Control Number, if applicable: 2502–0574.

Description of the need for the information and proposed use: The Single Family Program Support Division is responsible for administration of the Department's Housing Counseling Program, authorized by Section 106 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701w and 1701x). The Housing Counseling Program supports the delivery of a wide variety of housing counseling services to homebuyers, homeowners, low- to moderate-income renters, and the homeless. The primary objectives of the program are to expand homeownership opportunities, preserve homeownership, and improve access to affordable housing. These services are provided by non-profit and government organizations. Their counselors provide guidance and advice to help families and individuals improve their housing conditions and meet the responsibilities of tenancy and homeownership. Counselors also help borrowers avoid predatory lending practices, such as inflated appraisals, unreasonably high interest rates, unaffordable repayment terms, and other conditions that can result in a loss of equity, increased debt, default, and foreclosure.

To participate in HUD's Housing Counseling program, a housing counseling agency must be approved by HUD (2502–0261), designated as a sub grantee or affiliate of a HUD-approved intermediary or multi-state organization, or be a state housing finance agency or affiliate or sub grantee of a state housing finance agency. Participation in the program entails meeting various requirements relating to experience and capacity, including nonprofit status, a minimum of one year of housing counseling experience in the target community, and sufficient resources to implement a housing counseling plan. In order to maintain approval to participate, housing counseling agencies must remain in compliance with program policies and regulations. Participating organizations are required to submit to HUD Quarterly 9902 progress reports (2502–0261) to report on the demographics, education, and outcomes of clients served.

HUD periodically conducts performance reviews of participating agencies to ensure that agencies are in compliance with the program policy and regulations governing the program. Housing Counseling Program requirements are set forth in 24 CFR 214, Housing Counseling Program, Revision-5 of Housing Counseling Program Handbook 7610.1, mortgagee letters, and grant agreements (if applicable). Findings from performance reviews are used to renew or disapprove the status of housing counseling agencies to participate in the program. The information is also used to assist HUD in evaluating the managerial and financial capacity of organizations to sustain operations sufficient to implement HUD approved housing counseling programs. The collection of information assists HUD to reduce its own risk from fraudulent activities or supporting inefficient or ineffective housing counseling programs. Since HUD publishes a web list of HUD approved Housing Counseling Agencies and maintains a toll free housing counseling hotline, performance reviews help HUD ensure that individuals seeking assistance from these participating agencies can have confidence in the quality of services that they will receive. Additionally, performance review findings are used as past performance indicators in the grant application review scoring process. Performance reviews also give HUD the opportunity to provide technical assistance to participating housing counseling agencies.

HUD employees use Agency Performance Review, Form HUD 9910 to perform and document on-site, desk,

and remote monitoring reviews of agencies participating in the Housing Counseling Program. HUD staff uses the information collected on this performance review checklist to assess the management and financial capability of participating housing counseling agencies to carry out their missions relative to the HUD Housing Counseling Program. The information also assists HUD staff to detect any conflicts of interest or activities that may not be permissible. Additionally, this information helps HUD staff to assess whether participating organizations are meeting basic programmatic and grant administrative requirements and maintaining staff with the appropriate experience.

Most of the information required under this information collection is maintained by the affected organizations in the normal course of business with HUD and HUD ascribes no burden hours to recordkeeping. The requirements for recordkeeping and what information HUD expects to view when its staff conducts a performance review are set forth in the Housing Counseling Program Handbook 7610.1 Rev-5, Chapter 3. The information cited in the handbook is a tool for the participating organizations to use so that they can be prepared for HUD reviews.

HUD is seeking approval for the Agency Performance Review, Form HUD–9910. The form has been substantially revised to meet new program requirements, improve the quality and scope of the performance reviews conducted to better monitor the financial and administrative controls that agencies should have in place to effectively manage their programs, verify compliance with grant agreements, deter and discover conflicts of interest and to establish improved procedures to monitor the expenditure of HUD grant funds.

Agency form numbers, if applicable: HUD 9910.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 12,977. The number of respondents is 1,366 and the number of responses is 1,366. The frequency of response is periodic as determined by HUD, and the burden hour per response is 9.5.

Status of the proposed information collection: Revision of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: April 26, 2011.

Ronald Y. Spraker,

Associate General Deputy Assistant Secretary for Housing.

[FR Doc. 2011–10457 Filed 4–28–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5484–N–14]

Notice of Proposed Information Collection: Comment Request; Disposition of Multifamily Housing Projects by HUD; Purchaser's Compliance With State and Local Housing Laws and Requirements

AGENCY: Office of the Assistant Secretary for Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* June 28, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, Room 9120 or the number for the Federal Information Relay Service (1–800–877–8339).

FOR FURTHER INFORMATION CONTACT: Jeremy Bates, Housing Program Manager, Office of Asset Management, Multifamily Housing, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708–2121 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: OMB information Collection on Form HUD–9840, Disposition of Multifamily Housing Projects by HUD; Purchaser's Compliance With State and Local Housing Laws and Requirements.

OMB Control Number, if applicable: 2502–0559.

Description of the need for the information and proposed use: Information collection 2502–0559 is necessary for HUD to monitor potential purchasers' current compliance with state or local government housing statutes, regulations, ordinances, and codes. This information collection requires potential purchasers of HUD-owned multifamily housing projects to certify that all of their projects owned and located in the same city or town as the project to be purchased are in compliance with state and local housing codes. (This information is being collected in accordance with Section 219 of the Consolidated Appropriations Act of 2004[1] and the revised regulations at 24 CFR part 200, subpart H.[2] In addition, HUD issued a proposed rule (24 CFR parts 200 and 290, disposition of Multifamily Housing Projects by HUD; Purchaser's Compliance With State and Local Housing Laws and Requirements), which was announced in the **Federal Register** on August 5, 2005, Volume 70, No. 150, page 45492.

Agency form numbers, if applicable: Form HUD–9840.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 12.5. The number of respondents has previously been 25, the number of responses is 25, the frequency of response is on occasion, and the burden hour per response is 0.5.

Status of the proposed information collection: This is not a new collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: April 26, 2011.

Ronald Y. Spraker,

Associate General Deputy Assistant Secretary for Housing.

[FR Doc. 2011–10454 Filed 4–28–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5374–N–28]

Buy American Exceptions Under the American Recovery and Reinvestment Act of 2009

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: In accordance with the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–05, approved February 17, 2009) (Recovery Act), and implementing guidance of the Office of Management and Budget (OMB), this notice advises that certain exceptions to the Buy American requirement of the Recovery Act have been determined applicable for work using Capital Fund Recovery Formula and Competition (CFRFC) grant funds. Specifically, an exception was granted to the Minneapolis Public Housing Authority for the purchase and installation of compact fluorescent lamps (CFLs) and energy efficient fluorescent electronic light ballasts for 725 scattered housing units.

FOR FURTHER INFORMATION CONTACT: Donald J. LaVoy, Deputy Assistant Secretary for Office of Field Operations, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4112, Washington, DC 20410–4000, telephone number 202–402–8500 (this is not a toll-free number); or Dominique G. Blom, Deputy Assistant Secretary for Public Housing Investments, Office of Public Housing Investments, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4130, Washington, DC 20410–4000, telephone number 202–402–8500 (this is not a toll-free number). Persons with hearing- or speech-impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION: Section 1605(a) of the Recovery Act provides that none of the funds appropriated or made available by the Recovery Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. Section 1605(b) provides that the Buy American requirement shall not apply in any case or category in which the head of a Federal department or agency finds that: (1) Applying the Buy American requirement would be inconsistent with the public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the U.S. in sufficient and reasonably available quantities or of satisfactory quality, or (3) inclusion of iron, steel, and manufactured goods will increase the cost of the overall project by more than 25 percent. Section 1605(c) provides that if the head of a Federal department or agency makes a determination pursuant to section 1605(b), the head of the department or agency shall publish a detailed written justification in the **Federal Register**.

In accordance with section 1605(c) of the Recovery Act and OMB's implementing guidance published on April 23, 2009 (74 FR 18449), this notice advises the public that, on April 1, 2011, upon request of the Minneapolis Public Housing Authority, HUD granted an exception to applicability of the Buy American requirements with respect to work, using CFRFC grant funds. The exception was granted by HUD on the basis that the relevant manufactured goods (CFLs and energy efficient fluorescent electronic light ballasts) are not produced in the U.S. in sufficient and reasonably available quantities or of satisfactory quality.

Dated: April 11, 2011.

Sandra B. Henriquez,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 2011–10461 Filed 4–28–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5374–N–29]

Buy American Exceptions Under the American Recovery and Reinvestment Act of 2009

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: In accordance with the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–05, approved February 17, 2009) (Recovery Act), and implementing guidance of the Office of Management and Budget (OMB), this notice advises that certain exceptions to the Buy American requirement of the Recovery Act have been determined applicable for work using Capital Fund Recovery Formula and Competition (CFRFC) grant funds. Specifically, an exception was granted to the City of Charleston Housing Authority for the purchase and installation of tankless gas water heaters for the Reid Street Development.

FOR FURTHER INFORMATION CONTACT: Donald J. LaVoy, Deputy Assistant Secretary for Office of Field Operations, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4112, Washington, DC, 20410–4000, telephone number 202–402–8500 (this is not a toll-free number); or Dominique G. Blom, Deputy Assistant Secretary for Public Housing Investments, Office of Public Housing Investments, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4130, Washington, DC 20410–4000, telephone number 202–402–8500 (this is not a toll-free number). Persons with hearing- or speech-impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION: Section 1605(a) of the Recovery Act provides that none of the funds appropriated or made available by the Recovery Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. Section 1605(b) provides that the Buy American requirement shall not apply in any case or category in which the head of a Federal department or agency finds that: (1) Applying the Buy American requirement would be inconsistent with the public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the U.S. in sufficient and reasonably available quantities or of satisfactory quality, or (3) inclusion of iron, steel, and manufactured goods will increase the cost of the overall project by more than 25 percent. Section 1605(c) provides that if the head of a Federal department or agency makes a determination pursuant to section 1605(b), the head of the department or agency shall publish a detailed written justification in the **Federal Register**.

In accordance with section 1605(c) of the Recovery Act and OMB's implementing guidance published on April 23, 2009 (74 FR 18449), this notice advises the public that, on April 7, 2011, upon request of the City of Charleston Housing Authority, HUD granted an exception to applicability of the Buy American requirements with respect to work, using CFRFC grant funds. The exception was granted by HUD on the basis that the relevant manufactured goods (tankless gas water heaters) are not produced in the U.S. in sufficient and reasonably available quantities or of satisfactory quality.

Dated: April 15, 2011.

Deborah Hernandez,

General Deputy Assistant Secretary for Public and Indian Housing.

[FR Doc. 2011–10460 Filed 4–28–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5477–N–17]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7262, Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: April 21, 2011.

Mark R. Johnston,

Deputy Assistant Secretary for Special Needs.

[FR Doc. 2011–10043 Filed 4–28–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5500–N–09]

Notice of Availability: Notice of Funding Availability (NOFA) for HUD's Fiscal Year (FY) 2011 Public and Indian Housing Family Self-Sufficiency Program Under the Resident Opportunity and Self-Sufficiency (ROSS) Program

AGENCY: Office of the Chief of the Human Capital Officer, HUD.

ACTION: Notice.

SUMMARY: HUD announces the availability on its Web site of the applicant information, submission deadlines, funding criteria, and other requirements for HUD's FY2011 Public and Indian Housing Family Self-Sufficiency Program under the Resident Opportunity and Self-Sufficiency (ROSS) Program NOFA. Specifically, this NOFA announces the availability of approximately $15 million made available under the Department of Defense and Full-Year Continuing Appropriations Act, 2011, Public Law 112–10, approved April 15, 2011 for the Public and Indian Housing Family Self-Sufficiency Program under the Resident Opportunity and Self-Sufficiency (ROSS) Program.

The purpose of the Public Housing FSS (PH FSS) program is to promote the development of local strategies to coordinate the use of assistance under the Public Housing program with public and private resources, enable participating families to increase earned income and financial literacy, reduce or eliminate the need for welfare assistance, and make progress toward achieving economic independence and housing self-sufficiency. The PH FSS program provides critical tools that can be used by communities to support welfare reform and help families develop new skills that will lead to economic self-sufficiency.

The notice providing information regarding the application process, funding criteria and eligibility requirements, application and instructions can be found using the Department of Housing and Urban Development agency link on the Grants.gov/Find Web site at *http://www.grants.gov/search/agency.do.* A link to the funding opportunity is also available on the HUD Web site at *http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/grants/fundsavail.* The link from the funds available page will take you to the agency link on Grants.gov. The Catalogue of Federal Domestic Assistance (CFDA) number for this program is 14.877. Applications must be submitted electronically through Grants.gov.

FOR FURTHER INFORMATION CONTACT: Questions regarding specific program requirements should be directed to the agency contact identified in the program NOFA. Program staff will not be available to provide guidance on how to prepare the application. Questions regarding the 2011 General Section should be directed to the Office of Grants Management and Oversight at (202) 708–0667 or the NOFA Information Center at 800–HUD–8929 (toll free). Persons with hearing or speech impairments may access these numbers via TTY by calling the Federal Information Relay Service at 800–877–8339.

Dated: April 26, 2011.

Barbara S. Dorf,

Director, Office of Departmental Grants Management and Oversight, Office of the Chief of the Human Capital Officer.

[FR Doc. 2011–10462 Filed 4–28–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5500–N–08]

Notice of Availability: Notice of Funding Availability (NOFA) for HUD's Fiscal Year (FY) 2011 Public and Indian Housing Resident Opportunity and Self-Sufficiency (ROSS)—Service Coordinators Program

AGENCY: Office of the Chief of the Human Capital Officer, HUD.

ACTION: Notice.

SUMMARY: HUD announces the availability on its Web site of the applicant information, submission deadlines, funding criteria, and other requirements for HUD's FY2011 Public nad Indian Housing Resident Opportunity and Self-Sufficiency (ROSS)—Service Coordinators Program NOFA. Specifically, this NOFA announces the availability of approximately $35 million made available under the Department of Defense and Full-Year Continuing Appropriations Act, 2011, Public Law 112–10, approved April 15, 2011.

The purpose of the Public and Indian Housing Resident Opportunity and Self-Sufficiency (ROSS) Service Coordinators program is to provide grants to public housing agencies (PHAs), tribes/tribally designated housing entities (TDHEs), Resident Associations (RAs), and nonprofit organizations (including grassroots, faith-based and other community-based organizations) for the provision of a Service Coordinator to coordinate supportive services and other activities designed to help Public and Indian housing residents attain economic and housing self-sufficiency.

The notice providing information regarding the application process, funding criteria and eligibility requirements, application and instructions can be found using the Department of Housing and Urban Development agency link on the Grants.gov/Find Web site at *http://www.grants.gov/search/agency.do.* A link to the funding opportunity is also available on the HUD Web site at *http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/grants/fundsavail.*

The link from the funds available page will take you to the agency link on Grants.gov.

The Catalogue of Federal Domestic Assistance (CFDA) number for this program is 14.870. Applications must be submitted electronically through Grants.gov.

FOR FURTHER INFORMATION CONTACT: Questions regarding specific program requirements should be directed to the agency contact identified in the program NOFA. Program staff will not be available to provide guidance on how to prepare the application. Questions regarding the 2011 General Section should be directed to the Office of Grants Management and Oversight at (202) 708–0667 or the NOFA Information Center at 800–HUD–8929 (toll free). Persons with hearing or speech impairments may access these numbers via TTY by calling the Federal Information Relay Service at 800–877–8339.

Dated: April 26, 2011.

Barbara S. Dorf,

Director, Office of Departmental Grants Management and Oversight, Office of the Chief of the Human Capital Officer.

[FR Doc. 2011–10470 Filed 4–28–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5500–N–07]

Notice of Availability: Notice of Funding Availability (NOFA) for HUD's Fiscal Year (FY) 2011 Housing Choice Voucher Family Self-Sufficiency Program

AGENCY: Office of the Chief of the Human Capital Officer, HUD.

ACTION: Notice.

SUMMARY: HUD announces the availability on its website of the applicant information, submission deadlines, funding criteria, and other requirements for HUD's FY2011 Housing Choice Voucher Family Self-Sufficiency Program NOFA. Specifically, this NOFA announces the availability of approximately $59.88 million made available under the Department of Defense and Full-Year Continuing Appropriations Act, 2011, Public Law 112–10, approved April 15, 2011 for the Housing Choice Voucher Family Self-Sufficiency (HCV FSS) Program.

The purpose of the HCV FSS program is to promote the development of local strategies to coordinate the use of assistance under the HCV program with public and private resources to enable participating families to increase earned income and financial literacy, reduce or eliminate the need for welfare assistance, and make progress toward economic independence and self-sufficiency.

The notice providing information regarding the application process, funding criteria and eligibility requirements, application and instructions can be found using the Department of Housing and Urban Development agency link on the Grants.gov/Find Web site at *http://www.grants.gov/search/agency.do.* A link to the funding opportunity is also available on the HUD Web site at *http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/grants/fundsavail.* The link from the funds available page will take you to the agency link on Grants.gov. The Catalogue of Federal Domestic Assistance (CFDA) number for this program is 14.871. Applications must be submitted electronically through Grants.gov.

FOR FURTHER INFORMATION CONTACT: Questions regarding specific program requirements should be directed to the agency contact identified in the program NOFA. Program staff will not be available to provide guidance on how to prepare the application. Questions regarding the 2011 General Section should be directed to the Office of Grants Management and Oversight at (202) 708–0667 or the NOFA Information Center at 800–HUD–8929 (toll free). Persons with hearing or speech impairments may access these numbers via TTY by calling the Federal Information Relay Service at 800–877–8339.

Dated: April 26, 2011.

Barbara S. Dorf,

Director, Office of Departmental Grants Management and Oversight, Office of the Chief of the Human Capital Officer.

[FR Doc. 2011–10501 Filed 4–28–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5527–N–01]

Notice of HUD-Held Multifamily Loan Sale (MLS 2011–1)

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice of sale of mortgage loans.

SUMMARY: This notice announces HUD's intention to sell certain unsubsidized multifamily mortgage loans, without Federal Housing Administration (FHA) insurance, in a competitive, sealed bid sale (MLS 2011–1). This notice also describes generally the bidding process for the sale and certain persons who are ineligible to bid.

DATES: The Bidder's Information Package (BIP) was made available to qualified bidders on March 30, 2011. Submissions of bids for the loans were required by the bid date, which was April 27, 2011. Awards were made no later than April 28, 2011. Closings are expected to take place by May 6, 2011.

ADDRESSES: To become a qualified bidder and receive the BIP, prospective bidders must have completed, executed, and submitted a Confidentiality Agreement and a Qualification Statement acceptable to HUD. Both documents were available on the HUD Web site at *http://www.hud.gov/fhaloansales.* Executed documents were mailed and faxed documents to KDX Ventures: KDX Ventures, c/o The Debt Exchange, 133 Federal Street, 10th Floor, Boston, MA 02111, *Attention:* HCLS 2011–1 Sale Coordinator, *Fax:* 1–617–531–3499.

FOR FURTHER INFORMATION CONTACT: John Lucey, Deputy Director, Asset Sales Office, Room 3136, U.S. Department of Housing and Urban Development, 451

Seventh Street, SW., Washington, DC 20410–8000; telephone 202–708–2625, extension 3927. Hearing- or speech-impaired individuals may call 202–708–4594 (TTY). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: HUD announces its intention to sell in MLS 2011–1 certain unsubsidized mortgage loans (Mortgage Loans) secured by multifamily properties located throughout the United States. The Mortgage Loans were comprised of non-performing mortgage loans. A final listing of the Mortgage Loans was included in the BIP. The Mortgage Loans were sold without FHA insurance and with servicing released. HUD offered qualified bidders an opportunity to bid competitively on the Mortgage Loans.

The Mortgage Loans may be stratified for bidding purposes into several mortgage loan pools. Each pool contained Mortgage Loans that generally had similar performance, property type, geographic location, lien position and other characteristics. Qualified bidders could submit bids on one or more pools of Mortgage Loans or could bid on individual loans. A mortgagor who was a qualified bidder was permitted to submit an individual bid on its own Mortgage Loan. Interested Mortgagors were able to review the Qualification Statement to determine whether they were eligible to qualify to submit bids on one or more pools of Mortgage Loans or on individual loans in MLS 2011–1.

The Bidding Process

The BIP described in detail the procedure for bidding in MLS 2011–1. The BIP also included a standardized non-negotiable loan sale agreement (Loan Sale Agreement).

As part of its bid, each bidder was required to submit a deposit equal to the greater of $100,000 or 10% of the bid price. In the event the bidder's aggregate bid was less than $100,000.00, the minimum deposit was not less than fifty percent (50%) of the bidder's aggregate bid. HUD evaluated the bids submitted and determined the successful bids in its sole and absolute discretion. If a bidder was successful, the bidder's deposit was non-refundable and was applied toward the purchase price. Deposits were returned to unsuccessful bidders. Closings are scheduled to occur by May 6, 2011.

These were the essential terms of sale. The Loan Sale Agreement, which was included in the BIP, contained additional terms and details. To ensure a competitive bidding process, the terms of the bidding process and the Loan Sale Agreement were not subject to negotiation.

Due Diligence Review

The BIP described the due diligence process for reviewing loan files in MLS 2011–1. Qualified bidders were able to access loan information remotely via a high-speed Internet connection.

Mortgage Loan Sale Policy

HUD reserved the right to add Mortgage Loans to or delete Mortgage Loans from MLS 2011–1 at any time prior to the Award Date. HUD also reserved the right to reject any and all bids, in whole or in part, without prejudice to HUD's right to include any Mortgage Loans in a later sale. Mortgage Loans will not be withdrawn after the Award Date except as is specifically provided in the Loan Sale Agreement.

This was a sale of unsubsidized mortgage loans, pursuant to Section 204(a) of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1997, 12 U.S.C. 1715z–11a(a).

Mortgage Loan Sale Procedure

HUD selected a competitive sale as the method to sell the Mortgage Loans. This method of sale optimizes HUD's return on the sale of these Mortgage Loans, affords the greatest opportunity for all qualified bidders to bid on the Mortgage Loans, and provides the quickest and most efficient vehicle for HUD to dispose of the Mortgage Loans.

Bidder Eligibility

In order to bid in the sale, a prospective bidder was required to complete, execute and submit both a Confidentiality Agreement and a Qualification Statement acceptable to HUD. The following individuals and entities were ineligible to bid on any of the Mortgage Loans included in MLS 2011–1:

(1) Any employee of HUD, a member of such employee's household, or an entity owned or controlled by any such employee or member of such an employee's household;

(2) Any individual or entity that is debarred, suspended, or excluded from doing business with HUD pursuant to Title 24 of the Code of Federal Regulations, Part 24, and Title 2 of the Code of Federal Regulations, Part 2424;

(3) Any contractor, subcontractor and/or consultant or advisor (including any agent, employee, partner, director, principal or affiliate of any of the foregoing) who performed services for, or on behalf of, HUD in connection with MLS 2011–1;

(4) Any individual who was a principal, partner, director, agent or employee of any entity or individual described in subparagraph 3 above, at any time during which the entity or individual performed services for or on behalf of HUD in connection with MLS 2011–1;

(5) Any individual or entity that uses the services, directly or indirectly, of any person or entity ineligible under subparagraphs 1 through 4 above to assist in preparing any of its bids on the Mortgage Loans;

(6) Any individual or entity which employs or uses the services of an employee of HUD (other than in such employee's official capacity) who is involved in MLS 2011–1;

(7) Any affiliate, principal or employee of any person or entity that, within the two-year period prior to April 1, 2011, serviced any of the Mortgage Loans or performed other services for or on behalf of HUD;

(8) Any contractor or subcontractor to HUD that otherwise had access to information concerning the Mortgage Loans on behalf of HUD or provided services to any person or entity which, within the two-year period prior to April 1, 2011, had access to information with respect to the Mortgage Loans on behalf of HUD;

(9) Any employee, officer, director or any other person that provides or will provide services to the potential bidder with respect to such Mortgage Loans during any warranty period established for the Loan Sale, that (x) serviced any of the Mortgage Loans or performed other services for or on behalf of HUD or (y) within the two-year period prior to April 1, 2011, provided services to any person or entity which serviced, performed services or otherwise had access to information with respect to the Mortgage Loans for or on behalf of HUD;

(10) Any mortgagor or operator that failed to submit to HUD on or before March 31, 2011, audited financial statements for fiscal years 2007 through 2010 (or for such time as the project has been in operation or the prospective bidder served as operator, if less than three (3) years) for a project securing a Mortgage Loan;

(11) Any individual or entity and any Related Party (as such term is defined in the Qualification Statement) of such individual or entity that is a mortgagor in any of HUD's multifamily and/or healthcare housing programs and that is in default under such mortgage loan or is in violation of any regulatory or business agreements with HUD, unless such default or violation is cured on or before January 31, 2011.

Prospective bidders were encouraged to carefully review the Qualification Statement to determine whether they were eligible to submit bids on the Mortgage Loans in MLS 2011–1.

Freedom of Information Act Requests

HUD reserves the right, in its sole and absolute discretion, to disclose information regarding MLS 2011–1, including, but not limited to, the identity of any successful bidder and its bid price or bid percentage for any pool of loans or individual loan, upon the closing of the sale of all the Mortgage Loans. Even if HUD elects not to publicly disclose any information relating to MLS 2011–1, HUD will have the right to disclose any information that HUD is obligated to disclose pursuant to the Freedom of Information Act and all regulations promulgated thereunder.

Scope of Notice

This notice applies to MLS 2011–1 and does not establish HUD's policy for the sale of other mortgage loans.

Dated: April 22, 2011.

Robert C. Ryan,

Acting Assistant Secretary for Housing - Federal Housing—Commissioner.

[FR Doc. 2011–10465 Filed 4–28–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–R–2011–N060; 1265–0000–10137–S3]

Palmyra Atoll National Wildlife Refuge, U.S. Pacific Island Territory; Nonnative Rat Eradication Project, Final Environmental Impact Statement

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of the Palmyra Atoll National Wildlife Refuge (Refuge) nonnative rat eradication project final environmental impact statement (FEIS). In the FEIS we describe a range of alternatives for eliminating nonnative rats from Palmyra Atoll (Atoll). We are publishing this notice to inform the public of the proposed action and to announce the availability of the FEIS.

DATES: A Record of Decision will be signed no sooner than 30 days after the publication of the Environmental Protection Agency notice announcing the same FEIS.

ADDRESSES: The FEIS is available on our Web site: *http://www.fws.gov/palmyraatoll/rainforestrestoration.html.* A limited number of CD–ROM and printed copies are also available. You may request a copy by any of the following methods.

E-mail: pacific_reefs@fws.gov. Include "Palmyra rat project" in the subject line.

Fax: Attn: Susan White, 808–792–9586.

U.S. Mail: Pacific Reefs National Wildlife Refuge Complex, 300 Ala Moana Blvd., Room 5–231, Honolulu, HI 96850.

FOR FURTHER INFORMATION CONTACT: Susan White, (808) 792–9553.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice we continue the public involvement process in accordance with the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*), as amended, and implementing regulations. We prepared the FEIS in accordance with NEPA and the National Wildlife Refuge System Administration Act of 1966 as amended by the National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee) (Refuge Administration Act); and Service regulations and policies. The Refuge Administration Act requires each unit of the National Wildlife Refuge System to be managed to achieve its establishing purposes.

The Atoll is located in the Pacific Ocean, approximately halfway between Hawai'i and American Samoa. It consists of a circular string of 50 islets nestled among several lagoons and encircled by 15,000 acres of shallow reefs and submerged reefs. Nonnative invasive rats are damaging the Atoll's environment. Through our FEIS we are proposing to restore and protect native species and habitats by eradicating rats. In the FEIS we recommend applying a lethal dose of rodenticide to every rat on the Atoll, in a manner that minimizes harm to the ecosystem and upholds a high probability of success.

Public Involvement

We conducted public scoping for the draft environmental impact statement (DEIS) from January 14 to March 1, 2010. During that time we requested public comments through the **Federal Register** (75 FR 2158; January 14, 2010) and on our Web site (see **ADDRESSES**). The comments we received covered topics such as threats to nontarget species, our proposed selection of the rodenticide brodifacoum over diphacinone, and effects to other Refuge operations. We considered and evaluated these comments, and incorporated them into the various alternatives identified in the DEIS.

We distributed copies of the DEIS, posted it on our Web site (see **ADDRESSES**), and held a public comment period from February 25 to April 11, 2011 (76 FR 10621; February 25, 2011). During the public comment period, we received comments regarding strong support for and strong opposition to rat eradication, threats to nontarget species, our proposed selection of the rodenticide brodifacoum over diphacinone, effects to other Refuge operations, and implementation strategies. The comments we received and our responses are presented in the FEIS.

FEIS Alternatives

We present four alternatives in the FEIS. Alternative A is our no action alternative, and Alternatives B, C, and D, are our action alternatives. In all of the action alternatives, we propose using rodenticide bait pellets containing the anticoagulant brodifacoum (0.0025 percent active ingredient) to eradicate rats from the Atoll. In Alternative B, we propose broadcasting brodifacoum aerially; in Alternative C, our preferred alternative, we propose broadcasting brodifacoum aerially and mitigating risks to vulnerable shorebirds; and in Alternative D, we propose using brodifacoum bait stations and canopy baiting. In order to be retained for consideration, our action alternatives had to: (1) Have a high likelihood of success; (2) have an acceptably low probability for adverse effects on populations of nontarget species and the environment; and (3) be allowed under regulations governing the Refuge. The potential impacts of each alternative were assessed, and, where appropriate, mitigation measures were applied to avoid impacts or reduce their magnitude and intensity.

Under Alternative A, no new actions to eradicate rats would be implemented and they would continue to harm the Atoll's environment.

Under Alternatives B and C we would use a helicopter with a specialized bucket to broadcast brodifacoum bait pellets aerially. The bucket would deliver the bait at the appropriate rate and in a directional manner to all potential rat territories within a short operational period. Special measures to prevent the bait from entering the water would include hand broadcasting on narrow strands of land and tiny islands, and installing bait packets in canopy trees overhanging the water. In addition, under Alternative C, we would manage

shorebirds proactively to minimize their exposure to the rodenticide.

Under Alternative D, we would place bait stations containing brodifacoum bait pellets throughout the entire Atoll and maintain them until all rats are removed (or 2 years). Bait stations are box shaped enclosures with small entryways designed to attract rodents but be difficult for other species such as birds and land crabs to navigate. Bait stations reduce the amount of bait that is introduced to the ecosystem and the risk of exposing nontarget species to rodenticide. Bait stations designed for the Atoll would exclude shorebirds and land crabs, and allow easy access for rats.

The FEIS is intended to accomplish the following: (1) Inform the public of the proposed action and alternatives; (2) Address public comments received during the public comment periods; (3) Disclose the direct, indirect, and cumulative environmental effects of the proposed action and each of the alternatives; and (4) Indicate any irreversible commitment of resources that would result from project implementation. A Record of Decision stating which alternative the Service has selected for implementation will not be issued earlier than 30 days after the Environmental Protection Agency notice.

Dated: April 8, 2011.

Robyn Thorson,

Regional Director, Region 1, Portland, Oregon.

[FR Doc. 2011–10135 Filed 4–28–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCOS05000–L10100000–PH0000]

Notice of Public Meeting, Southwest Colorado Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Southwest Colorado Resource Advisory Council (RAC) will meet in June, August and October 2011.

DATES: Southwest Colorado RAC meetings will be held on June 3, 2011, in Norwood, Colorado; August 26, 2011, in Gunnison, Colorado; and October 28, 2011, in Durango, Colorado.

The meetings will begin at 9 a.m. and adjourn at approximately 4 p.m. A public comment period regarding matters on the agenda will be held at 2:30 p.m.

ADDRESSES: The Southwest Colorado RAC meetings will be held June 3, 2011, at the Norwood Community Center at 1670 Naturita Street, Norwood, Colorado 81423; August 26, 2011, at the Holiday Inn Express at 910 E Tomichi, Gunnison, Colorado 81230; and October 28, 2011, at the San Juan Public Lands Center, 15 Burnett Court, Durango, Colorado 81301.

FOR FURTHER INFORMATION CONTACT: Lori Armstrong, BLM Southwest District Manager, 2505 S. Townsend Avenue, Montrose, CO, telephone 970–240–5300; or Shannon Borders, Public Affairs Specialist, 2505 S. Townsend Avenue, Montrose, CO, telephone 970–240–5300.

Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The Southwest Colorado RAC advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of public land issues in Colorado.

Topics of discussion for all Southwest Colorado RAC meetings may include field manager and working group reports, recreation, fire management, land-use planning, invasive species management, energy and minerals management, travel management, wilderness, land exchange proposals, cultural resource management and other issues as appropriate.

These meetings are open to the public. The public may present written comments to the RACs. Each formal RAC meeting will also have time, as identified above, allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited.

Dated: April 22, 2011.

Helen M. Hankins,

State Director.

[FR Doc. 2011–10392 Filed 4–28–11; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLIDC00000.L16100000.DX0000.241A.0; 4500020887]

Notice of Public Meeting, Coeur d'Alene District Resource Advisory Council Meeting; Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Coeur d'Alene District Resource Advisory Council (RAC) will meet as indicated below.

DATES: June 1, 2011. The meeting will start at 8 a.m. and end no later than 3 p.m. with the public comment period from 1 p.m. to 1:30 p.m. The meeting will be held at the Super 8 Motel, 801 SW. 1st Street, Grangeville, Idaho 83530.

FOR FURTHER INFORMATION CONTACT: Lisa Wagner, RAC Coordinator, BLM Coeur d'Alene District, 3815 Schreiber Way, Coeur d'Alene, Idaho 83815 or telephone at (208) 769–5014.

SUPPLEMENTARY INFORMATION: The 15-member RAC advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in Idaho. The agenda will include discussions about the Salmon River Working Group and the fuels reduction issue in the Coeur d'Alene District; and information for consideration by the Travel Management Subcommittee established by the Idaho County Commission regarding an alternative site for ATV use based on the Community Corrals, Bug Slope site closure. Additional agenda topics or changes to the agenda will be announced in local press releases. More information is available at *http://www.blm.gov/id/st/en/res/resource_advisory.html.*

All meetings are open to the public. The public may present written comments to the RAC in advance of or at the meeting. Each formal RAC meeting will also have time allocated for receiving public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact the BLM as provided above.

Dated: April 19, 2011.

Gary D. Cooper,

District Manager.

[FR Doc. 2011–10381 Filed 4–28–11; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–CRSP–0411–7276; 2275–UYY]

Information Collection Request Sent to the Office of Management and Budget (OMB) for Approval; Archeological Permit Applications and Reports

AGENCY: National Park Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (National Park Service) have sent an Information Collection Request (ICR) to OMB for review and approval. We summarize the ICR below and describe the nature of the collection and the estimated burden and cost. This ICR is scheduled to expire on April 30, 2011. 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. However, under OMB regulations, we may continue to conduct or sponsor this information collection while it is pending at OMB.

DATES: You must submit comments on or before May 31, 2011.

ADDRESSES: Send your comments and suggestions on this information collection to the Desk Officer for the Department of the Interior at OMB–OIRA at (202) 395–5806 (fax) or *OIRA_DOCKET@OMB.eop.gov* (e-mail). Please provide a copy of your comments to Rob Gordon, Information Collection Clearance Officer, National Park Service, MS 2605, 1201 Eye Street NW., Washington, DC 20005 (mail), or *robert_gordon@nps.gov* (e-mail). Please include 1024–0037 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Rob Gordon by mail or e-mail (see **ADDRESSES**) or by telephone at (202) 354–1936. You may review the ICR online at *http://www.reginfo.gov.* Follow the instructions to review Department of the Interior collections under review by OMB.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 1024–0037.

Title: Archeological Permit Applications and Reports, 43 CFR parts 3 and 7.

Service Form Number: DI Form 1926.

Type of Request: Extension of a currently approved collection.

Description of Respondents: Individuals, businesses, organizations, and State, local, and tribal governments.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Estimated Number of Respondents: 736.

Activity	Number of responses	Completion time per response	Total annual burden hours
Applications	736	2.5 hours	1,840
Reports	736	.5 hour	368
Total	1,472		2,208

Abstract: Section 4 of the Archaeological Resources Protection Act (ARPA) of 1979 (16 U.S.C. 470cc) and section 3 of the Antiquities Act (AA) of 1906 (16 U.S.C. 432) authorize any individual or institution to apply to Federal land managing agencies to scientifically excavate or remove archeological resources from public or Indian lands. Permits for archeological investigations ordinarily are requested: (1) For conducting scientific research; (2) in conjunction with statutorily required environmental clearance activities prior to commencing a Federal undertaking; or (3) issuing a Federal license or permit for third party activities such as energy development on public or Indian lands. The implementing regulations (43 CFR part 7 for ARPA; 43 CFR part 3 for the AA) contain requirements for applications and reports.

We use DI Form 1926 (Application for Permit for Archeological Investigations) to collect:

- Name and contact information for applicant, principal investigator, field investigator, and permit administrator.
- A description of the purpose, nature, and extent of the work proposed.
- Evidence of the ability to carry out the proposed scope of work.
- Organizational history in completing the kind of work proposed.
- Curriculum vitae for principal investigator(s) and project director(s).
- Written consent by State or tribal authorities to undertake the activity on State or tribal lands.
- Curation authorization.
- Detailed schedule of all project activities, including completion of reports.

Each permittee must complete a report at the end of the project. The report must be consistent with information in field notes, photographs, and other materials.

Comments: On November 26, 2010, we published in the **Federal Register** (75 FR 72835) a notice of our intent to request that OMB renew approval for this information collection. In that notice, we solicited comments for 60 days, ending on January 25, 2011. We did not receive any comments.

We again invite comments concerning this information collection 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. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: April 26, 2011.

Rob Gordon,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2011–10459 Filed 4–28–11; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[2310–0003–422]

Coral Reef Restoration Plan, Final Programmatic Environmental Impact Statement, Biscayne National Park, FL

AGENCY: National Park Service, Interior.

ACTION: Notice of Availability of the Final Programmatic Environmental Impact Statement for the Coral Reef Restoration Plan, Biscayne National Park.

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4332(2)(C), the National Park Service (NPS) announces the availability of a Final Programmatic Environmental Impact Statement for the Coral Reef Restoration Plan (Plan/FEIS) for Biscayne National Park, Florida. The Plan/FEIS provides a systematic approach to addressing injuries to coral reefs caused by vessel groundings within Biscayne National Park.

DATES: The NPS will execute a Record of Decision no sooner than 30 days from the date of publication of the Notice of Availability of the FEIS in the **Federal Register** by the Environmental Protection Agency.

ADDRESSES: The Plan/FEIS is available in electronic format online at *http://parkplanning.nps.gov/bisc.* A limited number of compact discs and hard copies of the Plan/FEIS are available at Biscayne National Park Headquarters, 9700 SW. 328th Street, Homestead, Florida 33033. You may also request a CD or hard copy by contacting Mark Lewis, Superintendent of Biscayne National Park, 9700 SW. 328th Street, Homestead, Florida 33033, 305–230–1144.

SUPPLEMENTARY INFORMATION: Many vessel groundings occur annually in Biscayne National Park, causing injuries to submerged resources. The goal of coral reef restoration actions in Biscayne National Park is to create a stable, self-sustaining reef environment of similar topography and surface complexity to that which existed prior to injury, such that natural recovery processes, enhanced through mitigation, if needed, will lead to a fully functioning coral reef community with near natural complexity, structure, and make-up of organisms. The Plan/FEIS provides a systematic approach to addressing injuries to coral reefs caused by vessel groundings within Biscayne National Park. It analyzes two alternatives, the No Action alternative (Alternative 1) and Restoration Using a Programmatic Approach (Alternative 2).

Alternative 1 would not change the existing approach to coral reef restoration planning and implementation, including NEPA compliance. Currently, Biscayne National Park resource managers evaluate the impacts of coral reef restoration actions and specific restoration methods when planning and implementing restoration at each grounding incident. In contrast, to address each coral injury under Alternative 2, the most appropriate restoration actions and specific restoration methods would be selected from a "toolbox" of methods that already have had their impacts evaluated programmatically. Under Alternative 2, 10 reasonable and common coral reef restoration actions were identified and evaluated for inclusion in the toolbox.

Alternative 2 (Restoration Using a Programmatic Approach) was identified as the NPS's preferred alternative. The time required to evaluate environmental impacts of restoration actions after site-specific injuries would be minimized substantially under Alternative 2, resulting in fewer adverse effects and/or more beneficial effects to park resources.

FOR FURTHER INFORMATION CONTACT: Mark Lewis, Superintendent, Biscayne National Park, 9700 SW. 328th Street, Homestead, FL 33033; Telephone 305–230–1144.

Authority: The authority for publishing this notice is contained in 40 CFR 1506.6

The responsible official for this Final EIS is the Regional Director, Southeast Region, National Park Service, 100 Alabama Street SW., 1924 Building, Atlanta, Georgia 30303.

Dated: April 22, 2011.

Gordon Wissinger,

Acting Regional Director, Southeast Region.

[FR Doc. 2011–10455 Filed 4–28–11; 8:45 am]

BILLING CODE 4310–ML–P

DEPARTMENT OF THE INTERIOR

National Park Service

[1700–SZM]

Notice of June 6, 2011, Meeting for Acadia National Park Advisory Commission

AGENCY: National Park Service, Interior.

ACTION: Meeting Notice.

SUMMARY: This notice sets the date of June 6, 2011, for a meeting of the Acadia National Park Advisory Commission.

DATES: The public meeting of the Advisory Commission will be held on Monday, June 6, 2011, at 1 p.m. (eastern).

Location: The meeting will be held at Park Headquarters, Bar Harbor, Maine 04609.

Agenda

The June 6, 2011, Commission meeting will consist of the following:

1. Committee reports:
   —Land Conservation
   —Park Use
   —Science and Education
   —Historic
2. Old Business
3. Superintendent's Report
4. Chairman's Report
5. Public Comments

FOR FURTHER INFORMATION CONTACT: Further information concerning this meeting may be obtained from the Superintendent, Acadia National Park, P.O. Box 177, Bar Harbor, Maine 04609, telephone (207) 288–3338.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Interested persons may make oral/written presentations to the Commission or file written statements. Such requests should be made to the Superintendent at least seven days prior to the meeting. 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: April 18, 2011.

Sheridan Steele,

Superintendent, Acadia National Park.

[FR Doc. 2011–10453 Filed 4–28–11; 8:45 am]

BILLING CODE 4310–2N–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–0411–7204; 2280–665]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before April 16, 2011. Pursuant to § 60.13 of 36 CFR Part 60,

written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service,1201 Eye St., NW., 8th floor, Washington DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by May 16, 2011. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

J. Paul Loether,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

ALABAMA

Montgomery County

Montgomery Greyhound Bus Station, 210 S. Court St., Montgomery, 11000298

ARIZONA

Pima County

Gordon House, 6225 N. Camino Escalante, Tucson, 11000299

ARKANSAS

Faulkner County

Lasley's College Apartments, 1916 & 1922 Bruce St., Conway, 11000300

Logan County

Booneville Methodist Episcopal Church South, 355 N. Broadway, Booneville, 11000301

Prairie County

Wingmead, W. side of AR 33, ½ mi. S. of Eason Rd., Roe, 11000302

White County

Missouri Pacific Railway Caboose #928, Next to UPRR on Market St., SW. of Vine St., Bald Knob, 11000303

Woodruff County

Mathis—Hyde House, 400 N. 2nd St., Augusta, 11000304

CONNECTICUT

Hartford County

Freshwater Plantation, Bounded by Alden Ave., Enfield & Franklin Sts. & Connecticut R., Enfield, 11000305

MARYLAND

Carroll County

Koons, Jacob, Farm, 1151 Otterdale Mill Rd., Taneytown, 11000306

MASSACHUSETTS

Norfolk County

Fuller Brook Park, Dover Rd. to Maugus Ave., Wellesley, 11000307

MICHIGAN

Ontonagon County

Ontonagon School, 301 Greenland Rd., Ontonagon, 11000308

Wayne County

Detroit Yacht Club, 1 Riverbank Rd., Belle Isle, Detroit, 11000309

PENNSYLVANIA

Philadelphia County

United States Custom House, 200 Chestnut St., Philadelphia, 11000310

WISCONSIN

Waukesha County

Visitation Convent Complex, 13105 Watertown Plank Rd., Elm Grove, 11000311

[FR Doc. 2011–10346 Filed 4–28–11; 8:45 am]

BILLING CODE 4312–51–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–771]

In the Matter of Certain Electronic Devices, Including Mobile Phones, Mobile Tablets, Portable Music Players, and Computers, and Components Thereof; Notice of Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on March 28, 2011, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Nokia Corporation of Finland, Nokia Inc. of White Plains, New York, and Intellisync Corporation of White Plains, New York. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain electronic devices, including mobile phones, mobile tablets, portable music players, and computers, and components thereof by reason of infringement of certain claims of U.S. Patent No. 7,209,911 ("the '911 patent"); U.S. Patent No. 6,212,529 ("the '529 patent"); U.S. Patent No. 6,141,664 ("the '664 patent"); U.S. Patent No. 7,558,696 ("the '696 patent"); U.S. Patent No. 6,445,932 ("the '932 patent"); U.S. Patent No. 5,898,740 ("the '740 patent"); and U.S. Patent No. 7,319,874 ("the '874 patent"). The complaint further alleges that an industry in the United States exists or is in the process of being established as required by subsection (a)(2) of section 337.

The complainants request that the Commission institute an investigation and, after the investigation, issue an exclusion order and a cease and desist order.

ADDRESSES: The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2011).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on April 25, 2011, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain electronic devices, including mobile phones, mobile tablets, portable music players, and computers, and components thereof that infringe one or more of claims 1, 2,

5, 6, and 9–14 of the '911 patent; claims 1, 21, 25–27, 51, and 52 of the '529 patent; claims 3, 4, 21, 26, 28, 38, 43, 44, 61, 67, 68, 77, and 78 of the '664 patent; claims 1, 3, 5, 9, 11–14, 16, 18, 19, 21–23, and 25 of the '696 patent; claims 1–3, 5, 9, and 15 of the '932 patent; claims 1, 2, 5, and 6 of the '740 patent; and claims 1–6, 8–15, and 21 of the '874 patent, and whether an industry in the United States exists or is in the process of being established as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

Nokia Corporation, Keilalahdentie 4, (P.O. Box 226), FIN–00045 Nokia Group, Espoo, Finland.

Nokia Inc., 102 Corporate Park Drive, White Plains, NY 10604. Intellisync Corporation, 102 Corporate Park Drive, White Plains, NY 10604.

(b) The respondent is the following entity alleged to be in violation of section 337, and is the party upon which the complaint is to be served:

Apple Inc., 1 Infinite Loop, Cupertino, CA 95014.

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, the Honorable Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondent in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d)–(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of the respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

Issued: April 25, 2011.

By order of the Commission.

William R. Bishop,

Acting Secretary to the Commission.

[FR Doc. 2011–10348 Filed 4–28–11; 8:45 am]

BILLING CODE P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–567]

In the Matter of Certain Foam Footwear; Notice of Commission Decision Not To Review a Remand Initial Determination; Finding of a Violation of Section 337; Request for Written Submissions Regarding Remedy, Bonding, and the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's ("ALJ") remand initial determination ("ID") and has found a violation of section 337 in the above-captioned investigation. The Commission is requesting written submissions regarding remedy, bonding, and the public interest.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 708–5468. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on May 11, 2006, based on a complaint, as amended, filed by Crocs, Inc. ("Crocs") of Niwot, Colorado. 71 FR 27514–15 (May 11, 2006). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. CC1337), in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain foam footwear, by reason of infringement of claims 1–2 of U.S. Patent No. 6,993,858; U.S. Patent No. D517,789; and the Crocs trade dress (the image and overall appearance of Crocs-brand footwear). The complaint further alleged that an industry in the United States exists as required by subsection (a)(2) of section 337, and requested that the Commission issue a permanent general exclusion order and permanent cease and desist orders. The complaint named eleven (11) respondents that included: (1) Collective Licensing International, LLC of Englewood, Colorado; (2) Double Diamond Distribution Ltd. ("Double Diamond") of Canada; (3) Effervescent Inc. ("Effervescent") of Fitchburg, Massachusetts; (4) Gen-X Sports, Inc. of Toronto, Ontario; (5) Holey Shoes Holding Ltd. of Canada; (6) Australia Unlimited, Inc. of Seattle, Washington; (7) Cheng's Enterprises Inc. of Carlstadt, New Jersey; (8) D. Myers & Sons, Inc. of Baltimore, Maryland; (9) Inter-Pacific Trading Corp. of Los Angeles, California; (10) Pali Hawaii of Honolulu, Hawaii; and (11) Shaka Shoes of Kaliua-Kona, Hawaii. The Commission terminated the investigation as to the trade dress allegation on September 11, 2006. A twelfth respondent, Old Dominion Footwear, Inc. of Madison Heights, Virginia, was added to the investigation on October 10, 2006. All but two respondents have been terminated from the investigation on the basis of a consent order, settlement agreement, or undisputed Commission determination of non-infringement. The two remaining respondents are Double Diamond and Effervescent.

On April 11, 2008, the ALJ issued his final ID finding no violation of section 337. The ALJ's final ID made no finding on whether either asserted patent was unenforceable due to inequitable conduct. The ALJ's final ID also included his recommendation on remedy and bonding should the Commission find that there was a violation. On July 25, 2008, after review, the Commission affirmed the ALJ's final

ID with certain modifications and clarifications, and terminated the investigation with a finding of no violation of section 337. The Commission took no position regarding the issue of enforceability of the '858 and '789 patents. On February 24, 2010, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") issued its judgment overturning the Commission's findings regarding invalidity of the '858 patent, and non-infringement/lack of domestic industry concerning the '789 patent. The Federal Circuit also specifically "remand[ed] the investigation for a determination of infringement of the '858 patent and any appropriate remedies." See *Crocs, Inc.* v. *United States Int'l Trade Comm'n,* 598 F.3d 1294, 1311 (Fed. Cir. 2010). On July 6, 2010, the Commission remanded the investigation to the ALJ to decide the remaining issue of enforceability of the patents.

On February 9, 2011, the ALJ issued his remand ID finding that the patents were not unenforceable. On February 25, 2011, respondents filed both a joint petition for review of the remand ID and a motion for leave to file the petition two (2) days late. On March 4, 2011, the Commission issued an order declining to grant respondents' motion without prejudice to respondents refiling their motion stating good cause for the enlargement of time. On March 16, 2011, respondents filed a joint motion for an enlargement of the time for filing petitions for review of the remand ID. On March 18, 2011, the Commission issued an order granting respondents' motion for an enlargement of time and making responses due on March 28, 2011. On March 28, 2011, Crocs and the Commission investigative attorney each filed a brief in response to respondents' petition for review.

The Commission has determined not to review the subject remand ID. Also, the Commission has determined to reaffirm the ALJ's previous ruling that claims 1 and 2 of the '858 patent are infringed by Effervescent's accused products, and that claim 2 of the '858 patent is infringed by Double Diamond's accused products. See 73 FR 35710–11 (June 24, 2008); Remand ID at 2 (February 9, 2011) (*citing* Final ID at 121 (April 11, 2008)); Comm'n Op. at 3–4, n. 1 (July 25, 2008). These actions, along with the Federal Circuit's decision, result in a finding of a violation of section 337 by Double Diamond and Effervescent.

In connection with the final disposition of this investigation, the Commission may issue an order that results in the exclusion of the subject articles from entry into the United States. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *In the Matter of Certain Devices for Connecting Computers via Telephone Lines,* Inv. No. 337–TA–360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

When the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

When the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. See section 337(j), 19 U.S.C. 1337(j) and the Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

Written Submissions: Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding, and such submissions should address the recommended determination by the ALJ on remedy and bonding issued on April 23, 2008 (public version). The complainant and the IA are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is also requested to state the dates that the patents at issue expire and the HTSUS numbers under which the accused articles are imported. The written submissions and proposed remedial orders must be filed no later than close of business on May 6, 2011. Reply submissions must be filed no later than the close of business on May 13, 2011. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Any person desiring to submit a document to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 210.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in sections 210.42–46 of the Commission's Rules of Practice and Procedure, 19 CFR 210.42–46.

Issued: April 25, 2011.

By order of the Commission.

William R. Bishop,

Acting Secretary to the Commission.

[FR Doc. 2011–10363 Filed 4–28–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

[OMB Number 1121–NEW]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review; Proposed New Information Collection Activity; Comment Request, Proposed Project entitled "Violence and Victimization Experiences of Indian Women Living in Tribal Communities."

The Department of Justice (DOJ), Office of Justice Programs, National Institute of Justice (NIJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the

public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 76, Number 35, page 9813–9814, on February 22, 2011, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until May 31, 2011. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Christine Crossland, National Institute of Justice, 810 Seventh Street, NW., Washington, DC 20531 (overnight 20001).

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: DOJ Desk Officer. The best way to ensure your comments are received is to e-mail them to *oira_submission@omb.eop.gov* or fax them to 202–395–7285. All comments should reference the 8 digit OMB number for the collection or the title of the collection. If you have questions concerning the collection, please call Christine Crossland at 202–616–5166 or the DOJ Desk Officer at 202–395–3176.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection:

(1) *Type of Information Collection:* Survey.

(2) *The title of the Form/Collection:* Violence and Victimization Experiences of Indian Women Living in Tribal Communities Study.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* National Institute of Justice, Office of Justice Programs, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* American Indian and Alaska Native women living on tribal reservations and in Alaska Native communities who are 18 years or older. *Abstract:* Violence Against Women Act of 2005, Public Law 109–162, Title IX, Section 904(a) mandates that the United States Department of Justice conduct a comprehensive study of violence against American Indian and Alaska Native women living on tribal reservations and in Alaska Native villages. As part of that program of research, NIJ is undertaking a preliminary study known as the Violence Against Indian Women (VAIW) pilot study, with the following objectives:

(a) Create and pilot test a survey instrument that captures valid, reliable data on the nature and extent of intimate partner violence, sexual violence, and stalking committed against American Indian and Alaska Native women; and

(b) Develop a study methodology, including sampling strategy and data collection approach that enables the safe collection of meaningful, standardized data.

This will be a one-time information collection and is expected to take approximately two months from the time the first participant is enrolled until the last survey is administered. At the end of this project, NIJ will have the knowledge, tools, experience, and methods to coordinate and field a larger study as mandated by Congress. The VAIW pilot project will ensure that the survey instrument and approach used for NIJ's planned data collection are methodologically rigorous and fully responsive to Congressional mandate and to the needs of American Indian and Alaska Native communities.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: It is estimated that 225 respondents will complete the survey within 1 hour.

(6) An estimate of the total public burden (in hours) associated with the collection: There are an estimated 225 total annual burden hours associated with this collection.

If additional information is required contact: Lynn Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, U.S. Department of Justice, Two Constitution Square, 145 N Street, NE., Room 2E–808, Washington, DC 20530.

Dated: April 25, 2011.

Lynn Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2011–10358 Filed 4–28–11; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

[OMB Number 1117–0007]

Agency Information Collection Activities: Proposed Collection; Comments Requested: Registrants Inventory of Drugs Surrendered; DEA Form 41

AGENCY: Department of Justice.

ACTION: 30-Day notice of information collection under review.

The Department of Justice (DOJ), Drug Enforcement Administration (DEA) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 76, Number 37, Page 10392, on February 24, 2011, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until May 31, 2011. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Cathy A. Gallagher, Acting Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152; 202–307–7297.

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: DOJ Desk Officer. The best

way to ensure your comments are received is to e-mail them to *oira_submission@omb.eop.gov* or fax them to (202) 395–7285. All comments should reference the eight-digit OMB number for the collection or the title of the collection. If you have questions concerning the collection, please contact Cathy A. Gallagher, Acting Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152 or the DOJ Desk Officer at (202) 395–3176.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- 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 agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of Information Collection 1117–0007

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Registrants' Inventory of Drugs Surrendered.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* Form number: DEA Form 41; component: Office of Diversion Control, Drug Enforcement Administration, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. Other: Not-for-profit institutions, federal government, state, local or tribal government. Abstract: Title 21 CFR 1307.21 requires that any registrant desiring to voluntarily dispose of controlled substances shall list these controlled substances on DEA Form 41 and submit the form to the nearest DEA office. The DEA Form 41 is used to account for destroyed controlled substances, and its use is mandatory.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 22,500 respondents will respond annually, taking 30 minutes to complete each form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 11,250 annual burden hours.

If additional information is required contact: Lynn Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, 145 N Street, NE., Room 2E–808, Washington, DC 20530.

Dated: April 25, 2011.

Lynn Murray,

Department Clearance Officer, U.S. Department of Justice.

[FR Doc. 2011–10354 Filed 4–28–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

[OMB Number 1117–0001]

Agency Information Collection Activities: Proposed Collection; Comments Requested: Report of Theft or Loss of Controlled Substances; DEA Form 106

AGENCY: Department of Justice.

ACTION: 30-Day Notice of Information Collection Under Review.

The Department of Justice (DOJ), Drug Enforcement Administration (DEA) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 76, Number 37, pages 10390–10391, on February 24, 2011, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until May 31, 2011. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Cathy A. Gallagher, Acting Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152; (202) 307–7297.

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: DOJ Desk Officer. The best way to ensure your comments are received is to e-mail them to *oira_submission@omb.eop.gov* or fax them to (202) 395–7285. All comments should reference the eight-digit OMB number for the collection or the title of the collection. If you have questions concerning the collection, please contact Cathy A. Gallagher, Acting Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152 or the DOJ Desk Officer at (202) 395–3176.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- 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 agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of Information Collection 1117–0001

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Report of Theft or Loss of Controlled Substances (DEA Form 106).

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* Form number: DEA Form 106; component: Office of Diversion Control,

Drug Enforcement Administration, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. Other: Not-for-profit, State, local or tribal government. Abstract: Title 21 CFR, 1301.74(c) & 1301.76(b) require DEA registrants to complete and submit DEA–106 upon discovery of a theft or significant loss of controlled substances. This provides accurate accountability and allows DEA to monitor substances diverted for illicit purposes.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* DEA estimates that 7,677 registrants submit 15,162 forms (12,933 electronically, 2,229 paper) annually for this collection, taking .33 hours (20 minutes) to complete each form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 5,054 annual burden hours.

If additional information is required contact: Lynn Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, U.S. Department of Justice, Two Constitution Square, 145 N Street, NE., Suite 2E–808, Washington, DC 20530.

Dated: April 25, 2011.

Lynn Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2011–10357 Filed 4–28–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

[OMB Number 1117–0031]

Agency Information Collection Activities: Proposed Collection; Comments Requested: Application for Registration Under Domestic Chemical Diversion Control Act of 1993 and Renewal Application for Registration Under Domestic Chemical Diversion Control Act of 1993 DEA Forms 510 and 510a

AGENCY: Department of Justice.

ACTION: 30-Day Notice of Information Collection under Review.

The Department of Justice (DOJ), Drug Enforcement Administration (DEA) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 76, Number 35, Pages 9812–9813, on February 22, 2011, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until May 31, 2011. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Cathy A. Gallagher, Acting Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152; (202) 307–7297.

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, *Attn:* DOJ Desk Officer. The best way to ensure your comments are received is to e-mail them to *oira_submission@omb.eop.gov* or fax them to (202) 395–7285. All comments should reference the eight-digit OMB number for the collection or the title of the collection. If you have questions concerning the collection, please contact Cathy A. Gallagher, Acting Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152, (202) 307–7297, or the DOJ Desk Officer at (202) 395–3176.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- 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 agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of Information Collection 1117–0031

(1) *Type of Information Collection:* Extension of a currently approved collection

(2) *Title of the Form/Collection:* Application for Registration under Domestic Chemical Diversion Control Act of 1993 and Renewal Application for Registration under Domestic Chemical Diversion Control Act of 1993.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number: DEA Forms 510 and 510a.

Component: Office of Diversion Control, Drug Enforcement Administration, Department of Justice

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: None.

Abstract: The Domestic Chemical Diversion Control Act requires that manufacturers, distributors, importers, and exporters of List I chemicals which may be diverted in the United States for the production of illicit drugs must register with DEA. Registration provides a system of controls to aid in the tracking of the distribution of List I chemicals.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

	Respondents	Burden (minutes)	Total hour burden
DEA–510 (paper)	12	0.5 hours	6
DEA–510 (electronic)	112	0.25 hours	28
DEA–510a (paper)	165	0.5 hours	82.5
DEA–510a (electronic)	949	0.25 hours	237.25

	Respondents	Burden (minutes)	Total hour burden
Total	1,238		353.75

(6) *An estimate of the total public burden (in hours) associated with the collection:* DEA estimates that this collection takes 353.75 annual burden hours.

If additional information is required contact: Lynn Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, U.S. Department of Justice, Two Constitution Square, 145 N Street, NE., Suite 2E–808, Washington, DC 20530.

Dated: April 25, 2011.

Lynn Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2011–10351 Filed 4–28–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

[OMB Number 1117–0003]

Agency Information Collection Activities; Proposed Collection; Comments Requested; ARCOS Transaction Reporting DEA Form 333

ACTION: 30-Day Notice of Information Collection Under Review.

The Department of Justice (DOJ), Drug Enforcement Administration (DEA) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 76, Number 37, Pages 10391–10392, on February 24, 2011, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until May 31, 2011. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Cathy A. Gallagher, Acting Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152; (202) 307–7297.

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: DOJ Desk Officer. The best way to ensure your comments are received is to e-mail them to *oira_submission@omb.eop.gov* or fax them to (202) 395–7285. All comments should reference the eight-digit OMB number for the collection or the title of the collection. If you have questions concerning the collection, please contact Cathy A. Gallagher, Acting Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152 or the DOJ Desk Officer at (202) 395–3176.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- 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 agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection 1117–0003

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* ARCOS Transaction Reporting.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:*

Form Number: DEA Form 333.

Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: None.

Abstract: Controlled substances Manufacturers and distributors must report acquisition/distribution transactions to DEA to comply with Federal law and international treaty obligations. This information helps to ensure a closed system of distribution for these substances.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* DEA estimates that 1,186 respondents respond to this collection, with 6,856 responses annually to this collection. DEA estimates that it takes 1 hour to complete the form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* DEA estimates this collection has a public burden of 6,856 hours annually.

If additional information is required contact: Lynn Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, U.S. Department of Justice, Two Constitution Square, 145 N Street, NE., Suite 2E–808, Washington, DC 20530.

Dated: April 25, 2011.

Lynn Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2011–10350 Filed 4–28–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Notice of Lodging of a Consent Decree Under the Clean Water Act

Notice is hereby given that on April 25, 2011, a proposed Consent Decree in *United States and the State of Iowa* v. *City of Dubuque, Iowa,* Civil Action No. 2:11–cv–01011–EJM, was lodged with the United States District Court for the Northern District of Iowa.

In this action the United States and the State of Iowa seek civil penalties and injunctive relief for violations of the Clean Water Act, 33 U.S.C. 1251, *et seq.,* in connection with the City of Dubuque's operation of its municipal wastewater and sewer system. The

Complaint alleges that the City's discharges from its sanitary sewer overflows ("SSOs") violate the Clean Water Act because the discharge of sewage violates limitations and conditions in the City's National Pollutant Discharge Elimination System (NPDES) permit.

Under the proposed Consent Decree, City will be required to implement injunctive measures to prevent SSOs and comply with its NPDES permit, including upgrade its wastewater treatment plant and sewer collection system. The City will perform a supplemental environmental project in which it will reconstruct four alleys in the City with permeable interlocking pavers. Finally the City will pay $205,000 in civil penalties to be split evenly between the United States and the State of Iowa.

The Department of Justice will receive comments relating to the proposed Consent Decree for a period of 30 days from the date of this publication. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States and the State of Iowa* v. *City of Dubuque,* D.J. Ref. 90–5–1–1–09339.

The proposed Consent Decree may be examined at the U.S. Environmental Protection Agency, Region 7, 901 N. Fifth St., Kansas City, KS 66101 (contact Associate Regional Counsel Christopher Muehlberger (913) 551–7623). During the public comment period, the proposed Consent Decree, may also be examined on the following Department of Justice Web site, to *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the proposed consent decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $12.50 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by email or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Robert E. Maher, Jr.,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2011–10317 Filed 4–28–11; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

[OMB Number 1140–NEW]

Agency Information Collection Activities; Proposed Collection Comments Requested: Report of Multiple Sale or Other Disposition of Certain Rifles

ACTION: 30-Day Notice.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 75, Number 242, page 79021 on December 17, 2010, allowing for a 60-day comment period. ATF received 12,680 comments from this collection (8928 commenters support the collection, and 3752 commenters opposed to the collection).

The purpose of this notice is to allow for an additional 30 days for public comment until May 31, 2011. This process is conducted in accordance with 5 CFR 1320.10. To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, *Attn:* DOJ Desk Officer, *Fax:* 202–395–7285, or e-mailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number [1140–NEW]. Also include the DOJ docket number found in brackets in the heading of this document.

Comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—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;
—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;
—The quality, utility, and clarity of the information to be collected; and
—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:* New.

(2) *Title of the Form/Collection:* Report of Multiple Sale or Other Disposition of Certain Rifles

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* ATF F 3310.12. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be required to respond, as well as a brief abstract: Primary:* Business or For-Profit. *Other:* None. *Abstract:* The purpose of this information collection is to require Federal firearms licensees to report multiple sales or other dispositions whenever the licensee sells or otherwise disposes of two or more rifles with the following characteristics: (a) Semi-automatic; (b) a caliber greater than .22 (including .223/5.56 caliber); and (c) the ability to accept a detachable magazine, to the same person at one time or during any five consecutive business days. This requirement will apply only to Federal Firearms Licensees (FFLs) who are dealers and/or pawnbrokers in Arizona, California, New Mexico and Texas.

(5) *An estimate of the total number of respondents:* ATF estimates that 8,479 respondents will be subject to the reporting requirement. However, ATF anticipates fewer than 30% of the potential respondents will be required to report multiple sales of the subset of rifles that is the subject of this collection. This estimate is based upon the fact that, during fiscal year 2010, 2,509 FFLs in the affected states submitted reports of multiple sales of hand guns. ATF estimates that a similar number of FFLs are likely to submit reports of multiple sales of the subject rifles.

(6) *The estimated average burden per respondent:* In fiscal year 2010, 36,148 reports of multiple sales of hand guns sales were submitted by FFLs in the four southwest border states. Because the specified rifles ((a) semi-automatic; (b) a caliber greater than .22 (including .223/5.56 caliber); and (c) the ability to accept a detachable magazine) are a subset of the long gun category, we estimate we will receive 18,074 reports of multiple sale of the specified rifles from FFLs located in the four southwest border states. We estimate that each report will take 12 minutes to complete. If we receive 18,074 reports from 2,509 licensees the total burden is 3,615 hours. The estimated annual burden per respondent is 1 hour and 26 minutes.

If additional information is required contact: Lynn Murray, Department Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, 2 Constitution Square, Room 2E–808, 145 N Street, NE., Washington, DC 20530.

Dated: April 25, 2011.

Lynn Murray,

Department Clearance Officer, United States Department of Justice.

[FR Doc. 2011–10355 Filed 4–28–11; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Compliance Information Report—Workforce Investment Act of 1998 and Complaint Information Form

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Office of the Assistant Secretary for Administration and Management sponsored information collection request (ICR) titled, "Compliance Information Report—Workforce Investment Act of 1998 and Complaint Information Form," to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

DATES: Submit comments on or before May 31, 2011.

ADDRESSES: A copy of this ICR, with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain* or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an e-mail to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor, Office of the Assistant Secretary for Administration and Management, Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–6929/Fax: 202–395–6881 (these are not toll-free numbers), e-mail: *OIRA_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This information collection is being submitted, because it is necessary that certain information be collected for the effective enforcement of DOL regulations implementing the nondiscrimination and equal opportunity provisions of Workforce Investment Act of 1998 (WIA) section 188. These regulations, 29 CFR part 37, apply to entities receiving financial assistance, in whole or in part, under Title I of the WIA. The Compliance Information Report and related information collections are designed to ensure that programs or activities funded in whole or in part by the DOL operate in a nondiscriminatory manner. The Report requires such programs and activities to collect, maintain, and report upon request from the Department, race, ethnicity, sex, age, and disability data for program applicants, eligible applicants, participants, terminees, applicants for employment, and employees. The Complaint Information Form provides a template allowing persons who wish to allege unlawful discrimination to provide the needed information.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is currently approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. See 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under OMB Control Number 1225–0077. The current OMB approval is scheduled to expire on May 31, 2011; however, it should be noted that information collections submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on December 13, 2010 (75 FR 77663).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should reference OMB Control Number 1225–0077. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Office of the Assistant Secretary for Administration and Management.

Title of Collection: Compliance Information Report—Workforce Investment Act of 1998 and Complaint Information Form

OMB Control Number: 1225–0077.

Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Respondents: 900.

Total Estimated Number of Responses: 39,234,443.

Total Estimated Annual Burden Hours: 218,461.

Total Estimated Annual Costs Burden: $0.

Dated: April 25, 2011.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2011–10359 Filed 4–28–11; 8:45 am]

BILLING CODE 4510–23–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Delinquent Filer Voluntary Compliance Program

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Employee Benefits Security Administration (EBSA) sponsored information collection request (ICR) titled, "Delinquent Filer Voluntary Compliance Program," to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

DATES: Submit comments on or before May 31, 2011.

ADDRESSES: A copy of this ICR, with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain,* on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an e-mail to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor, Employee Benefits Security Administration (EBSA), Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–6929/Fax: 202–395–6881 (these are not toll-free numbers), e-mail: *OIRA_submission@omb.eop.gov.*

FOR FURTHER INFORMATION: Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by e-mail at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The Delinquent Filer Voluntary Compliance (DFVC) Program is intended to encourage, through the assessment of reduced civil penalties, delinquent plan administrators voluntarily to comply with their annual reporting obligations under Title I of the Employee Retirement Income Security Act of 1974. The only information collection requirement included in the DFVC Program is the requirement of providing data necessary to identify the plan along with the penalty payment.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid OMB control number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under OMB Control Number 1210–0089. The current OMB approval is scheduled to expire on May 31, 2011; however, it should be noted that information collections submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on November 10, 2010 (75 FR 69130).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to ensure appropriate consideration, comments should reference OMB Control Number 1210–0089. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Employee Benefits Security Administration (EBSA).

Title of Collection: Delinquent Filer Voluntary Compliance Program.

OMB Control Number: 1210–0089.

Affected Public: Private Sector—Businesses or other for profits.

Total Estimated Number of Respondents: 12,322.

Total Estimated Number of Responses: 12,322.

Total Estimated Annual Burden Hours: 616.

Total Estimated Annual Costs Burden: $676,712.

Dated: April 12, 2011.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2011–10421 Filed 4–28–11; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

[OMB Control No. 1219–0066]

Proposed Extension of Existing Information Collection; Testing, Evaluation, and Approval of Mining Products

AGENCY: Mine Safety and Health Administration.

ACTION: Notice of request for public comments.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [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 Mine Safety and Health Administration (MSHA) is soliciting comments concerning the extension of the information collection for 30 CFR Parts 6 through 36.

DATES: All comments must be postmarked or received by midnight Eastern Daylight Saving Time on June 28, 2011.

ADDRESSES: Comments must be clearly identified with OMB Control No. 1219–0066 in the subject line of the message and may be submitted to MSHA by any of the following methods:

(1) *Electronic mail: zzMSHA-Comments@dol.gov.*

(2) *Facsimile:* 202–693–9441.

(3) *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939.

(4) *Hand Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939. Sign in at the receptionist's desk on the 21st floor.

FOR FURTHER INFORMATION CONTACT: Mario Distasio, Chief of the Economic Analysis Division, Office of Standards, Regulations, and Variances, MSHA, at *distasio.mario@dol.gov* (e-mail), 202–693–9445 (voice mail), 202–693–9441 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

The Mine Safety and Health Administration (MSHA) is responsible for the inspection, testing, approval and certification, and quality control of mining equipment and components, materials, instruments, and explosives used in both underground and surface coal, metal, and nonmetal mines. Title 30, Code of Federal Regulations (CFR), parts 6 through 36 contain procedures by which manufacturers may apply for and have equipment approved as "permissible" for use in mines.

II. Desired Focus of Comments

MSHA is particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;
- 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;
- 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 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.

A copy of the documents supporting this information collection request can be obtained by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice, or viewed on the Internet at *http://www.msha.gov.* To view the documents on MSHA's Web site: select "Rules & Regs" on the right side of the screen; then select "FR Docs"; and under "Information Collection Requests" on the next screen, select "Paperwork Reduction Act Supporting Statements."

III. Current Actions

This notice contains the request for an extension of the existing collection of information in 30 CFR Parts 6 through 36. Parts 6 through 36 require that an investigation leading to approval or certification will be undertaken by the A&CC at the MSHA only pursuant to a written application accompanied by prescribed drawings and specifications identifying the piece of equipment. This information is used by engineers and scientists to evaluate the design in conjunction with tests to assure conformance to standards prior to approval for use in mines.

Type of Review: Extension.

Agency: Mine Safety and Health Administration.

OMB Number: 1219–0066.

Frequency: Frequently.

Affected Public: Business or other for-profit.

Cost to Federal Government: $56,476.

Total Number of Respondents: 257.

Total Number of Responses: 754.

Total Burden Hours: 4,441 hours.

Total Burden Cost (operating/maintaining): $2,780,708.

Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: April 25, 2011.

Patricia W. Silvey,

Certifying Officer.

[FR Doc. 2011–10360 Filed 4–28–11; 8:45 am]

BILLING CODE 4510–43–P

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act; Notice of Agency Meeting

TIME AND DATE: 2 p.m., Wednesday, May 4, 2011.

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, VA 22314–3428.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Consideration of Supervisory Activities. Closed pursuant to exemptions (8), (9)(A)(ii) and 9(B).

FOR FURTHER INFORMATION CONTACT: Mary Rupp, Secretary of the Board, Telephone: 703–518–6304.

Mary Rupp,

Board Secretary.

[FR Doc. 2011–10598 Filed 4–27–11; 4:15 pm]

BILLING CODE P

NATIONAL SCIENCE FOUNDATION

Notice of Intent To Seek Approval To Extend a Current Information Collection

AGENCY: National Science Foundation.

ACTION: Notice and request for comments.

SUMMARY: The National Science Foundation (NSF) is announcing plans to request renewal of this collection. In accordance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), we are providing opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting that OMB approve clearance of this collection for no longer than 3 years.

DATES: Written comments on this notice must be received by June 28, 2011 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

For Additional Information or Comments: Contact Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230; telephone 703–292–7556; or send e-mail to *splimpto@nsf.gov.* You also may obtain a copy of the data collection instrument and instructions from Ms. Plimpton. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including Federal holidays).

SUPPLEMENTARY INFORMATION:

Title of Collection: Graduate Research Fellowship Application.

OMB Approval Number: 3145–0023.

Expiration Date of Approval: September 30, 2011.

Type of Request: Intent to seek approval to extend without revision an information collection for three years.

Abstract: Section 10 of the National Science Foundation Act of 1950 (42 U.S.C. 1861 *et seq.*), as amended, states that "The Foundation is authorized to award, within the limits of funds made available * * * scholarships and

graduate fellowships for scientific study or scientific work in the mathematical, physical, biological, engineering, social, and other sciences at accredited U.S. institutions selected by the recipient of such aid, for stated periods of time."

The Graduate Research Fellowship Program is designed to meet the following objectives:

- To select, recognize, and financially support individuals with the demonstrated potential to be high achieving scientists and engineers.
- To broaden participation in science and engineering.

The list of GRFP Fellows sponsored by the Foundation may be found via FastLane through the NSF Web site: *http://www.fastlane.nsf.gov.* The GRF Program is described in the Solicitation available at: *http://www.nsf.gov/publications/pub_summ.jsp?WT.z_pims_id=6201&ods_key=nsf10604.*

Estimate of Burden: This is an annual application program providing three years of support to individuals, usable over a five-year fellowship period. The application deadline is the third week in November. It is estimated that each submission is averaged to be 12 hours per respondent.

Respondents: Individuals.

Estimated Number of Responses: 12,000.

Estimated Total Annual Burden on Respondents: 144,000 hours.

Frequency of Responses: Annually.

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 of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; (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.

Dated: April 25, 2011.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2011–10300 Filed 4–28–11; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Business and Operations Advisory Committee; Notice of Meeting

In accordance with Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Business and Operations Advisory Committee (9556).

Date/Time: May 17, 2011; 1 p.m. to 6 p.m. (EST).

May 18, 2011; 8 a.m. to 12 p.m. (EST).

Place: National Science Foundation, 4201 Wilson Boulevard,. Stafford I, Room 375, Arlington, VA.

Type of Meeting: Open.

Contact Person: Patty Balanga, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230 (703) 292–8100.

Purpose of Meeting: To provide advice concerning issues related to the oversight, integrity, development and enhancement of NSF's business operations.

Agenda:

May 17, 2011

Welcome/Introductions; BFA/OIRM/CHCO/CIO Overview Presentations; Innovative Technologies; International Facilities Subcommittee; Sensitive and Personally Identifiable Information; State of the B&O Committee.

May 18, 2011

NSF Recompetition Policy; Committee Discussion: Prepare for Meeting with NSF Deputy Director; Discussion with Deputy Director; Closing Committee Discussion/Wrap-Up.

Dated: April 26, 2011.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2011–10364 Filed 4–28–11; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Social, Behavioral and Economic Sciences; Notice of Meeting

In accordance with Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Social, Behavioral and Economic Sciences (#1171)

Date/Time: May 19, 2011; 9 a.m. to 5:30 p.m. May 20, 2011; 9 a.m. to 1 p.m.

Place: National Science Foundation, 4201 Wilson Boulevard, Stafford II, Room 555, Arlington, VA 22230.

Type of Meeting: Open.

Contact Person: Ms. Lisa Jones, Office of the Assistant Director, Directorate for Social, Behavioral and Economic Sciences, National Science Foundation, 4201 Wilson Boulevard, Room 905, Arlington, Virginia 22230, 703–292–8700

Summary of Minutes: May be obtained from contact person listed above.

Purpose of Meeting: To provide advice and recommendations to the National Science Foundation on major goals and policies pertaining to Social, Behavioral and Economic Sciences Directorate programs and activities.

Agenda:

Thursday, May 19, 2011

Updates and discussions on continuing activities

- Budget priorities for FY 2012
- SBE/SES COV Report
- Science of Learning Centers (SLC) Program
- AC Report on SBE Futures
- NCSES (formerly SRS) Update

SBE 2020 Activity

New SBE Data & Infrastructure Activities

Friday, May 20, 2011

Discussion with NSF Director and Deputy Director

Overview and discussion

- Science, Engineering & Education for Sustainability (SEES)
- Cyberinfrastructure Framework for the 21st Century (CIF21)

Opportunities for International Partnerships with ESRC

Dated: April 26, 2011.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2011–10365 Filed 4–28–11; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2010–0363; Docket Nos. 50–335 and 50–389]

Florida Power and Light Company, St. Lucie, Unit Nos. 1 and 2; Exemption

1.0 Background

Florida Power & Light Company, et al. (FPL, the licensee), is the holder of Facility Operating License Nos. DPR–67 and NPF–16, which authorize operation of St. Lucie, Unit 1 and 2 (St. Lucie 1 and 2). The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC) now or hereafter in effect. The facility consists of two pressurized-water reactors located on Hutchinson Island in St. Lucie County, Florida.

2.0 Request/Action

Title 10 of the *Code of Federal Regulations* (10 CFR), Part 26, Subpart I, Managing Fatigue, requires that an individual's work hours be scheduled consistent with the objective of preventing impairment from fatigue as

found in 10 CFR 26.205(c). Section 26.205(d) of 10 CFR provides the actual work hour controls—which include a maximum of 16 work hours in any 24-hour period, 26 work hours in any 48-hour period, and 72 work hours in any 7-day period. This section also provides the minimum break times between work periods and limits for the minimum number of days off an individual must be given. The licensee has requested an exemption from 10 CFR 26.205(c) and (d) for meeting work hour controls during preparation for severe weather conditions involving tropical storm or hurricane force winds.

The requested exemption applies to individuals who perform duties identified in 10 CFR 26.4(a)(1) through (a)(5) who are sequestered onsite during a severe wind event, as travel to and from the site during severe wind conditions may be hazardous or not possible. According to the National Weather Service, a sustained wind speed of 40 miles per hour (mph) makes travel unsafe for the common traveler. The exemption request states that because of the unpredictable nature and potential speed of a storm, a need to activate the storm crew could occur on short notice and without the ability to meet work hour controls. The exemption request also states that although the plant may not meet the criteria for declaring an emergency based on the NRC-approved emergency action levels, emergency preparedness would require the implementation of the site emergency plan.

The exemption does not apply to discretionary maintenance activities. Suspension of work hour controls is for storm preparation activities, and those activities deemed critical for plant and public safety.

Section 26.207(d) of 10 CFR states that licensees need not meet the requirements of 26.205(c) and (d) during declared emergencies, as defined in the licensee's emergency plan. A confirmed hurricane warning, defined by the National Hurricane Center (NHC) as when sustained winds of 74 mph are expected somewhere within the specified coastal area, is an entry condition for a declared emergency under the St. Lucie emergency plan. Therefore, this exemption is not needed, and does not apply, during the period of a St. Lucie declared emergency for severe winds. Although work hours, breaks, and days off are calculated as usual during a licensee-declared plant emergency, licensees are unconstrained in the number of hours that they may allow individuals to work performing covered duties or the timing and duration of breaks they must require them to take.

The entry condition for this exemption occurs when there is a confirmed tropical storm watch or warning or when there is a confirmed hurricane watch or warning and the St. Lucie Hurricane Response Coordinator (a senior management official at St. Lucie) indicates that site preparations should be commenced per the severe weather preparation procedure. As defined by the National Hurricane Center (NHC), a tropical storm watch is declared when sustained winds of at least 39 mph are expected somewhere within the specified coastal area. Therefore, entry conditions for the exemption may precede the declaration of an emergency due to a confirmed hurricane warning.

The exit condition for the exemption is when the Hurricane Response Coordinator determines that conditions and available personnel are sufficient to safely meet the requirements of 10 CFR 26.205(c) and (d). Therefore, exit conditions for this exemption request can possibly come well after the exit of a declared emergency. After high wind conditions pass, damage to the plant and surrounding area might preclude sufficient numbers of individuals from immediately returning to the site. Additionally, mandatory civil evacuations could also delay the return of sufficient relief personnel. When the Hurricane Response Coordinator determines that conditions permit sufficient personnel to be available following a severe wind event, full compliance with 10 CFR 26.205(c) and (d) is again required.

Regulatory Guide 5.73, Fatigue Management for Nuclear Power Plant Personnel, endorses the Nuclear Energy Institute (NEI) report NEI 06–11, revision 1, "Managing Personnel Fatigue at Nuclear Power Plants," with certain clarifications, additions and exceptions.

The NRC staff has endorsed this guidance for use during declared emergencies. After exiting the emergency, the licensee is immediately subject to the scheduling requirements of 10 CFR 26.205(c) and the work hour/rest break/minimum day off requirements of 10 CFR 26.205(d). As required by 26.205(b)(3), all time worked during the emergency must be tracked to ensure that individuals are not fatigued when work hour controls are reinstated. The staff has previously determined that NEI 06–11, Revision 1, Section 7.5 "Reset from Deviations" is an acceptable method for resuming work hour controls after a Plant Emergency exception.

STP Nuclear Operating Company, the licensee for South Texas Project Units 1 and 2 has been granted a similar exemption from severe wind conditions, which can be found in the **Federal Register** dated July 12, 2010 (75 FR 39707). The NRC staff granted a similar exemption to FPL for Turkey Point, Units 3 and 4. The exemption can be found in the **Federal Register** dated January 6, 2011 (76 FR 802).

The effects of Hurricane Andrew on the Turkey Point site were used to identify lessons learned to consider when evaluating this request. The following sources were reviewed:

- NUREG–1474, "Effect of Hurricane Andrew on the Turkey Point Nuclear Generating Station from August 20–30, 1992."
- NRC Information Notice 93–53, "Effect of Hurricane Andrew on Turkey Point Nuclear Generating Station and Lessons Learned."
- NRC Information Notice 93–53, Supplement 1, "Effect of Hurricane Andrew on Turkey Point Nuclear Generating Station and Lessons Learned."
- NUREG–0933, "Resolution of Generic Safety Issues," Issue 178: Effect of Hurricane Andrew on Turkey Point (Rev 2).

Hurricane Andrew was a Category 5 hurricane that struck the Turkey Point site on August 24, 1992. On September 10, 1992, the NRC and the Institute of Nuclear Power Operations jointly sponsored a team to review the damage of Hurricane Andrew on the nuclear units and the utility's actions to prepare for the storm and recover from it and compile lessons learned that might benefit other nuclear utilities. Lessons learned from Hurricane Andrew, NUREG–1474, include having all units shutdown and on residual heat removal when a storm strikes so that a loss of offsite power will not jeopardize core cooling. The licensee exemption request for St. Lucie and the licensee's site procedures related to severe winds were compared to the actions and lessons learned documented in NUREG–1474, including an indication that detailed methodical preparations should be made prior to the onset of hurricane force winds, and are consistent with the lessons learned.

The licensee's site procedures provide that if a hurricane warning is in effect and the storm is projected to reach the site as a Category 1 or 2 hurricane, then shutdown of the units to hot standby (mode 3) is commenced at least two (2) hours before the projected onset of sustained hurricane force winds at the site. Both units will remain offline for the duration of the hurricane force

winds (or restoration of reliable offsite power). If the storm is projected to reach the site as a category 3, 4, or 5 hurricane prior to landfall, specific shutdown conditions are established at least two (2) hours before the projected onset of sustained hurricane force winds at the site. Because severe weather preparations will likely commence prior to the shutdown of the units, this exemption will allow sufficient personnel onsite to ensure that the facility is properly secured for severe weather. The NRC staff has reviewed the FPL exemption request for the St. Lucie site and agrees that preparing the site for the onset of severe wind conditions such as hurricanes, including sequestering enough essential personnel to provide for shift relief, is prudent to ensure plant and personnel safety.

The licensee plans to sequester sufficient individuals to staff two 12-hour shifts of workers consisting of personnel from operations, maintenance, health physics, chemistry, engineering, and security to maintain the safe and secure operation of the facility. The St. Lucie hurricane plan provides for bunking facilities that provide an accommodation for restorative rest for the off crew. A 12-hour break provides each individual with an opportunity for restorative rest. Although the accommodations and potentially stressful circumstances may not be ideal for restorative rest, the NRC finds that these actions are consistent with the practice of fatigue management when limited personnel are available during severe weather conditions.

In summary, by letter dated October 16, 2009 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML092990394), and pursuant to Title 10 of the *Code of Federal Regulations* (CFR) 26.9, FPL requested an exemption from the requirements of 10 CFR 26.205(c), "Work hours scheduling," and (d), "Work hour controls," during declarations of severe weather conditions such as tropical storm and hurricane force winds at the St. Lucie site. Supplemental responses and responses to requests for additional information are dated March 11, 2010 (ADAMS Accession No. ML100750658), September 16, 2010 (ADAMS Accession No. ML102640111), December 10, 2010 (ADAMS Accession No. ML103560079), and December 22, 2010 (ADAMS Accession No. ML103630360).

3.0 Discussion

Pursuant to 10 CFR 26.9, the Commission may, upon application of any interested person or on its own initiative, grant such exemptions from the requirements of 10 CFR Part 26 as it determines are authorized by law and will not endanger life or property or the common defense and security, and are otherwise in the public interest.

Authorized by Law

As stated above, this exemption would allow the licensee to sequester the storm crew on site when conditions are met and suspend work hour controls for the stated reasons. As stated above, 10 CFR 26.9 allows the NRC to grant exemptions from the requirements of 10 CFR 26.205(c) and (d). The NRC staff has determined that granting of the licensee's proposed exemption will not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemption is authorized by law.

Will Not Endanger Life or Property

The underlying purposes of 10 CFR 26.205(c) and (d) are to prevent impairment from fatigue due to duration, frequency, or sequencing of successive shifts. Based on the above evaluation, no new accident precursors are created by the licensee maintaining the additional staff on site necessary to respond to a plant emergency during a severe storm to ensure that the plant maintains a safe and secure status; therefore, the probability of postulated accidents is not increased. Even though the licensee will utilize whatever staff resources may be necessary during severe weather preparation and storm crew activation, opportunities for restorative sleep will be maintained. Also, the consequences of postulated accidents are not increased because there is no change in the types of accidents previously evaluated. Therefore, the exemption will not endanger life or property.

Will Not Endanger the Common Defense and Security

The proposed exemption would allow the licensee to utilize whatever staff resources may be necessary to respond to a plant emergency and ensure that the plant maintains a safe and secure status. The licensee will provide sufficient numbers of management and supervision over the storm crew or the resources utilized during the plant emergency to provide additional oversight for monitoring the effects of fatigue to ensure that the safety and security of the facility are maintained. Also, during the plant emergency, opportunities for restorative sleep will be maintained. Therefore, the common defense and security is not impacted by this exemption.

Otherwise in the Public Interest

The proposed exemption would increase the availability of the licensee staff. The exemption would allow licensee staff to remain at or return to the site and perform additional duties to ensure the plant is in a safe configuration during the emergency. Therefore, granting this exemption is otherwise in the public interest.

4.0 Conclusion

Accordingly, the Commission has determined that, pursuant to 10 CFR 26.9, the exemption is authorized by law and will not endanger life or property or the common defense and security, and is otherwise in the public interest. Therefore, the Commission hereby grants Florida Power & Light Company an exemption from the requirements of 10 CFR 26.205(c) and (d) under the conditions specified above for St. Lucie 1 and 2.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment (75 FR 73134).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 22nd day of April 2011.

For the Nuclear Regulatory Commission.

Robert A. Nelson,

Acting Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2011–10404 Filed 4–28–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–528, 50–529, 50–530; NRC–2009–0012

Arizona Public Service Company, Palo Verde Nuclear Generating Station, Units 1, 2, and 3, Notice of Issuance of Renewed Facility Operating License Nos. NPF–41, NPF–51, and NPF–74 for an Additional 20-Year Period; Record of Decision

Notice is hereby given that the U.S. Nuclear Regulatory Commission (NRC, the Commission) has issued Renewed Facility Operating License Nos. NPF–41, NPF–51, and NPF–74 to Arizona Public Service Company (licensee), the operator of the Palo Verde Nuclear Generating Station, Units 1, 2, and 3 (PVNGS). Renewed Facility Operating License Nos. NPF–41, NPF–51, and NPF–74 authorize the licensee to operate PVNGS at reactor core power levels not in excess of 3990 megawatts

thermal for all three units, in accordance with the provisions of the PVNGS renewed licenses and technical specifications.

The notice also serves as the record of decision for Renewed Facility Operating License Nos. NPF–41, NPF–51, and NPF–74, consistent with Title 10 of the *Code of Federal Regulations* (10 CFR) 51.103, "Record of Decision—General." NUREG–1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Supplement 43, Regarding Palo Verde Nuclear Generating Station," issued January 2011, discusses the Commission's consideration of a range of reasonable alternatives, including generation of replacement power from new supercritical coal-fired generation; natural gas combined-cycle generation; new nuclear generation; a combination of alternatives that includes natural gas combined-cycle generation, energy conservation, and solar; and not renewing the license (the no-action alternative). The factors considered in the record of decision appear in the supplemental environmental impact statement for PVNGS.

PVNGS units are pressurized water reactors located in Maricopa County, Arizona. The application for the renewed licenses complied with the standards and requirements of the Atomic Energy Act of 1954, as amended, and the Commission's regulations. As required by the Atomic Energy Act and the Commission's regulations in 10 CFR Chapter I, the Commission has made appropriate findings, which are set forth in the licenses. Prior public notice of the action involving the proposed issuance of the renewed licenses and of an opportunity for a hearing regarding the proposed issuance of the renewed licenses was published in the **Federal Register** on May 15, 2009 (74 FR 22978).

For further details with respect to this action, see: (1) Arizona Public Service Company's license renewal application for PVNGS dated December 11, 2008, as supplemented by letters dated through March 17, 2011; (2) the Commission's safety evaluation report (NUREG–1961), issued April 2011; (3) the licensee's updated final safety analysis report; and (4) the Commission's final environmental impact statement (NUREG–1437, Supplement 43), issued January 2011. These documents are available at the NRC's Public Document Room, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, and online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.*

Copies of Renewed Facility Operating License Nos. NPF–41, NPF–51, and NPF–74, may be obtained by writing to the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Director, Division of License Renewal. Copies of the PVNGS safety evaluation report (NUREG–1961) and the final environmental impact statement (NUREG–1437, Supplement 43) may be purchased from the National Technical Information Service, U.S. Department of Commerce, Springfield, Virginia 22161 (*http://www.ntis.gov*), 703–605–6000, or Attention: Superintendent of Documents, U.S. Government Printing Office, P.O. Box 371954, Pittsburgh, PA 15250–7954 (*http://www.gpoaccess.gov*), 202–512–1800. All orders should clearly identify the NRC publication number and the requestor's Government Printing Office deposit account number or VISA or MasterCard number and expiration date.

Dated at Rockville, Maryland, this 21st day of April, 2011.

For the Nuclear Regulatory Commission.

Andrew S. Imboden,

Chief, Environmental Review and Guidance Update Branch, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. 2011–10403 Filed 4–28–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR WASTE TECHNICAL REVIEW BOARD

Board Workshop: June 6–7, 2011—Arlington, Virginia; the U.S. Nuclear Waste Technical Review Board Will Hold a Workshop on Methods for Evaluating Nuclear Waste Streams

Pursuant to its authority under section 5051 of Public Law 100–203, Nuclear Waste Policy Amendments Act of 1987, the U.S. Nuclear Waste Technical Review Board will hold a workshop on Monday, June 6, and Tuesday, June 7, 2011, in Arlington, Virginia, on methods for evaluating waste streams associated with light-water reactor (LWR) fuel-cycle options. The Board has developed a personal-computer-based systems analysis tool, the Nuclear Waste Assessment System for Technical Evaluation (NUWASTE), to analyze the implications of various nuclear fuel-cycle scenarios being considered by the U.S. Department of Energy (DOE) for managing spent nuclear fuel. The Board will discuss NUWASTE, its methodology, and some preliminary results from the analysis at the meeting. Other organizations with similar projects under way have been invited to discuss their analytical methods and results at the workshop. The overall objectives of the workshop are to benchmark each of the systems analysis tools against each other and to understand the basis for any differences among the results.

The workshop will be held at the Hilton Arlington Hotel; 950 N. Stafford Street; Arlington, VA 22203; telephone: 703–528–6000. A block of rooms has been reserved at the hotel. To make a reservation, attendees may call 1–800–Hiltons. The group code for the meeting is "NUC." Or, go to the hotel Web site, *http://www.arlingtonva.hilton.com,* and enter the arrival and departure dates and the group code. All reservations must be made by May 13 to receive the group rate.

The workshop will begin on Monday, June 6, at 9 a.m. and will conclude by 4 p.m. on Tuesday, June 7. A detailed agenda will be available on the Board's Web site at *http://www.nwtrb.gov* approximately one week before the workshop. The agenda also may be obtained by telephone request at that time.

The workshop will be open to the public, and opportunities for public comment will be provided. Those wanting to speak are encouraged to sign the "Public Comment Register" at the check-in table. It may be necessary to set a time limit on individual remarks, but written comments of any length may be submitted for the record.

Transcripts of the workshop discussions will be available on the Board's Web site, by e-mail, on computer disk, and on library-loan in paper form from Davonya Barnes of the Board's staff after June 27, 2011.

The Board was established as an independent federal agency to provide ongoing, objective expert advice to Congress and the Secretary of Energy on technical issues related to the management and disposition of spent nuclear fuel and high-level radioactive waste and to review the technical validity of DOE activities related to implementing the Nuclear Waste Policy Act. Board members are experts in their fields and are appointed to the Board by the President from a list of candidates submitted by the National Academy of Sciences. The Board is required to report to Congress and the Secretary no fewer than two times each year. Board reports, correspondence, congressional testimony, and meeting transcripts and materials are posted on the Board's Web site.

For information on the meeting agenda, contact Karyn Severson. For information on lodging or logistics, contact Linda Coultry. They can be reached at 2300 Clarendon Boulevard, Suite 1300; Arlington, VA 22201–3367; (tel) 703–235–4473; (fax) 703–235–4495.

Dated: April 25, 2011.

Nigel Mote,

Executive Director, U.S. Nuclear Waste Technical Review Board.

[FR Doc. 2011–10329 Filed 4–28–11; 8:45 am]

BILLING CODE 6820–AM–M

RAILROAD RETIREMENT BOARD

Proposed Collection; Comment Request

Summary: In accordance with the requirement of Section 3506 (c)(2)(A) of the Paperwork Reduction Act of 1995 which provides opportunity for public comment on new or revised data collections, the Railroad Retirement Board (RRB) will publish periodic summaries of proposed data collections.

Comments are invited on: (a) Whether the proposed information collection is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the RRB's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden related to the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

1. *Title and purpose of information collection:* Certification of Termination of Service and Relinquishment of Rights; OMB 3220–0016.

Under Section 2(e)(2) of the Railroad Retirement Act (RRA), an age and service annuity, spouse annuity, or divorced spouse annuity cannot be paid unless the Railroad Retirement Board (RRB) has evidence that the applicant has ceased railroad employment and relinquished rights to return to the service of a railroad employer. Under Section 2(f)(6) of the RRA, earnings deductions are required for each month an annuitant works in certain non-railroad employment termed Last Pre-Retirement Non-Railroad Employment.

Normally, the employee, spouse, or divorced spouse relinquishes rights and certifies that employment has ended as part of the annuity application process. However, this is not always the case. In limited circumstances, the RRB utilizes Form G–88, *Certification of Termination of Service and Relinquishment of Rights,* to obtain an applicant's report of termination of employment and relinquishment of rights. One response is required of each respondent. Completion is required to obtain or retain benefits. The RRB proposes no changes to Form G–88.

Estimate of Annual Respondent Burden

The estimated annual respondent burden is as follows:

Form No.	Annual responses	Time (minutes)	Burden (hours)
G–88	3,600	6	360

2. *Title and purpose of information collection:* Statement of Authority to Act for Employee; OMB 3220–0034.

Under Section 5(a) of the Railroad Unemployment Insurance Act (RUIA), claims for benefits are to be made in accordance with such regulations as the Railroad Retirement Board (RRB) shall prescribe. The provisions for claiming sickness benefits as provided by Section 2 of the RUIA are prescribed in 20 CFR 335.2. Included in these provisions is the RRB's acceptance of forms executed by someone else on behalf of an employee if the RRB is satisfied that the employee is sick or injured to the extent of being unable to sign forms.

The RRB utilizes Form SI–10, Statement of Authority to Act for Employee, to provide the means for an individual to apply for authority to act on behalf of an incapacitated employee and also to obtain the information necessary to determine that the delegation should be made. Part I of the form is completed by the applicant for the authority and Part II is completed by the employee's doctor. One response is requested of each respondent. Completion is required to obtain benefits. The RRB proposes no changes to Form SI–10.

Estimate of Annual Respondent Burden

The estimated annual respondent burden is as follows:

Form No.	Annual responses	Time (minutes)	Burden (hours)
SI–10	400	6	40

3. *Title and purpose of information collection:* Statement Regarding Contributions and Support; OMB 3220–0099.

Under Section 2 of the Railroad Retirement Act, dependency on an employee for one-half support at the time of the employee's death can affect (1) Entitlement to a survivor annuity when the survivor is a parent of the deceased employee; (2) the amount of spouse and survivor annuities; and (3) the Tier II restored amount payable to a widow(er) whose annuity was reduced for receipt of an employee annuity, and who was dependent on the railroad employee in the year prior to the employee's death. One-half support may also negate the public service pension offset in Tier I for a spouse or widow(er). The Railroad Retirement Board (RRB) utilizes Form G–134, Statement Regarding Contributions and Support, to secure information needed to adequately determine if the applicant meets the one-half support requirement. One response is completed by each respondent. Completion is required to obtain benefits. The RRB proposes no changes to Form G–134.

Estimate of Annual Respondent Burden

The estimated annual respondent burden is as follows:

Form No.	Annual responses	Time (minutes)	Burden (hours)
G–134:			
With assistance	75	147	184

Form No.	Annual responses	Time (minutes)	Burden (hours)
Without assistance	25	180	75
Total	100		259

Additional Information or Comments: To request more information or to obtain a copy of the information collection justification, forms, and/or supporting material, contact Charles Mierzwa, the RRB Clearance Officer, at (312) 751–3363 or *Charles.Mierzwa@RRB.GOV.* Comments regarding the information collection should be addressed to Patricia Henaghan, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–2092 or e-mailed to *Patricia.Henaghan@RRB.GOV.* Written comments should be received within 60 days of this notice.

Charles Mierzwa,

Clearance Officer.

[FR Doc. 2011–10418 Filed 4–28–11; 8:45 am]

BILLING CODE 7905–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64326; File No. SR–NASDAQ–2011–057]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ Stock Market, LLC Relating to the $2.50 Strike Price Program

April 22, 2011.

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 April 18, 2011, The NASDAQ Stock Market LLC ("NASDAQ" or "Exchange") filed with the Securities and Exchange Commission ("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 NASDAQ Stock Market LLC proposes to amend Section 6, Series of Options Open for Trading, of Chapter IV, Securities Traded on NOM, to expand the $2.50 Strike Price Program, which applies to NASDAQ members using the NASDAQ Options Market ("NOM").

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaq.cchwallstreet.com,* 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. 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 proposed rule change is to expand the Exchange's ability to select option classes on individual stocks for which the intervals of strike prices will be $2.50 to list for trading.

The Exchange recently expanded its $2.50 Strike Price Program ("Program") [3] to permit the listing of options with $2.50 strike price intervals for options with strike prices between $50 and $100, provided the $2.50 strike price intervals are no more than $10 from the closing price of the underlying stock in the primary market.[4] The Exchange currently list [sic] series at $2.50 strike price intervals in any multiply traded option once another exchange has selected that option to be a part of the program.

The Exchange proposes to amend Chapter IV, Section 6 at Commentary .03 to specify that it may select up to sixty (60) option classes on individual stocks for which the intervals of strike prices will be $2.50 in addition to options selected by another exchange as part of the $2.50 Strike Price Program.

NOM has participated in the industry wide $2.50 Strike Price Program since NOM's inception in 2007. Currently, other options exchanges select up to 60 option classes on individual stocks for which the intervals of strike prices will be $2.50.[5] In addition, each options exchange is permitted to list options with $2.50 strike price intervals on any option class that another options exchange selects under its program. Also, significantly more options classes are trading in 2011 as compared to 2007. The Exchange proposes to specify that it may select up to 60 options classes to remain competitive with other exchanges and to offer investors additional investment choices.

Furthermore, the Exchange does not believe that this proposal would have a negative impact on the marketplace. The Exchange would compare this proposal with the $1 Strike Price expansion, wherein NOM expanded its $1 Strike Price Program from 55 individual stocks to 150 individual stocks on which an option series may list at $1 strike price intervals.[6] The Exchange believes that this proposed rule change that would, in part, result in an increase to overall options classes in the industry wide Program, is less than the $1 Strike Price

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In 2007, NOM proposed to participate in the $2.50 Strike Price Program. *See* Securities Exchange Act Release Nos. 40662 (November 12, 1998), 63 FR 64297 (November 19, 1998) (order approving File Nos. SR–Amex–98–21; SR–CBOE–98–29; SR–PCX–98–31; and SR–Phlx–98–26) ("1998 Order") and 52893 (December 5, 2005), 70 FR 73488 (December 12, 2005) (order approving File No. SR–Amex–2005–067). NOM participates in the $2.50 Strike Price Program on the same terms and conditions as the other options exchanges. *See* Securities Exchange Act Release No. 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR–NASDAQ–2007–004 and SR–NASDAQ–2007–080). *See also* Securities Exchange Act Release No. 64157 (March 31, 2011), 76 FR 18817 (April 5, 2011) (SR–Phlx–2011–15).

[4] The term "primary market" is defined in Exchange Rule 1000 in respect of an underlying stock or exchange-traded fund share as the principal market in which the underlying stock or exchange-traded fund share is traded.

[5] The International Securities Exchange, LLC ("ISE"), NASDAQ OMX PHLX LLC ("Phlx"), and Chicago Board Options Exchange ("CBOE") may select up to 60 option classes on individual stocks for which the intervals of strike prices will be $2.50. *See* Securities Exchange Act Release Nos. 64258 (April 8, 2011), 76 FR 20764 (April 13, 2011) (SR–ISE–2011–23), 63914 (February 15, 2011) and 76 FR 9846 (February 22, 2011) (SR–Phlx–2011–15).

[6] *See* Securities Exchange Release Act No. 62451 (July 6, 2010), 75 FR 40001 (July 13, 2010) (SR–NASDAQ–2010–083).

Program increase, which also occurred among several exchanges participating in the program. The Exchange believes that this proposal would have less impact than the $1 Strike Program increase, which did not have any negative impact on the market in terms of proliferation of quote volume or fragmentation.

The Exchange believes that the effect of the proposed expansion on the marketplace would not result in a material proliferation of quote volume or concerns with fragmentation. With regard to the impact of this proposal on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary system capacity to handle the potential additional traffic associated with the listing and trading of classes on individual stocks in the $2.50 Strike Price Program.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [7] in general, and furthers the objectives of Section 6(b)(5) of the Act [8] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The Exchange believes that the effect of the proposed expansion on the marketplace would not result in a material proliferation of quote volume or concerns with fragmentation. In addition, the Exchange believes that it has the necessary system capacity to handle the potential additional traffic associated with the listing and trading of classes.

The Exchange believes the $2.50 Strike Price Program proposal would provide the investing public and other market participants increased opportunities to better manage their risk exposure. While expansion of the $2.50 Strike Price Program may generate additional quote traffic, the Exchange does not believe that this increased traffic will become unmanageable since the proposal is limited to a fixed number of classes. Further, the Exchange does not believe that the proposal will result in a material proliferation of additional series because it is limited to a fixed number of classes.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

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

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, 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, it has become effective pursuant to Section 19(b)(3)(A) of the Act [9] and Rule 19b–4(f)(6) thereunder.[10]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal is substantially similar to that of another exchange that has been approved by the Commission.[11] Therefore, the Commission designates the proposal operative upon filing.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 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 Commission has waived the five-day prefiling requirement in this case.

[11] *See* Securities Exchange Act Release No. 64157 (March 31, 2011), 76 FR 18817 (April 5, 2011) (SR–Phlx–2011–15) (order approving expansion of $2.50 Strike Price Program).

[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).

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–2011–057 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–2011–057. 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–NASDAQ–2011–057 and should be submitted on or before May 20, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–10361 Filed 4–28–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64338; File No. SR–Phlx–62011–13]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Order Approving Proposed Rule Change, as Modified by Amendment No. 1, Relating to Amendments to NASDAQ OMX PHLX LLC's Limited Liability Company Agreement, By-Laws, Rules, Advices and Regulations

April 25, 2011.

I. Introduction

On February 16, 2011, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to alter its governance structure and to make other non-substantive conforming changes. The proposed rule change was published for comment in the **Federal Register** on March 4, 2011.[3] On April 15, 2011, the Exchange filed Amendment No. 1 to the proposed rule change.[4] The Commission received no comment letters regarding the proposal. This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposal

The Exchange proposes to amend its Limited Liability Company Agreement ("LLC Agreement") and By-Laws to substantially conform them to The NASDAQ Stock Market LLC's ("NASDAQ") Second Amended Limited Liability Company Agreement ("NASDAQ LLC Agreement") and By-Laws, respectively. These conforming changes include, among other things: (1) The elimination of the Exchange's Series A Preferred Stock and dissolution of the Member Voting Trust; (2) modifications to the Exchange's board and committee structure to harmonize it with NASDAQ's board and committee structure;[5] (3) the elimination of foreign currency option ("FCO") participations, of which there are none outstanding; (4) the elimination of definitions, rules, and references to XLE (the Exchange's former equities trading platform); and (5) changes to other terms, names, and cross-references contained in the Exchange's LLC Agreement and By-Laws, including technical and grammatical changes to reflect the Exchange's recent conversion from a Delaware corporation to a Delaware limited liability company ("LLC"),[6] and changes to clarify and simplify the By-Laws, Rules, Option Floor Procedure Advices and Equity Floor Procedure Advices (the latter two are collectively referred to herein as "Advices"), and Regulations of the Exchange.

A. Elimination of the Series A Preferred Stock and Dissolution of the Member Voting Trust

The Exchange proposes to amend the Exchange's formation documents to eliminate the Series A Preferred Stock. In 2003, Phlx, formerly the Philadelphia Stock Exchange, Inc., filed with the Commission to amend its formation documents to form a demutualized Delaware stock corporation.[7] At the time of demutualization, the Exchange amended its Certificate of Incorporation to designate one share of preferred stock as the "Series A Preferred Stock," the holder of which had the sole power to select and remove the On-Floor Governors,[8] in accordance with specified procedures.[9] A trust agreement was created and the one and only outstanding share of Series A Preferred Stock was then held by the Phlx Member Voting Trust ("Trust"). The Exchange believes that these arrangements were necessary at the time of demutualization to preserve the ability of members to vote for and affirmatively elect certain board Governors because: (i) Under Delaware law, only stockholders can elect the directors of a Delaware corporation; and (ii) after the demutualization, Members and Member Organizations that were not owners at the time of the demutualization were not stockholders of the Exchange.[10]

After the Exchange's demutualization, the trustee of the Trust, pursuant to the Amended Trust Agreement, had the power to vote the share of Series A Preferred Stock to elect the Member Governor and the Designated Independent Governors,[11] as directed by the vote of the Member Organization Representatives of Member Organizations entitled to vote pursuant to Article III of the By-Laws. According to the Exchange, this process was designed to facilitate the exercise by Members and Member Organizations of their rights to fair representation in the selection and removal of certain Governors of the Exchange and to facilitate the administration of the affairs of the Exchange in accordance with the Act.[12] In particular, the Trust ensured that the candidates for Governor elected by vote of the Members were, in turn, validly elected to the Board of Governors pursuant to Delaware law and that the Members' vote could not be overridden.

In 2008, the Exchange was acquired by and became a wholly-owned subsidiary of The NASDAQ OMX Group, Inc. ("NASDAQ OMX"). The Exchange represents that, since the acquisition by NASDAQ OMX, there are no longer any other common

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 63981 (February 25, 2011), 76 FR 12180 (March 4, 2011) ("Notice").

[4] In Amendment No. 1, the Exchange amended the text of Rules 607, 862, 1012, 1017, 1058, 1079, 1080, 1082, and 3202 to reflect separate and unrelated intervening proposed rule changes that became effective after this proposal was published for comment. Because Amendment No. 1 is technical in nature, the Commission is not required to publish it for comment.

[5] To align itself with the terminology used by NASDAQ, the Exchange proposes to rename the Board of Governors to now be the Board of Directors ("Board"). As a result, all references to "Governors" would be changed to "Directors" in the By-Laws, Rules, Advices, and Regulations of the Exchange. *See* Notice, *supra* note 3, 76 FR at 12181, 12185, 12189.

[6] *See* Securities Exchange Act Release No. 62783 (August 27, 2010), 75 FR 54204 (September 3, 2010) (SR–Phlx–2010–104). As a result of the conversion, all references to Incorporation would be changed to LLC in the By-Laws, Rules, Advices, and Regulations of the Exchange. The specific proposed rule changes relating to this amendment are discussed in detail in the Notice. *See* Notice, *supra* note 3, 76 FR at 12181, 12189.

[7] *See* Securities Exchange Act Release No. 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR–Phlx–2003–73).

[8] "On-Floor Governors" were the Governors elected by the Exchange's Members and Member Organizations. *See* Securities Exchange Act Release No. 53734 (April 27, 2006), 71 FR 26589 (May 5, 2006) (SR–Phlx–2005–93); e-mail from Angela S. Dunn, Assistant General Counsel, Office of the General Counsel, NASDAQ OMX ("Dunn"), to Ronesha A. Butler, Special Counsel, Division of Trading and Markets, Commission ("Butler"), dated April 20, 2011 ("Dunn Email"). *See also supra* note 7 (discussing On-Floor Governors).

[9] *See supra* note 7.

[10] *See* Notice, *supra* note 3, 76 FR at 12181.

[11] After the Exchange's demutualization, the term "On-Floor Governors" was eliminated and replaced by the Member Governor and the Designated Independent Governors. *See* Dunn Email, *supra* note 8. "Member Governor" means a Governor who is a Member or a general partner or an executive officer (vice-president and above) of a Member Organization and is duly elected to fill the one vacancy on the Board of Governors allocated to the Member Governor. *See* By-Laws Article I. "Designated Independent Governors" means those Independent Governors who are elected by the holder of the Series A Preferred Stock. *See id.*

[12] *See* Notice, *supra* note 3, 76 FR at 12181.

shareholders of Phlx.[13] As a result, the Exchange's formation documents were amended so that the Series A Preferred Stockholder is the sole preferred shareholder of the Exchange and elects the Member Governor and the Designated Independent Governors pursuant to Section 16 of the LLC Agreement and Article IV of the By-Laws.[14] Currently, the number of Designated Independent Governors, together with the Member Governor, equals at least 20% of the total number of Governors who are elected by the Series A Preferred Stockholder. Further, Phlx recently restructured to a limited liability company and thus is no longer a corporation subject to Delaware corporate law.[15] Accordingly, the Exchange proposes to amend the LLC Agreement to refer to the fact that it has a single stockholder—NASDAQ OMX ("Stockholder").

Because the Exchange believes the Series A Preferred Stock mechanism is no longer necessary to facilitate the exercise by Members and Member Organizations of their rights to fair representation, Phlx proposes to eliminate the Trust in favor of a nomination process for Member Representative Directors that is identical to the process currently utilized by NASDAQ.[16] The Exchange believes that its proposed board structure and election process, identical to that of NASDAQ, would provide Members and Member Organizations fair representation in the selection and removal of certain directors of the Exchange ("Directors") in accordance with the Act.[17] The Exchange would maintain the requirement that at least 20% of the Directors would be Member Representative Directors, and all Directors other than the Member Representative Directors would be elected by the Stockholder as described in the By-Laws.[18]

The Exchange represents that it would continue to accept nominations from Members and Member Organizations for certain designated Board positions.[19] With respect to the election of the Member Representative Directors, the Exchange represents the process would remain substantially unchanged.[20] In an uncontested election (*i.e.,* when there is only one candidate nominated for each open Member Representative Director position), the Stockholder would be obligated to elect the Member Representative Directors from the list of candidates provided by the Member Nominating Committee.[21] In a contested election, the Stockholder would be obligated to elect the persons on the list of candidates who received the most Member votes, where the Members have the right to cast one vote for each Member Representative Director position to be filled.[22] The Stockholder would not have discretion to do anything other than vote for the Member Representative Director candidates nominated as described above.

B. Composition of the Board

The Exchange proposes to conform its Board structure to mirror that of NASDAQ's, including provisions related to composition and powers, standing committees, meetings, and quorum. Among other provisions, the Exchange proposes to amend its LLC Agreement to indicate that the Stockholder would have discretion to determine the size of the Board, subject to compositional and term requirements. The authorized number of Directors could be increased or decreased by the Stockholder at any time, upon notice to all Directors, but no decrease in the number of Directors could shorten the term of any incumbent Member Representative Director.[23] Currently, the By-Laws give the Board of Governors the exact same discretion.[24]

Phlx would retain one-year terms for Directors and would allow for removal of a Director for cause (*e.g.,* the Director no longer satisfies the classification for which the Director was elected or the Director's continued service as such would violate the compositional requirements of the Board).[25] Additionally, the Exchange would retain the discretion to hold Member meetings.[26]

The Exchange proposes to amend its By-Laws regarding the annual election of Member Representative Directors to mirror the provisions of the NASDAQ By-Laws. Specifically, the Stockholder would be able to fill a vacancy in a Member Representative Director position on the Board with a person from a list of candidates prepared by the Member Nominating Committee. Filling such vacancies currently requires a majority vote by the Board of Governors.[27] However, as proposed, the vacancy could remain unfilled if the remaining term of the vacant Director position is less than six months.[28]

The Exchange also proposes to amend the composition qualifications for its Board. Currently, the Board of Governors includes: One Governor who is the Chief Executive Officer; one Governor who is a Member Governor; one Governor who is a Stockholder Governor; and such additional Governors, who are Independent Governors, to fill the remaining seats, including a number of Designated Independent Governors, who, together with the Member Governor, equal at least 20% of the total number of Governors.[29]

As proposed, the new Board would consist of: A number of Non-Industry Directors, including at least one Public Director and at least one Stockholder Director (or if the Board consists of ten or more Directors, at least two Stockholder Directors), which would equal or exceed the sum of the number of Industry Directors and Member

[13] *See id.*

[14] The Exchange represents that the Series A Preferred Stock is still held by the Trust pursuant to the Third Amended and Restated Trust Agreement dated February 22, 2007 ("Amended Trust Agreement"). *See* Notice, *supra* note 3, 76 FR at 12181.

[15] *See supra* note 6.

[16] The term "Member Representative Director" would mean a Director who has been elected or appointed after having been nominated by the Member Nominating Committee or by a Member pursuant to the By-Laws. A Member Representative Director may be, but is not required to be, an officer, director, employee, or agent of a Member. *See* Notice, *supra* note 3, 76 FR at 12185.

[17] *See id.* at 12181. The Exchange is not proposing to amend its By-Laws with respect to the nomination of Directors, which process is currently the same as that of NASDAQ. Rather, the Exchange is proposing to eliminate the prior mechanism concerning the actual election of designated directors that the Series A Preferred Stock and accompanying Trust were designed to facilitate.

[18] *See* LLC Agreement, Section 8.

[19] *See* Notice, *supra* note 3, 76 FR at 12181.

[20] *See id.* at 12184.

[21] *See id.*

[22] *See id.* Pursuant to proposed By-Laws Article II, Section 2–1, a candidate would be added to the list of candidates by a Member that submits a timely and duly executed written nomination to the Secretary of the Exchange. The Exchange represents that it provides Members procedures to nominate candidates at each annual meeting. *See* Notice, *supra* note 3, 76 FR at 12182.

[23] *See* NASDAQ LLC Agreement, Section 9.

[24] *See* By-Laws Article IV, Section 4–1.

[25] *See* NASDAQ By-Laws Article II, Section 2; Notice, *supra* note 3, 76 at 12184–85. Currently, Governors are elected for one year. *See* By-Laws Article IV, Section 4–3. Similar to NASDAQ provisions, each Director elected, designated, or appointed by the Stockholder would hold office until a successor is elected and qualified or until the earlier of such Director's death, resignation, expulsion, or removal.

[26] *See* By-Laws Article IV, Section 4–11; Dunn Email, *supra* note 8.

[27] *See* e-mail from Dunn to Butler, dated April 21, 2011. The Exchange also proposes to rename Article II "Annual Election of Member Representative Directors and Other Actions By Members." The specific NASDAQ By-Laws and the relevant, current By-Laws are identified in the Notice. *See* Notice, *supra* note 3, 76 FR at 12184.

[28] *See* proposed By-Laws Article II, Section 2–3; NASDAQ By-Laws Article II, Section 3.

[29] All of the Governors are required to meet the respective qualifications set forth in Article I of the By-Laws. *See* Notice, *supra* note 3, 76 FR at 12185. The number of Governors is set by the Board of Governors. *See* By-Laws, Section 4–1.

Representative Directors to be elected under the terms of the LLC Agreement. The Exchange would retain the same 20% requirement with respect to directors elected by Members, and the composition of the new Board would be identical to that of NASDAQ.

The Exchange proposes to amend Article I of the By-Laws to incorporate changes to defined terms that concern its revised Board structure.[30] The Exchange is proposing to replace the Independent Governor designation with "Public Director," the Designated Industry Governor/Member Governor designation with "Member Representative Director," and the Stockholder Governor designation with "Stockholder Director."

The Exchange proposes to adopt the following definitions for the various Director positions. The term "Industry Director" would mean a Director who has demonstrated industry experience by satisfying one of several criteria.[31] The term "Non-Industry Director" would mean a Director who is (i) a Public Director; (ii) an officer, director, or employee of an issuer of securities listed on the national securities exchange operated by the Exchange; or (iii) any other individual who would not be an Industry Director.[32] The term "Public Director" would mean a Director who has no material business relationship with a broker or dealer, the Exchange or its affiliates, or FINRA.[33] The term "Stockholder Director" would mean a Director who is an officer, director (or a person in a similar position in business entities that are not corporations), designee, or employee of a holder of common stock or any affiliate or subsidiary of such holder of common stock and is duly elected to fill the one vacancy on the Board allocated to the Stockholder Director.[34]

C. Committees of the Board

Currently, the Exchange's enumerated standing committees are: An Executive Committee, a Regulatory Oversight Committee, a Business Conduct Committee, a Nominating Committee, a Member Nominating Committee, a Quality of Markets Committee, and an Options Trade Review Committee. Additional committees may be established by resolution of the Board of Governors.[35] Each standing committee is currently composed of not more than nine members, including ex-officio members, except for the Options Trade Review Committee which may be composed of twenty members.[36] Currently, the chair of each standing committee must be a member of the Board of Governors and at least one other person on each committee must be a Governor, except for the Options Trade Review Committee.[37] All committee members are appointed by the Board of Governors, and each appointee serves for one year, except for the members of the Options Trade Review Committee who are appointed for terms of no more than three years, subject to reappointment by the Board of Governors.[38]

The Exchange proposes to revise its current standing committees to more closely align them with the standing committees of NASDAQ. Committees would fall into two categories: "Committees Composed Solely of Directors" or "Committees Not Composed Solely of Directors." This categorization of committees would not affect any committee's compositional requirements. The Executive Committee, a Finance Committee,[39] and the Regulatory Oversight Committee, all of which the Exchange currently has, would be Committees Composed Solely of Directors. The Nominating Committee, the Member Nominating Committee, and the Business Conduct Committee, all of which also currently exist, would be Committees Not Composed Solely of Directors.[40]

The Exchange proposes to amend the composition of the Business Conduct Committee by increasing its size from between five and nine to between eight and twelve, as determined by the Board.[41] Further, while the composition of the Business Conduct Committee would remain majority "Non-Industry,"[42] the compositional requirements would change slightly to require that the number of Non-Industry Directors, including at least three Public Directors, equal or exceed the sum of the number of Industry Directors and Member Representative Directors. This new composition would result in Phlx's Business Conduct Committee mirroring the composition of the NASDAQ Review Council, which performs similar functions.[43] The Business Conduct Committee would continue to include a number of Member Representative Directors equal to at least 20% of the total number of members.[44]

In addition, the language describing the responsibilities of the Quality of Markets Committee would be revised to conform to the language used to describe the responsibilities of the NASDAQ Quality of Markets Committee, though the Quality of Markets Committee would continue to perform the same functions that it performs today.[45] The Quality of Markets Committee would continue to include broad representation of market participants, including investors, market makers, integrated retail firms, and order entry firms. Further, it would

[30] The specific additions and deletions are listed in the Notice. *See* Notice, *supra,* note 3, 76 FR at 12183.

[31] The Director either: (i) Is or has served in the prior three years as an officer, director, or employee of a broker or dealer, excluding an outside director or a director not engaged in the day-to-day management of a broker or dealer; (ii) is an officer, director (excluding an outside director), or employee of an entity that owns more than 10% of the equity of a broker or dealer, and the broker or dealer accounts for more than 5% of the gross revenues received by the consolidated entity; (iii) owns more than 5% of the equity securities of any broker or dealer, whose investments in brokers or dealers exceed 10% of his or her net worth, or whose ownership interest otherwise permits him or her to be engaged in the day-to-day management of a broker or dealer; (iv) provides professional services to brokers or dealers, and such services constitute 20% or more of the professional revenues received by the Director or 20% or more of the gross revenues received by the Director's firm or partnership; (v) provides professional services to a director, officer, or employee of a broker, dealer, or corporation that owns 50% or more of the voting stock of a broker or dealer, and such services relate to the director's, officer's, or employee's professional capacity and constitute 20% or more of the professional revenues received by the Director or member, or 20% or more of the gross revenues received by the Director's or member's firm or partnership; or (vi) has a consulting or employment relationship with or provides professional services to the Exchange (or any affiliate thereof) or the Financial Industry Regulatory Authority ("FINRA") (or any predecessor) or has had any such relationship or provided any such services at any time within the prior three years. *See id.* at 12185.

[32] *See id.*

[33] *See id.*

[34] *See id.*

[35] *See* By-Laws Article X; Notice, *supra* note 3, 76 FR at 12182.

[36] *See* Notice, *supra* note 3, 76 FR at 12182.

[37] *See id.*

[38] *See id.*

[39] The current By-Laws permit, but do not require, a Finance Committee. *See* By-Laws Article X, Section 10–1.

[40] Proposed By-Laws Section 5–1, titled "Committees," would require committee members, who are not Directors, to provide the Secretary of the Exchange certain information to classify as a committee member. *See* Notice, *supra* note 3, 76 FR at 12186.

[41] *See id.*

[42] *See id.*

[43] *See* NASDAQ By-Laws Article VI, Section 2.

[44] Currently, at least one Member who conducts options business at the Exchange is required to be on the Business Conduct Committee. *See* By-Laws Article 10, Section 10–11.

[45] *See* By-Laws Article 10, Section 10–21; NASDAQ By-Laws Article III, Section 6. The Quality of Markets Committee would continue to: (1) Provide advice and guidance to the Board on issues relating to the fairness, integrity, efficiency, and competitiveness of the information, order handling, and execution mechanisms of the national securities exchange operated by the Exchange from the perspective of investors, both individual and institutional, retail firms, market making firms, NASDAQ-listed companies, and other market participants; and (2) advise the Board with respect to national market system plans and linkages between the facilities of the Exchange and other markets.

continue to be comprised of a number of Member Representative Directors that is equal to at least 20% of the total number of members. The number of Non-Industry Directors would continue to equal or exceed the sum of the number of Industry Directors and Member Representative Directors.

Finally, the Exchange proposes to rename its Options Trade Review Committee as the Market Operations Review Committee and expand its scope to include both equities and options matters.[46] This committee would continue to include a number of Member Representative Directors equal to at least 20% of the total number of members. Further, the By-Laws would continue to require that no more than 50% of the members of the Market Operations Review Committee would be engaged in market making activity or employed by a Member firm whose revenues from market making activity exceed 10% of its total revenues.[47]

D. Meetings of the Board and Committees

The Exchange proposes to amend its LLC Agreement to modify the provisions regarding meetings of the Board to mirror provisions in NASDAQ's LLC Agreement which are similar to current Phlx By-Laws.[48] In the absence or disqualification of a member of a committee composed solely of Directors, the member or members thereof present at any meeting and not disqualified from voting, whether or not such members constitute a quorum, could unanimously appoint another member of the Board to act at the meeting in the place of any such absent or disqualified member.[49] Members of each committee would hold office for such period as may be fixed by a resolution adopted by the Board. Any member of a committee could be removed from such committee only by the Board, and vacancies could be filled by the Board.

The quorum requirements for the Board and the committees are not substantively changing. Thus, as proposed, a majority of a committee would continue to constitute a quorum and the vote of a majority present would continue to be an act of the committee.[50] Further, any committee that consists solely of one or more Directors would continue to have and could exercise all the powers and authority of the Board in the management of the business and affairs of the Exchange, to the extent provided in a resolution of the Board.[51]

E. Elimination of Foreign Currency Options Participations

The initial offering period for FCOs on Phlx began on January 25, 1982 and extended through the last business day preceding the first day of FCO trading on the Exchange.[52] Access to the Exchange's FCO market was available only to those who purchased a FCO participation ("FCO Participation"). Non-members were admitted to the Exchange as FCO participants ("FCO Participants") by the Exchange's Admission Committee upon completing an application process similar to that utilized when Exchange membership was sought.[53]

In 2003, when the Exchange demutualized, the Exchange proposed that access to the Exchange's facilities and the right to trade would be conferred by newly-issued permits rather than by ownership or leasing of seats of the Exchange.[54] However, the Exchange preserved the concept of FCO Participations after its demutualization. Trading of FCOs continued to be allowed through the FCO Participations, but, since demutualization, trading of any product other than FCOs requires permits.[55]

The Exchange represents that it currently does not have any persons who are FCO Participants because such participations are no longer necessary in light of the fact that a trading permit holder has the ability, by virtue of the trading permit, to trade all of the products traded on the Exchange, including FCOs.[56] The Exchange is proposing to eliminate FCO Participations and to delete all related references and provisions that are only applicable to FCO Participations, including remaining provisions concerning seat leases, owners, and lessors in the By-Laws and the Rules.

F. Technical Changes

The Exchange proposes to delete definitions and Equity Floor Procedure Advices that related solely to the Exchange's former equity trading system, XLE, which ceased operations in October 2008.[57] In addition, the Exchange is proposing to change references from "XLE" to "PSX," the Exchange's recently-launched new cash equities trading platform,[58] where applicable. Rule 3202 notes existing rules which are applicable to PSX, and the Exchange proposes to amend it to enumerate former By-Laws applicable to PSX participants, which would be relocated to sections of the Rules, and to include another rule pertaining to listing criteria on PSX.[59]

The Exchange is also proposing to remove outdated references to AUTO–X and AUTOM, which references no longer apply to the current equity options trading platform, Phlx XL.[60] Additionally, the Exchange proposes to update certain references to AUTOM and AUTO–X with references to Phlx XL, where applicable.[61]

Lastly, the Exchange proposes to amend other references in the Rules to correct and update cross-references to sections that were impacted by previous rule changes;[62] to make technical amendments to certain rules which are reserved or would benefit from the addition of a heading for ease of reference; and to make other non-substantive changes. In particular, the Exchange proposes to:

- Amend the LLC Agreement to require explicitly that the Board keep books and records within the United States;

[46] Accordingly, all references to "Options Trade Review Committee" would be changed to "Market Operations Review Committee" in the By-Laws, Rules, Advices, and Regulations of the Exchange as discussed in the Notice. *See supra* note 3, 76 FR at 12189. The functions of this committee are specified in Rules 124, 1092, 3312, and Option Floor Procedure Advice F–27. *See id.* at 12187.

[47] *See* By-Laws Article X, Section 10–10; Notice, *supra* note 3, 76 FR at 12187.

[48] *See* NASDAQ LLC Agreement, Section 9; By-Laws Article IV, Sections 4–10, 4–11, and 4–14.

[49] *See* proposed LLC Agreement, Section 8; NASDAQ LLC Agreement, Section 9.

[50] *See* By-Laws Article IV, Section 4–9, and Article X, Section 10–3.

[51] *See* By-Laws Article X, Section 10–3.

[52] *See* Securities Exchange Act Release No. 19134 (October 14, 1982), 47 FR 46949 (October 21, 1982) (SR–Phlx–82–5).

[53] *See id.*

[54] *See* Securities Exchange Act Release No. 48847 (November 26, 2003), 68 FR 67720 (December 3, 2003) (SR–Phlx–2003–73).

[55] *See* Rule 908. FCO Participants and the organizations upon which the Exchange confers FCO trading privileges are subject to all the provisions of the Rules that are applicable to Members and Member Organizations, and to many provisions of the By-Laws. *See* Notice, *supra* note 3, 76 FR at 12184.

[56] *See* Notice, *supra* note 3, 76 FR at 12184.

[57] *See* Securities Exchange Act Release No. 58613 (September 22, 2008), 73 FR 57181 (October 1, 2008) (SR–Phlx–2008–65). The definitions are listed in the Notice. *See supra* note 3, 76 FR at 12189.

[58] *See* Securities Exchange Act Release No. 62877 (September 9, 2010), 75 FR 56633 (September 16, 2010) (SR–Phlx–2010–79).

[59] The specific rules are identified in the Notice. *See supra* note 3, 76 FR at 12190.

[60] The Exchange removed such verbiage from Rule 1014. *See* Securities Exchange Act Release No. 63036 (October 4, 2010), 75 FR 62621 (October 12, 2010) (SR–Phlx–2010–131); Dunn Email, *supra* note 8.

[61] *See* Rule 1080(a).

[62] *See* Securities Exchange Act Release Nos. 42889 (June 2, 2000), 65 FR 36878 (June 12, 2000) (SR–Phlx–00–12) (a proposal to rescind Rule 132); 60169 (June 24, 2009), 74 FR 31782 (July 2, 2009) (SR–Phlx–2009–40) (a proposal to amend text in Rule 1043); and 63036, *supra* note 60.

• Permit a transfer or assignment to an affiliate of the Stockholder; [63]
• Add a new Schedule A to the LLC Agreement to define certain new terms for ease of reference; [64]
• Replace "Member Organization Representative" with "Executive Representative;"
• Replace certain references to "Phlx" with references to the "Exchange;"
• Update names of other self-regulatory organizations' references in the Rules; and
• Change references to reflect the restructuring of certain departments of the Exchange, including name changes.[65]

The Exchange has represented that these proposed changes are all technical in nature and do not constitute substantive or material changes.[66]

III. Discussion

After careful review of the proposal, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[67] In particular, the Commission finds that the proposal is consistent with Section 6(b)(1) of the Act,[68] which requires a national securities exchange to be so organized and have the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Act. The Commission further finds that the proposal is consistent with Section 6(b)(3) of the Act,[69] which requires that one or more directors be representative of issuers and investors and not be associated with a member of the exchange, or with a broker or dealer. The Commission also finds that the proposal is consistent with Section 6(b)(5) of the Act,[70] which requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission finds that the proposed elimination of Phlx's Series A Preferred Stock and dissolution of the Trust is consistent with the Act. Though it is dismantling the current mechanism through which it assures that members have the power to nominate, vote for, and elect certain representative governors to its Board of Governors, the Exchange is preserving the fair representation of members in the selection of governors/directors by adopting provisions that are substantially similar to those currently utilized by NASDAQ, which were previously approved by the Commission.[71] In particular, under the new process, the Exchange will continue to accept nominations from Members and Member Organizations for specifically designated Member Representative Director positions, and the Stockholder will be obligated to elect persons on the list of candidates provided by the Member Nominating Committee (which list, in the case of a contested election, would be those directors that received the most Member votes). The Commission notes that the dissolution of the Trust will not eliminate or affect the ability of members to nominate and vote for Member Representative Directors, nor will it affect the assurance that Members' chosen director candidates will be elected to the Board by the Stockholder. The Commission believes that the proposed nomination process for Member Representative Directors, similar to that of NASDAQ, would provide Members and Member Organizations with fair representation in the selection of certain Directors of the Exchange in accordance with the Act.

The Commission notes that the revised LLC Agreement and By-Laws will require the Board to include Public,[72] Non-Industry,[73] and Member Representative Directors,[74] the latter of which will continue to comprise at least 20% of the Board. The Commission has previously noted that, consistent with Section 6(b)(3) of the Act,[75] the selection of Member Representative Directors helps to ensure that an exchange's members have a voice in the governing body of the exchange and the corresponding exercise by the exchange of its self-regulatory authority, and that the exchange is administered in a way that is equitable to all who trade on its market or through its facilities.[76] Further, the composition of the Board will continue to satisfy the requirements of Section 6(b)(3) of the Act by requiring that one or more directors be representative of issuers and investors and not be associated with a member of the Exchange, broker, or dealer.

The Exchange also proposes to adopt a provision that allows for the removal of a Director with cause (*e.g.,* where the Director no longer satisfies the classification for which the Director was elected or the Director's continued service as such would violate the compositional requirements of the Board). The Commission finds that such removal for cause is consistent with the Act in that it is identical to a NASDAQ provision previously approved by the Commission, and is designed to ensure that the Board continues to satisfy compositional requirements consistent with Section 6(b)(3) of the Act.[77] In addition, the Exchange proposes to amend its By-Laws so that the Stockholder would fill a vacancy of a Member Representative Director on the Board with a person from a list of candidates prepared by the Member Nominating Committee. Currently, such vacancies may be filled only upon a majority vote by the Board of Governors.[78] This change is intended to replicate a NASDAQ provision previously approved by the Commission, and is consistent with the Act in that it is designed to ensure that the Board continues to satisfy compositional requirements, particularly those concerning fair

[63] The Exchange represents that this change would give the Stockholder the ability to transfer or assign the common stock of Phlx to an affiliate within the NASDAQ OMX organizational chart. *See* Dunn Email, *supra* note 8.

[64] The specific definitions are listed in the Notice. *See supra* note 3, 76 FR at 12183. Additionally, the Exchange proposes to adopt new rules of construction to further explain the definitions as used in the LLC Agreement, and the current Schedule A, amended to eliminate the reference to the Trust, would become Schedule B. *See id.*

[65] The specific references are described in detail in the Notice. *See id.* at 12189.

[66] *See id.* at 12190.

[67] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[68] 15 U.S.C. 78f(b)(1).

[69] 15 U.S.C. 78f(b)(3)

[70] 15 U.S.C. 78f(b)(5).

[71] *See* Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550, 3553 (January 23, 2006) (File No. 181) (approving NASDAQ as a national securities exchange) ("NASDAQ Approval Order").

[72] A Public Director has no material business relationship with a broker or dealer, the Exchange or its affiliates, or FINRA.

[73] A Non-Industry Director is a Public Director; an officer, director, or employee of an issuer of securities listed on the national securities exchange operated by the Exchange; or any other individual who would not be an Industry Director.

[74] A Member Representative Director is elected or appointed after having been nominated by the Member Nominating Committee or by a Member pursuant to the By-Laws, and he or she may, but is not required to be, an officer, director, employee, or agent of a Member.

[75] 15 U.S.C. 78f(b)(3).

[76] *See* NASDAQ Approval Order, *supra* note 71, 71 FR at 3553.

[77] *Id.*

[78] The vacancy could remain unfilled if the term of the vacant Director position is less than six months.

representation.[79] The Commission believes that Phlx's revised governing documents, as proposed, will continue to provide for the fair representation of Phlx Members and Member Organizations and also will provide board qualification requirements that are consistent with the Act and consistent with those that have been approved previously by the Commission for NASDAQ.

The Commission finds that the Exchange's proposal to modify the composition of Business Conduct Committee is consistent with the Act. The proposed revisions to the composition of the Business Conduct Committee will make it identical to the composition of the equivalent NASDAQ committee (the NASDAQ Review Council).[80] In particular, the Exchange proposes to increase the number of Non-Industry and Member Representative Directors on the committee as well as require the Business Conduct Committee to be comprised of a number of Member Representative Directors that equals at least 20% of the total number of members of the committee.[81]

In addition, other proposed changes to the Exchange's committees will not materially affect the compositional requirements that are currently in place. For example, the Quality of Markets and Market Operations Review Committees are currently, and will remain, subject to the same compositional requirement for Member Representative Directors, and the Regulatory Oversight Committee will continue to be comprised of Public Directors. According to the Exchange, these compositional requirements are designed to foster the Exchange's ability to protect the public interest and foster the integrity of the Exchange by bringing a unique, unbiased perspective to these committees and the work that they perform. Among other things, the Exchange intends for these changes to increase representation of Non-Industry Directors on the committees. The Commission notes these proposed changes are designed to align Phlx's compositional requirements with those of its affiliated exchange, NASDAQ, which were previously approved by the Commission.[82]

The Commission finds that the Exchange's proposal to eliminate FCO Participations is also consistent with the Act. Importantly, the Exchange represents that it currently does not have any persons who access the Exchange's FCO market exclusively through an FCO Participation, as such participations are no longer utilized on the Exchange in light of the ability, since the Exchange demutualized, of any permit holder to trade FCO Participations by means of a general all-purpose trading permit. As a result, the Commission believes that the elimination of FCO Participations will not adversely impact the ability of market participants to continue to access and trade on the Exchange FCO market.

The Commission believes that the remaining revisions to the LLC Agreement, By-Laws, Rules, Advices, and Regulations, including those related to the Exchange's organizational structure, renaming the Board of Governors the Board of Directors, and identifying NASDAQ OMX as the single Stockholder, are consistent with the Act and are designed to update the Exchange's governance process and create equivalent governing standards between Phlx and NASDAQ, which are both controlled by NASDAQ OMX. The proposed changes are designed to conform certain Phlx provisions to more closely parallel provisions maintained by NASDAQ that were previously approved by the Commission.

Finally, the Exchange's proposed conforming changes to various provisions of the LLC Agreement, By-Laws, Rules, Advices, and Regulations to amend cross references, update terminology, and rename and renumber sections are consistent with the Act and are intended to make non-material revisions to update and correct various outdated references. For example, the revisions to eliminate references to FCO Participations and to XLE, as well as other now-obsolete terms are reasonable and are not intended to constitute a material or substantive change to any provision. The Commission finds that these changes are technical in nature and will provide clarity to the Exchange's LLC Agreement, By-Laws, Rules, Advices, and Regulations.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[83] that the proposed rule change (SR–Phlx–2011–13), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[84]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–10362 Filed 4–28–11; 8:45 am]

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[79] *See* NASDAQ Approval Order, *supra* note 71, 71 FR at 3553.

[80] *See id.* at 3554 ("The Commission believes that [NASDAQ's] proposed committees should enable it to carry out its responsibilities under the Exchange Act."). *See also* Notice, *supra* note 3, 76 FR at 12187.

[81] Currently, the Business Conduct Committee is required to have not less than one Member who conducts options business at the Exchange, which would provide less than 20% member representation if the committee had more than five members.

[82] *See* NASDAQ Approval Order, *supra* note 71, 71 FR at 3554.

[83] 15 U.S.C. 78s(b)(2).

[84] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64335; File No. SR–NYSEAmex–2011–25]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 72(d) Regarding Agency Cross Transactions

April 25, 2011.

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 April 19, 2011, NYSE Amex LLC ("NYSE Amex" 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 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 proposes to amend Rule 72(d)—NYSE Amex Equities with respect to agency cross transactions. The text of the proposed rule change is available at the Exchange, at *http://www.nyse.com,* at the Commission's Public Reference Room, and at *http://www.sec.gov.*

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 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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 amend Rule 72(d)—NYSE Amex Equities with respect to agency cross transactions.[3]

Under Rule 72(d)—NYSE Amex Equities, when a member[4] has an order to buy and an order to sell an equivalent amount of the same security, and both orders are for 25,000 shares or more, the member may "cross" those orders at a price at or within the Exchange best bid or offer and does not have to break up the cross transaction to trade with any bids or offers previously displayed at the Exchange best bid or offer, including any interest with priority (a "72(d) crossing transaction").[5] Rule 72(d)—NYSE Amex Equities further provides that a member can effect a 72(d) crossing transaction only for the accounts of persons who are not members or member organizations. Accordingly, a Floor broker cannot use this provision for customers who are unaffiliated NYSE Amex members or member organizations.

The Exchange proposes to amend Rule 72(d)—NYSE Amex Equities to change the required minimum share size from 25,000 and instead require that both the order to buy and the order to sell be "block" orders, which the Exchange proposes to define for purposes of Rule 72 as at least 10,000 shares or a quantity of stock having a market value of $200,000 or more, whichever is less.[6] This proposed change would more closely align agency cross transactions with other "block" orders with respect to the minimum applicable order size.[7]

The Exchange further proposes to amend Rule 72(d)—NYSE Amex Equities to modify the current restriction that a member may not effect a 72(d) crossing transaction for the account of a member or member organization. The Exchange instead proposes to conform Rule 72(d)—NYSE Amex Equities to Rule 90—NYSE Amex Equities, and restrict a member from effecting a 72(d) crossing transaction for the account of such member or member organization, an account of an associated person, or an account with respect to which the member, member organization or associated person thereof exercises investment discretion. This proposed change would enable Floor brokers to effect 72(d) crossing transactions on behalf of unaffiliated members or member organizations.

The Exchange also proposes to update a reference to the term "priority" within Rule 72(d)—NYSE Amex Equities, which currently provides that a member who is providing a better price to one side of the cross transaction must trade with all other market interest *having priority* at that price before trading with any part of the cross transaction. The Exchange proposes to modify this requirement so that the member seeking to provide price improvement must instead trade with all other displayed market interest on the Exchange at that price before trading with the cross transaction. The proposed change would expand protection for interest on the Display Book®[8] by requiring the member who is providing price improvement to trade not only with priority interest, but with all displayed interest in the Display Book.[9] The Exchange proposes to similarly incorporate this change in Example 1 within Rule 72(d)—NYSE Amex Equities by deleting the clause related to "priority" and replacing it with a reference to "displayed."

Finally, the Exchange proposes to remove the reference to "prevailing quotation" within Rule 72(d)—NYSE Amex Equities and replace it with a reference to the "Exchange best bid or offer." This change would provide clarity regarding the price at which a member could effect a 72(d) crossing transaction, but does not alter the meaning of the current rule or the mechanics of a 72(d) crossing transaction.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the "Act"),[10] in general, and furthers the objectives of Section 6(b)(5),[11] 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 mechanism of a free and open market and a national market system. Specifically, the proposed rule change would more closely align Rule 72(d)—NYSE Amex Equities with other Exchange rules concerning block-sized orders and the accounts for which agency orders may be crossed while also expanding protection for interest on the Display Book by requiring that such interest must be executed before a member could break up an agency cross.

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.

[3] The provisions of Rule 72 are in effect during a pilot set to end on August 1, 2011. *See* Securities Exchange Act Release Nos. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR–NYSE–2008–60 and SR–Amex–2008–62) (approving the Exchange's merger with the New York Stock Exchange LLC ("NYSE")) and 59022 (November 26, 2008), 73 FR 73683 (December 3, 2008) (SR–NYSEALTR–2008–10) (conforming the Exchange's rules with those of NYSE, including establishing the "New Market Model Pilot" or "Pilot"). *See also* Securities Exchange Act Release Nos. 60758 (October 1, 2009), 74 FR 51639 (October 7, 2009) (SR–NYSEAmex–2009–65) (extending Pilot to November 30, 2009); 61030 (November 19, 2009), 74 FR 62365 (November 27, 2009) (SR–NYSEAmex–2009–83) (extending Pilot to March 30, 2010); 61725 (March 17, 2010), 75 FR 14223 (March 24, 2010) (SR–NYSEAmex–2010–28) (extending Pilot to September 30, 2010); 62820 (September 1, 2010), 75 FR 54935 (September 9, 2010) (SR–NYSEAmex–2010–86) (extending Pilot to January 31, 2011); and 63620 (December 29, 2010), 76 FR 598 (January 5, 2011) (SR–NYSEAmex–2010–122) (extending Pilot to August 1, 2011).

[4] The reference to "member" in Rule 72(d)—NYSE Amex Equities and this rule proposal means only Floor broker members. Designated Market Makers ("DMMs"), while members of the Exchange, do not have any agency relationships, and are therefore not able to effect this type of cross.

[5] A transaction effected at the cross price in reliance on Rule 72(d)—NYSE Amex Equities is printed as a "stopped stock" to denote that the transaction was outside of normal market procedures. *See* Rule 128A.16—NYSE Amex Equities. The Exchange notes that block-sized crosses outside of the Exchange best bid or offer are addressed under Rule 127—NYSE Amex Equities.

[6] The Exchange proposes to include the "block" definition as new Supplementary Material .10 to Rule 72(d)—NYSE Amex Equities.

[7] *See, e.g.,* Rule 104—NYSE Amex Equities and Rule 127—NYSE Amex Equities, which provide that a "block" shall be at least 10,000 shares or a quantity of stock having a market value of $200,000 or more, whichever is less.

[8] The Display Book system is an order management and execution facility. The Display Book receives and displays orders to the DMMs, contains order information and provides a mechanism to execute and report transactions and publish the results to the Consolidated Tape. The Display Book is connected to a number of other Exchange systems for the purposes of comparison, surveillance and reporting information to customers and other market data and national market systems.

[9] The Exchange notes that displayed interest does not include the reserve portion of any orders on the Display Book. This proposed amendment to Rule 72(d) does not change the obligation of the member providing price improvement to comply with Rule 90.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

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 [12] and Rule 19b–4(f)(6) thereunder.[13] 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 and Rule 19b–4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6) [14] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[15] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *(http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEAmex–2011–25 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAmex–2011–25. 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–NYSEAmex–2011–25 and should be submitted on or before May 20, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–10413 Filed 4–28–11; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A)(iii).

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6)(iii).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64341; File No. SR–FINRA–2011–017]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Amend FINRA Rule 5131 (New Issue Allocations and Distributions)

April 26, 2011.

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 April 18, 2011, Financial Industry Regulatory Authority, Inc. ("FINRA") 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 substantially by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend FINRA Rule 5131 (New Issue Allocations and Distributions) to simplify the spinning provision and to delay the implementation date of paragraphs (b) and (d)(4).

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org*, at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On November 29, 2010, FINRA issued *Regulatory Notice* 10–60 announcing

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Commission approval of SR–NASD–2003–140 [3] and designating the effective date of new Rule 5131 (the "Rule") as May 27, 2011.[4]

A. Spinning

Paragraph (b) of the Rule (Spinning), implements a recommendation from the IPO Advisory Committee Report [5] to prohibit spinning—*i.e.*, an underwriter's allocation of IPO shares to directors or executives of investment banking clients in exchange for receipt of investment banking business. The primary means by which the Rule prohibits spinning is through a series of prophylactic prohibitions on the allocation of new issues. Specifically, the Rule prohibits allocations of a new issue to any account in which an executive officer or director of a public company or a covered non-public company, or a person materially supported by such executive officer or director, has a beneficial interest: (A) If the company is currently an investment banking services client of the member or the member has received compensation from the company for investment banking services in the past 12 months; (B) if the person responsible for making the allocation decision knows or has reason to know that the member intends to provide, or expects to be retained by the company for, investment banking services within the next 3 months; or (C) on the express or implied condition that such executive officer or director, on behalf of the company, will retain the member for the performance of future investment banking services.

Paragraph (b)(1) requires that members establish, maintain and enforce policies and procedures reasonably designed to ensure that investment banking personnel have no involvement or influence, directly or indirectly, in the new issue allocation decisions of the member. However, because the term "investment banking personnel" is not defined in the Rule, members have raised concern that, if the term is read co-extensively with the definition of "investment banking services," certain necessary functions traditionally performed by syndicate personnel would be prohibited. In light of this unintended consequence, FINRA is proposing to delete paragraph (b)(1). FINRA believes that benefits of the anti-spinning provisions can be attained without this particular provision inasmuch as firms currently are required to have written policies and procedures with respect to the spinning prohibitions in paragraph (b)(2) pursuant to NASD Rule 3010.

In addition, upon further discussions with member firms regarding the steps necessary to prepare for compliance with the spinning provisions,[6] FINRA proposes to delay the implementation date of paragraph (b), as amended, until September 26, 2011.

B. Market Orders

Paragraph (d)(4) of the Rule (Market Orders) prohibits members from accepting any market order for the purchase of shares of a new issue in the secondary market prior to the commencement of trading of such shares in the secondary market. Members have requested additional time to develop a process for reliably identifying new issues and to modify their order handling systems to prevent the acceptance of market orders in new issue shares in contravention of the Rule. FINRA believes the Rule must carefully balance the investor protection concerns with needs of issuers in capital formation and market participants in price discovery. Accordingly, FINRA proposes to delay the implementation date of paragraph (d)(4) until September 26, 2011.

The effective date of the proposed rule change will be the date of Commission approval. However, FINRA also is proposing to delay the implementation date of paragraphs (b) and (d)(4) until September 26, 2011.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Exchange Act,[7] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes the proposed rule change simplifies member obligations with respect to Rule 5131, thereby aiding member compliance efforts and helping to maintain investor confidence in the capital markets.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

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–FINRA–2011–017 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2011–017. This file number should be included on the

[3] *See* Securities Exchange Act Release No. 63010 (September 29, 2010), 75 FR 61541 (October 5, 2010) (Order Approving File No. SR–NASD–2003–140).

[4] *See Regulatory Notice* 10–60 (November 2010) (Approval of New Issue Rule).

[5] *NYSE/NASD IPO Advisory Committee Report and Recommendations* (May 2003). *http://www.finra.org/web/groups/industry/@ip/@reg/@guide/documents/industry/p010373.pdf.*

[6] For example, members have requested additional time to: (1) Create additional forms, account documents and other measures of obtaining information from clients necessary to assess eligibility for new issue allocations under the new Rule; (2) build systems and surveillance infrastructure to ensure appropriate blocks of allocations; and (3) develop appropriate compliance policies and procedures and training materials on the new policies and procedures.

[7] 15 U.S.C. 78*o*–3(b)(6).

subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 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 FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2011–017 and should be submitted on or before May 16, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–10447 Filed 4–28–11; 8:45 am]

BILLING CODE 8011–01–P

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64334; File No. SR–NYSE–2011–18]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 72(d) Regarding Agency Cross Transactions

April 25, 2011.

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 April 19, 2011, New York Stock Exchange LLC ("NYSE" 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 Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 72(d) with respect to agency cross transactions. The text of the proposed rule change is available at the Exchange, at *http://www.nyse.com*, at the Commission's Public Reference Room, and at *http://www.sec.gov.*

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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 72(d) with respect to agency cross transactions.[3] Legacy Rule 72(b) became current Rule 72(d) when the Exchange adopted the New Market Model Pilot. Although the rule text was renumbered as part of the New Market Model Pilot filing, the substance of the rule was not changed from its prior version.

Under NYSE Rule 72(d), when a member[4] has an order to buy and an order to sell an equivalent amount of the same security, and both orders are for 25,000 shares or more, the member may "cross" those orders at a price at or within the Exchange best bid or offer and does not have to break up the cross transaction to trade with any bids or offers previously displayed at the Exchange best bid or offer, including any interest with priority (a "72(d) crossing transaction").[5] NYSE Rule 72(d) further provides that a member can effect a 72(d) crossing transaction only for the accounts of persons who are not members or member organizations. Accordingly, a Floor broker cannot use this provision for customers who are unaffiliated NYSE members or member organizations.

The Exchange proposes to amend Rule 72(d) to change the required minimum share size from 25,000 and instead require that both the order to buy and the order to sell be "block" orders, which the Exchange proposes to define for purposes of Rule 72 as at least 10,000 shares or a quantity of stock having a market value of $200,000 or more, whichever is less.[6] This proposed change would more closely align agency cross transactions with other "block" orders with respect to the minimum applicable order size.[7]

The Exchange further proposes to amend Rule 72(d) to modify the current restriction that a member may not effect a 72(d) crossing transaction for the account of a member or member organization. The Exchange instead proposes to conform Rule 72(d) to Rule 90, and restrict a member from effecting a 72(d) crossing transaction for the account of such member or member organization, an account of an associated person, or an account with respect to which the member, member organization or associated person

[3] The provisions of Rule 72 are in effect during a pilot set to end on August 1, 2011. *See* Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR–NYSE–2008–46) (establishing the "New Market Model Pilot" or "Pilot"). *See also* Securities Exchange Act Release Nos. 60756 (October 1, 2009), 74 FR 51628 (October 7, 2009) (SR–NYSE–2009–100) (extending Pilot to November 30, 2009); 61031 (November 19, 2009), 74 FR 62368 (November 27, 2009) (SR–NYSE–2009–113) (extending Pilot to March 30, 2010); 61724 (March 17, 2010), 75 FR 14221 (March 24, 2010) (SR–NYSE–2010–25) (extending Pilot to September 30, 2010); 62819 (September 1, 2010), 75 FR 54937 (September 9, 2010) (SR–NYSE–2010–61) (extending Pilot to January 31, 2011); and 63618 (December 29, 2010), 76 FR 617 (January 5, 2011) (SR–NYSE–2010–85) (extending Pilot to August 1, 2011).

[4] The reference to "member" in Rule 72(d) and this rule proposal means only Floor broker members. Designated Market Makers ("DMMs"), while members of the Exchange, do not have any agency relationships, and are therefore not able to effect this type of cross.

[5] A transaction effected at the cross price in reliance on NYSE Rule 72(d) is printed as a "stopped stock" to denote that the transaction was outside of normal market procedures. *See* NYSE Rule 128A.16. *See also* Securities Exchange Act Release No. 31343 (October 21, 1992), 57 FR 48645 (October 27, 1992) (SR–NYSE–90–39). The Exchange notes that block-sized crosses outside of the Exchange best bid or offer are addressed under NYSE Rule 127.

[6] The Exchange proposes to include the "block" definition as new Supplementary Material .10 to Rule 72.

[7] *See, e.g.*, NYSE Rules 104 and 127, which provide that a "block" shall be at least 10,000 shares or a quantity of stock having a market value of $200,000 or more, whichever is less.

thereof exercises investment discretion. This proposed change would enable Floor brokers to effect 72(d) crossing transactions on behalf of unaffiliated members or member organizations.

The Exchange also proposes to update a reference to the term "priority" within Rule 72(d), which was included in the rule based on the definition of the term "priority" under Exchange rules before adopting the New Market Model Pilot. NYSE Rule 72(d) currently provides that a member who is providing a better price to one side of the cross transaction must trade with all other market interest having priority at that price before trading with any part of the cross transaction. The Exchange proposes to modify this requirement so that the member seeking to provide price improvement must instead trade with all other displayed market interest on the Exchange at that price before trading with the cross transaction. The proposed change would expand protection for interest on the Display Book® [8] by requiring the member who is providing price improvement to trade not only with priority interest, but with all displayed interest in the Display Book.[9] The Exchange proposes to similarly incorporate this change in Example 1 within Rule 72(d) by deleting the clause related to "priority" and replacing it with a reference to "displayed."

Finally, the Exchange proposes to remove the reference to "prevailing quotation" within Rule 72(d) and replace it with a reference to the "Exchange best bid or offer." This change would provide clarity regarding the price at which a member could effect a 72(d) crossing transaction, but does not alter the meaning of the current rule or the mechanics of a 72(d) crossing transaction.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the "Act"),[10] in general, and furthers the objectives of Section 6(b)(5),[11] 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 mechanism of a free and open market and a national market system. Specifically, the proposed rule change would more closely align Rule 72(d) with other Exchange rules concerning block-sized orders and the accounts for which agency orders may be crossed while also expanding protection for interest on the Display Book by requiring that such interest must be executed before a member could break up an agency cross.

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 [12] and Rule 19b–4(f)(6) thereunder.[13] 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 and Rule 19b–4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6) [14] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[15] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2011–18 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–NYSE–2011–18. 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

[8] The Display Book system is an order management and execution facility. The Display Book receives and displays orders to the DMMs, contains order information and provides a mechanism to execute and report transactions and publish the results to the Consolidated Tape. The Display Book is connected to a number of other Exchange systems for the purposes of comparison, surveillance and reporting information to customers and other market data and national market systems.

[9] The Exchange notes that displayed interest does not include the reserve portion of any orders on the Display Book. This proposed amendment to Rule 72(d) does not change the obligation of the member providing price improvement to comply with Rule 90.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(3)(A)(iii).

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6)(iii).

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–NYSE–2011–18 and should be submitted on or before May 20, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–10409 Filed 4–28–11; 8:45 am]

BILLING CODE 8011–01–P

[16] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Houston District Office Advisory Committee

AGENCY: U.S. Small Business Administration (SBA).

ACTION: Notice of open Federal advisory committee meeting.

SUMMARY: The SBA is issuing this notice to announce the location, date, time, and agenda for the next meeting of the Houston District Office Advisory committee. The meeting will be open to the public.

DATES: The meeting will be held on May 24, 2011 from approximately 11:30 a.m. to 12:30 p.m. Central Standard Time.

ADDRESSES: The meeting will be held at the Internal Revenue Service (IRS), Conference Room 453, 4th Floor; located at 8701 South Gessner, Houston, TX 77074.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2), SBA announces the meeting of the Houston District Office Advisory Committee. The Houston District Office Advisory Committee is tasked with providing advice and recommendations to the District Director, Regional Administrator, and the SBA Administrator.

The purpose of the meeting is to interact and get feedback from the community stakeholders on how we can better serve our community and to create new networking opportunities with the Houston community. The agenda or topics to be discussed will include: Lenders and SBA Goals for 2010–2011, Small Business Job Act updates, Guest Speaker: Beth Shapiro, Director, Counselors to America's Small Business (SCORE) the topic: SCORE * * * yesterday, today, and tomorrow! and Lender SBA Goals for FY 2010–2011.

FOR FURTHER INFORMATION CONTACT: The meeting is open to the public; however, advance notice of attendance is requested. Anyone wishing to attend and/or make a presentation to the Houston District Office Advisory Committee must contact Sonia Maldonado, Business Development Specialist by February 9, 2011, by fax or email in order to be placed on the agenda. Sonia Maldonado, Business Development Specialist, SBA; 8701 South Gessner Drive, Suite 1200, Houston, TX 77074, Fax 202–481–5617, or e-mail *Sonia.maldonado@sba.gov.*

Additionally, if you need accommodations because of a disability or require additional information, please contact Sonia Maldonado.

For more information, please visit our Web site at *http://www.sba.gov/tx.*

Dated: March 19, 2011.

Dan Jones,

SBA Committee Management Officer.

[FR Doc. 2011–10349 Filed 4–28–11; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice: 7436]

30-Day Notice of Proposed Information Collection: DS–60, Affidavit Regarding a Change of Name, OMB Control Number 1405–0133

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the following information collection request to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Affidavit Regarding a Change of Name.
- *OMB Control Number:* 1405–0133.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* Bureau of Consular Affairs, CA/PPT.
- *Form Number:* DS–60.
- *Respondents:* Individuals or households.
- *Estimated Number of Respondents:* 202,920 per year.
- *Estimated Number of Responses:* 202,920 per year.
- *Average Hours per Response:* 15 minutes.
- *Total Estimated Burden:* 50,730 hours.
- *Frequency:* On occasion.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

DATES: Submit comments to the Office of Management and Budget (OMB) for up to 30 days from April 29, 2011.

ADDRESSES: Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *E-mail: oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

FOR FURTHER INFORMATION CONTACT: You may obtain copies of the proposed information collection and supporting documents from the Passport Forms Management Officer, U.S. Department of State, Office of Program Management and Operational Support, 2100 Pennsylvania Avenue, NW., Room 3031, Washington, DC 20037, who may be reached on 202–663–2457 or at *PPTFormsOfficer@state.gov.*

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary to properly perform our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond.

Abstract of Proposed Collection

The Affidavit Regarding a Change of Name is submitted in conjunction with an application for a U.S. passport. It is used by Passport Services to collect information for the purpose of establishing that a passport applicant has adopted a new name without formal court proceedings or by marriage and has publicly and exclusively used the adopted name over a period of time (at least five years).

Methodology

When needed, the Affidavit Regarding a Change of Name is completed at the time a U.S. citizen applies for a U.S. passport.

Dated: April 18, 2011.

Brenda Sprague,

Deputy Assistant Secretary for Passport Services, Bureau of Consular Affairs, Department of State.

[FR Doc. 2011–10493 Filed 4–28–11; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice: 7435]

30-Day Notice of Proposed Information Collection: DS–10, Birth Affidavit, 1405–0132

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the following information collection request to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Birth Affidavit.
- *OMB Control Number:* 1405–0132.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* Bureau of Consular Affairs, CA/PPT/FO/FC.
- *Form Number:* DS–10.
- *Respondents:* Individuals or households.
- *Estimated Number of Respondents:* 154,850 per year.
- *Estimated Number of Responses:* 154,850 per year.
- *Average Hours per Response:* 15 minutes.
- *Total Estimated Burden:* 38,713 hours.
- *Frequency:* On Occasion.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

DATES: Submit comments to the Office of Management and Budget (OMB) for up to 30 days from April 29, 2011.

ADDRESSES: Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *E-mail: oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

FOR FURTHER INFORMATION CONTACT: You may obtain copies of the proposed information collection and supporting documents from the Passport Forms Management Officer, U.S. Department of State, Office of Program Management and Operational Support, 2100 Pennsylvania Avenue, NW., Room 3031, Washington, DC 20037, who may be reached on 202–663–2457 or at *PPTFormsOfficer@state.gov.*

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary to properly perform our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond,

Abstract of Proposed Collection

The Birth Affidavit is submitted in conjunction with an application for a U.S. passport and is used by Passport Services to collect information for the purpose of establishing the citizenship of a passport applicant who has not submitted an acceptable United States birth certificate with his/her passport application.

Methodology

When needed, a Birth Affidavit is completed at the time a U.S. citizen applies for a U.S. passport.

Dated: April 18, 2011.

Brenda Sprague,

Deputy Assistant Secretary for Passport Services, Bureau of Consular Affairs, Department of State.

[FR Doc. 2011–10496 Filed 4–28–11; 8:45 am]

BILLING CODE 4710–06–P

SUSQUEHANNA RIVER BASIN COMMISSION

Notice of Commission Determination

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice of commission determination.

SUMMARY: Pursuant to authority set forth in the Susquehanna River Basin Compact, Pub. L. 91–575, 84 Stat. 1509 *et seq.,* Article 3, Section 3.10(3); and at 18 CFR 806.4(a)(8) and 806.5, the Executive Director has issued a determination regarding the requirement for review and approval of natural gas well development projects targeting the Antes, Burket, Geneseo, Mandata, Middlesex, Needmore, or Rhinestreet shale formations.

DATES: April 21, 2011.

ADDRESSES: Susquehanna River Basin Commission, 1721 N. Front Street, Harrisburg, PA 17102–2391.

FOR FURTHER INFORMATION CONTACT: Richard A. Cairo, General Counsel, telephone: (717) 238–0423, ext. 306; fax: (717) 238–2436; e-mail: *rcairo@srbc.net;* or Thomas W. Beauduy, Deputy Executive Director, telephone: (717) 238–0423, ext. 305; fax: (717) 238–2436; e-mail: *tbeauduy@srbc.net.* Regular mail inquiries may be sent to the above address.

SUPPLEMENTARY INFORMATION: On April 21, 2011, Executive Director Paul O. Swartz issued the following determination: Pursuant to my authority under 18 CFR §§ 806.4(a)(8) and 806.5, I hereby determine that natural gas well development projects involving a withdrawal, diversion or consumptive use of water and targeting the Antes, Burket, Geneseo, Mandata, Middlesex, Needmore, or Rhinestreet shale formations shall be subject to the review and approval of the Susquehanna River Basin Commission (the "Commission"). These projects shall be in addition to and shall not affect any other gas well development projects targeting the Marcellus or Utica shale formations that the Commission has already determined to be subject to review and approval by prior determination or rulemaking action.

Any project sponsor proposing to initiate a gas well development project(s) targeting any of the shale formations subject to this determination that involves a withdrawal, diversion or consumptive use of water, regardless of quantity, is directed to submit an application requesting review and approval in accordance with 18 CFR part 806. All existing "Approvals by Rule" (ABRs) issued by the Commission under 18 CFR 806.22(f), are hereby modified to subject any natural gas well development activity targeting such shale formations to the terms and conditions thereof.

This determination may be appealed to the Commission within thirty (30) days of receipt of this notice in the manner described by 18 CFR 808.2.

Dated: April 21, 2011.

Paul O. Swartz,

Executive Director.

[FR Doc. 2011–10416 Filed 4–28–11; 8:45 am]

BILLING CODE 7040–01–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Notice With Respect to List of Countries Denying Fair Market Opportunities for Government-Funded Airport Construction Projects

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: Pursuant to section 533 of the Airport and Airway Improvement Act of 1982, as amended (49 U.S.C. 50104), the United States Trade Representative (USTR) has determined not to list any countries as denying fair market opportunities for U.S. products, suppliers, or bidders in foreign government-funded airport construction projects.

DATES: *Effective Date:* Date of publication.

FOR FURTHER INFORMATION CONTACT: Jean Heilman Grier, Senior Procurement Negotiator, Office of the United States Trade Representative, (202) 395–9476, or Maria Pagan, Associate General Counsel, Office of the United States Trade Representative, (202) 395–9626.

SUPPLEMENTARY INFORMATION: Section 533 of the Airport and Airway Improvement Act of 1982, as amended by section 115 of the Airport and Airway Safety and Capacity Expansion Act of 1987, Public Law 100–223 (codified at 49 U.S.C. 50104) ("the Act"), requires USTR to decide whether any foreign country has denied fair market opportunities to U.S. products, suppliers, or bidders in connection with airport construction projects of $500,000 or more that are funded in whole or in part by the government of such country. The list of such countries must be published in the **Federal Register**. USTR has not received any complaints or other information that indicates that U.S. products, suppliers, or bidders are being denied fair market opportunities in such airport construction projects. As a consequence, for purposes of the Act, USTR has decided not to list any countries as denying fair market opportunities for U.S. products, suppliers, or bidders in foreign government-funded airport construction projects.

Ronald Kirk,

United States Trade Representative.

[FR Doc. 2011–10473 Filed 4–28–11; 8:45 am]

BILLING CODE 3190–W1–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Assistance to Small Shipyards Grant Program; Catalog of Federal Domestic Assistance Number: 20.814

AGENCY: Maritime Administration, Department of Transportation, Office of Shipyards and Marine Engineering.

ACTION: Notice.

SUMMARY: There is currently $9,800,000 available for grants for capital and related improvements for qualified small shipyard facilities that will be effective in fostering efficiency, competitive operations, and quality ship construction, repair, and reconfiguration.

DATES: *Key Dates:* The period for submitting grant applications, as mandated by statute, commenced on April 15, 2011 and will terminate on June 14, 2011. The applications must be received by the Maritime Administration by 5 p.m. EDT on June 14, 2011. Applications received later than this time will not be considered. The Maritime Administration intends to award grants no later than August 15, 2011.

FOR FURTHER INFORMATION CONTACT: Office of Shipyards and Marine Engineering, Maritime Administration, Room W21–318, 1200 New Jersey Ave., SE., Washington, DC 20590; phone: (202) 366–5737; or fax: (202) 366–6988.

SUPPLEMENTARY INFORMATION:

Funding Opportunity: Section 54101 of Title 46, United States Code, and the Department of Defense and Full-Year Continuing Appropriations Act, 2011, 2011 Public Law 112–10 provide that the Maritime Administration shall establish an assistance program for small shipyards. Under this program, there is currently $9,800,000 available for grants for capital and related improvements for qualified small shipyard facilities that will be effective in fostering efficiency, competitive operations, and quality ship construction, repair, and reconfiguration. ($200,000 of the $10,000,000 appropriated for the program is reserved for program administration.) Such grants may not be used to construct buildings or other physical facilities or to acquire land unless such use is specifically approved by the Maritime Administration as being consistent with and supplemental to capital and related infrastructure improvements. Grant funds may also be used for maritime training programs to foster technical skills and operational productivity in communities whose economies are related to or dependent upon the maritime industry. Grants for such training programs may only be awarded to "Eligible Applicants" as described below, but training programs can be established through vendors to such applicants.

Award Information: The Maritime Administration intends to award the full amount of the available funding through grants to the extent that there are worthy applications. No more than 25 percent of the funds available will be awarded to any small shipyard facility in one geographic location that has more than 600 production employees. The Maritime Administration will seek to obtain the maximum benefit from the available funding by awarding grants for as many of the most worthy projects as possible. The Maritime Administration may partially fund applications by selecting parts of a total project. The start date and period of performance for each award will depend on the specific project and must be agreed to by the Maritime Administration.

Eligibility Information: 1. Eligible Applicants—the statutes referenced in "Funding Opportunity" above provide that shipyards can apply for grants. The small shipyard facility for which a grant is sought is defined as a shipyard facility in a single geographical location, located in or near a maritime community, which does not have more than 1200 employees. The applicant must be the operating entity of the shipyard facility. The shipyard facility must construct, repair, or reconfigure vessels 40 ft. in length or greater, for commercial or government use. 2. Eligible Projects—capital and related improvement projects that will be effective in fostering efficiency, competitive operations, and quality ship construction, repair, and reconfiguration; and training projects that will be effective in fostering employee skills and enhancing productivity. For capital improvement projects, all items proposed for funding must be new and to be owned by the applicant. For both capital improvement and training projects, all project costs, including the recipient's share, must be incurred after the date of the grant agreement.

Matching Requirements: The Federal funds for any eligible project will not exceed 75 percent of the total cost of such project. The remaining portion of the cost shall be paid in funds from or on behalf of the recipient. The applicant is required to submit detailed financial statements and supporting documentation demonstrating how and when such required matching funds are

proposed to be provided as described below. The recipient's entire matching requirement must be paid prior to payment of any federal funds for the project. However, for good cause shown, the Maritime Administrator may waive the matching requirement in whole or in part, if the Administrator determines that a proposed project merits support and cannot be undertaken without a higher percentage of federal financial assistance.

Application: An application must be filed on standard Form SF–424, which can be found on the Internet at Marad.dot.gov. Although the form is available electronically, the application must be filed in hard copy as indicated below due to the amount of information requested. A shipyard facility in a single geographic location applying for multiple projects must do so in a single application. The application for a grant must include all of the following information as an addendum to Form SF–424. The information should be organized in sections as described below:

Section 1: A description of the shipyard including (a) location of the shipyard; (b) a description of the shipyard facilities; (c) years in operation; (d) ownership; (e) customer base; (f) current order book, including type of work; (g) vessels delivered (or major projects) over last 5 years, and (h) Web site address, if any.

Section 2: For each project proposed for funding, the following:

(a) A comprehensive, detailed description of the project including a statement of whether the project will replace existing equipment, and if so the disposition of the replaced equipment.

(b) A description of the need for the project in relation to shipyard operations and business plan and an explanation of how the project will fulfill this need.

(c) An quantitative analysis demonstrating how the project will be effective in fostering efficiency, competitive operations, and quality ship construction, repair, or reconfiguration (for capital improvement projects), or how the project will be effective in fostering employee skills and enhancing productivity (for training projects). The analysis should quantify the benefits of the project in terms of man-hours saved, dollars saved, percentages, or other meaningful metrics. The methodology of the analysis should be explained, with identification of and justification for assumptions used.

(d) A detailed methodology and timeline for implementing the project.

(e) A detailed itemization of the cost of the project, together with supporting documentation, including current vendor quotes and estimates of installation costs.

(f) A statement explaining whether any elements of the project require action under the National Environmental Policy Act (42 U.S.C. 4321, *et seq.*) or require any licenses or permits.

Items 2(a) through 2(f) should be repeated, in order, for each separate project included in the application.

Section 3: A table with a prioritized list of projects, their respective total costs, and Government portion (in dollars) for each.

Section 4: A description of existing programs or arrangements, if any, which will be used to supplement or leverage the federal grant assistance.

Section 5: Special economic circumstances and conditions, if any, of the maritime community in which the shipyard is located (beyond that which is reflected in the unemployment rate of the county in which the shipyard is located and whether that county is an economically distressed area, as defined by 42 U.S.C. 3161).

Section 6: Shipyard company officer's certification of each of the following items:

(a) That the shipyard facility for which a grant is sought is located in a single geographical location in or near a maritime community and (i) the shipyard facility has no more than 600 production employees, or (ii) the shipyard facility has more than 600 production employees, but fewer than 1200 production employees (the shipyard officer must certify to one or the other of (i) or (ii));

(b) That the applicant has the authority to carry out the proposed project; and

(c) Certification in accordance with the Department of Transportation's regulation restricting lobbying, 49 CFR part 20, that the applicant has not, and will not, make any prohibited payments out of the requested grant.

Certifications are not required to be notarized.

Section 7: Unique identifier of shipyard's parent company (when applicable): Data Universal Numbering System (DUNS + 4 number) (when applicable).

Section 8: 2009 or 2010 (if available) year-end, audited, reviewed or compiled financial statements prepared by a certified public accountant, according to U.S. generally accepted accounting principles, not on an income tax basis. September 30, 2010 financial statements prepared by the applicant entity if December 31, 2010 CPA-prepared statements are not available. Do not provide tax returns.

Section 9: Statement regarding the relationship between applicants and any parents, subsidiaries, or affiliates, if any such entity is going to provide a portion of matching funds.

Section 10: Evidence documenting applicant's ability to satisfy the proposed matching fund requirement (loan agreement, commitment from investors, cash on balance sheet, etc.) and in the times outlined in 2(d) above.

Section 11: Pro-forma financial statements reflecting (a) September 30, or December 31, 2010 financial condition; (b) effect on balance sheet of grant and matching funds (i.e. a decrease in cash or increase in debt, additional equity, or an increase in fixed assets); and (c) impact on applicant entity's projected financial condition (balance sheet) by completion of proposed project, showing that applicant will have sufficient financial resources to remain in business.

Section 12: Statement whether during the past five years, the applicant or any predecessor or related entity has been in bankruptcy or in reorganization under Chapter 11 of the Bankruptcy Code, or in any insolvency or reorganization proceedings, and whether any substantial property of the applicant or any predecessor or related entity has been acquired in any such proceeding or has been subject to foreclosure or receivership during such period. If so, give details.

Additional information may be requested as deemed necessary by the Maritime Administration in order to facilitate and complete its review of the application. If such information is not provided, the Maritime Administration may deem the application incomplete and cease processing it.

Where to File Application: Submit an original copy and one additional paper copy of the application and two CDs each containing a complete electronic version of the paper copy in PDF format to: Associate Administrator for Business and Finance Development, Room W21–318, Maritime Administration, 1200 New Jersey Ave., SE., Washington, DC 20590. Submissions should be sent by express delivery service.

Evaluation of Applications: The Maritime Administration will evaluate the applications on the basis of how well the project for which a grant is requested would be effective in fostering efficiency, competitive operations, and quality ship construction, repair, and reconfiguration (for capital improvement projects) or how well the project for which a grant is requested would be effective in fostering employee

skills and enhancing productivity (for training projects), and the economic circumstances and conditions of the surrounding community. The economic circumstances and conditions description will be based on the unemployment rate of the county in which the shipyard is located and whether that county is an economically distressed area, supplemented by any special economic circumstances and conditions identified by the applicant. The Maritime Administration will award grants in its sole discretion in such amounts and under such conditions it determines will best further the statutory purposes of the small shipyard grant program. Projects that may require additional environmental assessments such as those including waterside improvements (dredging, bulkheading, pier work, pilings, etc.) will not be considered for funding. Preference will be given to funding applications: (1) That propose matching funds greater than a 25% share of the project; (2) that impact existing operations and/or product lines rather than expand the capabilities of the shipyard into new product lines or capabilities; and (3) that result in a geographic diversity of grant recipients.

Potential applicants are advised that it is expected, based on past experience, that application requests will far exceed the funds available and that only a small percentage of applications will be funded. It is anticipated that about 10 applications will be selected for funding with an average grant amount of about $1 million.

Conditions Attached to Awards: The grant agreement will set out the records to be maintained by the recipient that must be available for review and audit by the Maritime Administration, as well as any other conditions and requirements.

Dated: April 26, 2011.

By Order of the Maritime Administrator.

Murray Bloom,

Acting Secretary, Maritime Administration.

[FR Doc. 2011–10511 Filed 4–27–11; 4:15 pm]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35485]

Nittany & Bald Eagle Railroad Company—Temporary Trackage Rights Exemption—Norfolk Southern Railway Company

Norfolk Southern Railway Company (NSR), pursuant to a written trackage rights agreement dated February 25, 2011, has agreed to grant nonexclusive overhead temporary trackage rights to Nittany & Bald Eagle Railroad Company (N&BE) over a portion of NSR's line of railroad between Lock Haven, PA (milepost BR 194.2), and Driftwood, PA (milepost BR 139.2), a distance of 55 miles.[1]

The transaction is scheduled to be consummated on or after May 15, 2011, the effective date of the exemption (30 days after the exemption was filed). The temporary trackage rights are scheduled to expire on December 15, 2011. The purpose of the temporary trackage rights is to allow N&BE to operate bridge train service for temporary, seasonal traffic originating on N&BE for delivery to an off-line destination.

As a condition to this exemption, any employees affected by the acquisition of the temporary trackage rights will be protected by the conditions imposed in *Norfolk & Western Railway—Trackage Rights—Burlington Northern, Inc.,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Railway, Inc.—Lease & Operate—California Western Railroad,* 360 I.C.C. 653 (1980), and any employees affected by the discontinuance of those trackage rights will be protected by the conditions set out in *Oregon Short Line Railroad & The Union Pacific Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979).

This notice is filed under 49 CFR 1180.2(d)(8). If it 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 transaction. Petitions for stay must be filed no later than May 6, 2011 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35485, 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 Richard R. Wilson, 518 N. Center Street, Suite 1, Ebensburg, PA 15931.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: April 26, 2011.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Andrea Pope-Matheson,

Clearance Clerk.

[FR Doc. 2011–10414 Filed 4–28–11; 8:45 am]

BILLING CODE 4915–01–P

[1] A redacted, executed trackage rights agreement between NSR and N&BE was filed with the notice of exemption. The unredacted version was concurrently filed under seal along with a motion for protective order, which will be addressed in a separate decision.

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35492]

Atlantic and Western Railway, Limited Partnership—Trackage Rights Exemption—Norfolk Southern Railway Company

Pursuant to a written trackage rights agreement, Norfolk Southern Railway Company (NSR) has agreed to grant limited local trackage rights to Atlantic and Western Railway, Limited Partnership (ATW)[1] over approximately 13.8 miles of NSR's rail line between milepost NS–279.9, NSR's connection with ATW, at Cumnock, NC and milepost 266.1 at Brickhaven, NC (the line).[2]

The transaction is scheduled to be consummated on May 13, 2011, the effective date of the exemption (30 days after the exemption was filed).

The purpose of the transaction is to allow ATW to extend its existing rail service to the three customers located on the line.

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk & Western Railway—Trackage Rights—Burlington Northern, Inc.,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Railway—Lease and Operate—*

[1] By letter filed April 15, 2011, ATW corrects two places in its initial filing in which its corporate name was incorrectly identified as Atlantic and Western Railway Company, Limited Partnership.

[2] These trackage rights also include sufficient head/tail room at both ends of the line to safely conduct operations. According to the agreement, ATW's trackage rights are limited to providing local service to Noble Oil at Colon, NC, Lee Brick & Tile at Leebrick, NC, and General Shale Brick at Brickhaven, or their respective successors. In addition, the written trackage agreement does not permit ATW to handle coal.

California Western Railroad, 360 I.C.C. 653 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Stay petitions must be filed by May 6, 2011 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35492, 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 Thomas J. Litwiler, 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: April 25, 2011.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2011–10372 Filed 4–28–11; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Privacy Act of 1974, as Amended; System of Records

AGENCY: Treasury.

ACTION: Notice of Alteration to a Privacy Act System of Records.

SUMMARY: The Treasury Department gives notice of proposed alterations to the system of records entitled, "Treasury .004—Freedom of Information Act/Privacy Act Request Records" which is subject to the Privacy Act of 1974.

DATES: *Effective Date:* April 29, 2011.

FOR FURTHER INFORMATION CONTACT: Hugh Gilmore, Director, Disclosure Services, *Hugh.Gilmore@treasury.gov,* 202–622–0876.

SUPPLEMENTARY INFORMATION: The Department of the Treasury (Department) is amending Treasury .004—Freedom of Information Act/Privacy Act Request Records to assist the Department in carrying out its responsibilities under Public Law 110–175, 121 Stat. 2524, the "Openness Promotes Effectiveness in our National Government Act of 2007" to increase public access to Treasury Records.

The information in the system will enable the appropriate Freedom of Information Act office within the Department to administratively control and/or process requests for records; to ensure compliance with the Freedom of Information Act (FOIA) and Privacy Act (PA); and to collect raw data for the annual reporting requirements of the FOIA and other Department management reporting requirements. The system also simplifies the FOIA/PA request process by allowing requesters to submit requests online.

This document makes minor alterations to the system of records notice reflecting that the contact information under "Categories of records in the system" now includes email, and under "Purposes," the system now allows for online submissions by a requester. The language under "Safeguards" has been updated to reflect the additional standards and guidance issued by the National Institute of Standards and Technology. In addition, the Treasury components and offices listed under "System location" and "System manager(s) and addresses" have been revised to reflect the current organization of the Department.

The notice for the system of records was last published in its entirety on September 7, 2010, at 75 FR 54429.

The described alterations are not considered significant and are not subject to the reporting requirements of subsection (r) of the Privacy Act of 1974.

The system of records notice for the amended "Treasury .004—Freedom of Information Act/Privacy Act Request Records" is published in its entirety below.

Dated: April 25, 2011.

Melissa Hartman,

Deputy Assistant Secretary for Privacy, Transparency, and Records.

TREASURY .004

SYSTEM NAME:

Freedom of Information Act/Privacy Act Request Records—Treasury.

SYSTEM LOCATION:

Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220. The locations at which the system is maintained by Treasury components and their associated field offices are:

(1) Departmental Offices (DO), which includes the Office of Inspector General (OIG), the Community Development Financial Institutions Fund (CDFI), and Special Inspector General for the Troubled Asset Relief Program (SIGTARP);

(2) Alcohol and Tobacco Tax and Trade Bureau (TTB);

(3) Office of the Comptroller of the Currency (OCC);

(4) Bureau of Engraving and Printing (BEP);

(5) Financial Management Service (FMS);

(6) United States Mint (MINT);

(7) Bureau of the Public Debt (BPD);

(8) Office of Thrift Supervision (OTS);

(9) Financial Crimes Enforcement Network (FinCEN); and

(10) Treasury Inspector General for Tax Administration (TIGTA).

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who have: (1) Requested access to records pursuant to the Freedom of Information Act, 5 U.S.C. 552 (FOIA), or who have appealed initial denials of their requests; and/or (2) made a request for access, amendment, or other action pursuant to the Privacy Act of 1974, 5 U.S.C. 552a (PA).

CATEGORIES OF RECORDS IN THE SYSTEM:

Requests for records or information pursuant to the FOIA/PA, which includes the names of individuals making written or electronically submitted requests for records under the FOIA/PA; the contact information of the requesting individual such as their mailing address, e-mail address, and/or phone number; and the dates of such requests and their receipt. Supporting records include the written correspondence received from requesters and responses made to such requests; internal processing documents and memoranda; referrals and copies of records provided or withheld; and may include legal memoranda and opinions. Comparable records are maintained in this system with respect to any appeals made from initial denials of access, refusal to amend records, and lawsuits under the FOIA/PA.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Freedom of Information Act, 5 U.S.C. 552; Privacy Act of 1974, 5 U.S.C. 552a; and 5 U.S.C. 301.

PURPOSE(S):

The system is used by officials to administratively control and/or process requests for records to ensure compliance with the FOIA/PA and to collect data for the annual reporting requirements of the FOIA and other Departmental management report requirements. In addition, the system allows for online submission to expedite the consideration of requests.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

These records may be used to:

(1) Disclose pertinent information to appropriate Federal, foreign, State,

local, tribal or other public authorities or self-regulatory organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, or license, where the disclosing agency becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation;

(2) Disclose information to a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, in response to a court order, or in connection with criminal law proceedings;

(3) Provide information to a congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(4) Disclose information to another Federal agency to (a) permit a decision as to access, amendment or correction of records to be made in consultation with or by that agency, or (b) verify the identity of an individual or the accuracy of information submitted by an individual who has requested access to or amendment or correction of records;

(5) Disclose information to the Department of Justice when seeking legal advice, or when (a) the agency, or (b) any component thereof, or (c) any employee of the agency in his or her official capacity, or (d) any employee of the agency in his or her individual capacity where the Department of Justice has agreed to represent the employee, or (e) the United States, where the agency determines that litigation is likely to affect the agency or any of its components, is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice is deemed by the agency to be relevant and necessary to the litigation;

(6) Disclose information to the appropriate foreign, State, local, tribal, or other public authority or self-regulatory organization for the purpose of (a) consulting as to the propriety of access to or amendment or correction of information obtained from that authority or organization, or (b) verifying the identity of an individual who has requested access to or amendment or correction of records;

(7) Disclose information to contractors and other agents who have been engaged by the Department or one of its bureaus to provide products or services associated with the Department's or bureaus' responsibilities arising under the FOIA/PA;

(8) Disclose information to the National Archives and Records Administration for use in records management inspections;

(9) Disclose information to appropriate agencies, entities, and persons when (a) the Department suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic media, computer paper printout, index file cards, and paper records in file folders.

RETRIEVABILITY:

Retrieved by name, subject, request file number, or other data element as may be permitted by an automated system.

SAFEGUARDS:

Protection and control of any sensitive but unclassified (SBU) records are in accordance with Treasury Directive Publication 71–10, Department of the Treasury Security Manual; DO P–910, Departmental Offices Information Technology Security Policy Handbook; Treasury Directive Publication 85–01, Treasury Information Technology Security Program; National Institute of Standards and Technology 800–122 and any supplemental guidance issued by individual bureaus; the National Institute of Standards and Technology Special Publication 800–53 Revision 3, Recommended Security Controls for Federal Information Systems and Organizations; and Guide to Protecting the Confidentiality of Personally Identifiable Information. Access to the records is available only to employees responsible for the management of the system and/or employees of program offices who have a need for such information.

RETENTION AND DISPOSAL:

The records pertaining to FOIA/PA requests are retained and disposed of in accordance with the National Archives and Records Administration's General Record Schedule 14—Information Services Records.

SYSTEM MANAGER(S) AND ADDRESS:

Department of the Treasury: Official prescribing policies and practices—Departmental Disclosure Officer, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220. The system managers for the Treasury components are:

1. (a) DO: Director, Disclosure Services, Department of the Treasury, Washington, DC 20220.

(b) OIG: Director, Disclosure Services, Department of the Treasury, Washington, DC 20220.

(c) CDFI: Director, Disclosure Services, Department of the Treasury, Washington, DC 20220.

(d) SIGTARP: Chief Counsel, Office of the Special Inspector General for the Troubled Asset Relief Program, 1801 L Street, NW., Washington, DC 20036.

2. Alcohol and Tobacco Tax and Trade Bureau (TTB): 1310 G St., NW., Washington, DC 20220.

3. BEP: Disclosure Officer, FOIA Office, 14th & C Streets, SW., Washington, DC 20228.

4. FMS: Disclosure Officer, 401 14th Street, SW., Washington, DC 20227.

5. Mint: Disclosure Officer, 801 9th Street, NW., 8th Floor, Washington, DC 20220.

6. OCC: Disclosure Officer, Communications Division, Washington, DC 20219.

7. BPD: Information Disclosure Officer, Avery Street Building, 320 Avery Street, Parkersburg, WV.

8. OTS: Manager, Freedom of Information Act Office, 1700 G Street, NW., Washington, DC 20552.

9. FinCEN: P.O. Box 39, Vienna, VA 22182.

10. TIGTA: Director, Human Capital and Support Services, 1125 15th Street, NW., Suite 700A, Washington, DC 20005.

NOTIFICATION PROCEDURE:

Individuals seeking notification and access to any record contained in the system of records, or seeking to contest its content, may inquire in accordance with instructions pertaining to individual Treasury components appearing at 31 CFR part 1, subpart C, appendices A–M.

RECORD ACCESS PROCEDURES:

See "Notification procedure" above.

CONTESTING RECORD PROCEDURES:

See "Notification procedure" above.

RECORD SOURCE CATEGORIES:

The information contained in these files originates from individuals who make FOIA/PA requests and agency officials responding to those requests.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None. Please note that the Department has claimed one or more exemptions (see 31 CFR 1.36) for a number of its other systems of records under 5 U.S.C. 552a(j)(2) and (k)(1), (2), (3), (4), (5), and (6). During the course of a FOIA/PA action, exempt materials from those other systems may become a part of the case records in this system. To the extent that copies of exempt records from those other systems have been recompiled and/or entered into these FOIA/PA case records, the Department claims the same exemptions for the records as they have in the original primary systems of records of which they are a part.

[FR Doc. 2011–10417 Filed 4–28–11; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Homeless Veterans; 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 Homeless Veterans will be held May 18–20, 2011, in the Harbor View Room at the Best Western Bay Harbor Hotel, 7700 Courtney Campbell Causeway, Tampa, Florida. The meeting will be held from 8 a.m. to 4 p.m. and is open to the public.

The purpose of the Committee is to provide the Secretary of Veterans Affairs with an on-going assessment of the effectiveness of the policies, organizational structures, and services of the Department in assisting homeless Veterans. The Committee shall assemble and review information relating to the needs of homeless Veterans and provide on-going advice on the most appropriate means of providing assistance to homeless Veterans. The Committee will make recommendations to the Secretary regarding such activities.

The agenda will include briefings from VA and other officials regarding services for homeless Veterans. The Committee will also discuss final preparation of its upcoming annual report and recommendations to the Secretary.

No time will be allocated for receiving oral presentations from the public. However, members of the public may submit written statements for review by the Committee to Mr. Pete Dougherty, Designated Federal Officer, at the Department of Veterans Affairs, Homeless Veterans Program Office (075D), 810 Vermont Avenue, NW., Washington, DC 20420, or e-mail at *Homeless.Vets@va.gov.* Any member of the public wishing to attend the meeting should contact Mr. Dougherty at (202) 461–1857.

Dated: April 25, 2011.

By Direction of the Secretary.

William F. Russo,

Director of Regulations Management, Office of General Counsel.

[FR Doc. 2011–10371 Filed 4–28–11; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

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Part II

Department of the Treasury

Office of the Comptroller of the Currency
12 CFR Part 43

Federal Reserve System

12 CFR Part 244

Federal Deposit Insurance Corporation

12 CFR Part 373

Federal Housing Finance Agency

12 CFR Part 1234

Securities and Exchange Commission

17 CFR Part 246

Department of Housing and Urban Development

24 CFR Part 267
Credit Risk Retention; Proposed Rule

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 43

[Docket No. OCC–2011–0002]

RIN 1557–AD40

FEDERAL RESERVE SYSTEM

12 CFR Part 244

[Docket No. 2011–1411]

RIN 7100–AD–70

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 373

RIN 3064–AD74

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1234

RIN 2590–AA43

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 246

[Release No. 34–64148; File No. S7–14–11]

RIN 3235–AK96

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 267

RIN 2501–AD53

Credit Risk Retention

AGENCIES: Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); U.S. Securities and Exchange Commission (Commission); Federal Housing Finance Agency (FHFA); and Department of Housing and Urban Development (HUD).

ACTION: Proposed rule.

SUMMARY: The OCC, Board, FDIC, Commission, FHFA, and HUD (the Agencies) are proposing rules to implement the credit risk retention requirements of section 15G of the Securities Exchange Act of 1934 (15 U.S.C. 78o–11), as added by section 941 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 15G generally requires the securitizer of asset-backed securities to retain not less than five percent of the credit risk of the assets collateralizing the asset-backed securities. Section 15G includes a variety of exemptions from these requirements, including an exemption for asset-backed securities that are collateralized exclusively by residential mortgages that qualify as "qualified residential mortgages," as such term is defined by the Agencies by rule.

DATES: Comments must be received by June 10, 2011.

ADDRESSES: Interested parties are encouraged to submit written comments jointly to all of the Agencies. Commenters are encouraged to use the title "Credit Risk Retention" to facilitate the organization and distribution of comments among the Agencies. Commenters are also encouraged to identify the number of the specific request for comment to which they are responding.

Office of the Comptroller of the Currency: Because paper mail in the Washington, DC, area and at the OCC is subject to delay, commenters are encouraged to submit comments by the Federal eRulemaking Portal or e-mail, if possible. Please use the title "Credit Risk Retention" to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal—"Regulations.gov":* Go to *http://www.regulations.gov,* under the "More Search Options" tab click next to the "Advanced Docket Search" option where indicated, select "Comptroller of the Currency" from the agency drop-down menu, then click "Submit." In the "Docket ID" column, select "OCC–2011–0002" to submit or view public comments and to view supporting and related materials for this proposed rule. The "How to Use This Site" link on the Regulations.gov home page provides information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.
- *E-mail: regs.comments@occ.treas.gov.*
- *Mail:* Office of the Comptroller of the Currency, 250 E Street, SW., Mail Stop 2–3, Washington, DC 20219.
- *Fax:* (202) 874–5274.
- *Hand Delivery/Courier:* 250 E Street, SW., Mail Stop 2–3, Washington, DC 20219.

Instructions: You must include "OCC" as the agency name and "Docket Number OCC–2011–0002" in your comment. In general, OCC will enter all comments received into the docket and publish them on the Regulations.gov Web site without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this proposed rulemaking by any of the following methods:

- *Viewing Comments Electronically:* Go to *http://www.regulations.gov,* under the "More Search Options" tab click next to the "Advanced Document Search" option where indicated, select "Comptroller of the Currency" from the agency drop-down menu, then click "Submit." In the "Docket ID" column, select "OCC–2011–0002" to view public comments for this rulemaking action.
- *Viewing Comments Personally:* You may personally inspect and photocopy comments at the OCC, 250 E Street, SW., Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–4700. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.
- *Docket:* You may also view or request available background documents and project summaries using the methods described above.

Board of Governors of the Federal Reserve System: You may submit comments, identified by Docket No. R–1411, by any of the following methods:

- *Agency Web Site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: regs.comments@federalreserve.gov.* Include the docket number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Address to Jennifer J. Johnson, Secretary, Board of Governors of the

Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments will be made available on the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

Federal Deposit Insurance Corporation: You may submit comments, identified by RIN number, by any of the following methods:

- *Agency Web Site: http://www.FDIC.gov/regulations/laws/federal/notices.html.* Follow instructions for submitting comments on the Agency Web Site.
- *E-mail: Comments@FDIC.gov.* Include the RIN number on the subject line of the message.
- *Mail:* Robert E. Feldman, Executive Secretary, *Attention:* Comments, Federal Deposit Insurance Corporation, 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.

Instructions: All comments received must include the agency name and RIN for this rulemaking and will be posted without change to *http://www.fdic.gov/regulations/laws/federal/propose.html,* including any personal information provided.

Securities and Exchange Commission: You may submit comments by the following method:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–14–11 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.
- All submissions should refer to File Number S7–14–11. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for website 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. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

Federal Housing Finance Agency: You may submit your written comments on the proposed rulemaking, identified by RIN number 2590–AA43, by any of the following methods:

- *E-mail:* Comments to Alfred M. Pollard, General Counsel, may be sent by e-mail at *RegComments@fhfa.gov.* Please include "RIN 2590–AA43" in the subject line of the message.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by e-mail to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by the Agency. Please include "RIN 2590–AA43" in the subject line of the message.
- *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel, *Attention:* Comments/RIN 2590–AA43, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552.
- *Hand Delivery/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA43, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. A hand-delivered package should be logged at the Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.

All comments received by the deadline will be posted for public inspection without change, including any personal information you provide, such as your name and address, on the FHFA website at *http://www.fhfa.gov.* Copies of all comments timely received will be available for public inspection and copying at the address above on government-business days between the hours of 10 a.m. and 3 p.m. To make an appointment to inspect comments please call the Office of General Counsel at (202) 414–6924.

Department of Housing and Urban Development: Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500. Communications must refer to the following docket number [FR–5504–P–01] and title of this rule. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

- Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500.
- Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at www.regulations.gov. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the www.regulations.gov website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.
- **NOTE:** To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.
- No Facsimile Comments. Facsimile (FAX) comments are not acceptable.
- Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an appointment to review the public comments must be scheduled in advance by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Information Relay Service at 800–877–8339. Copies of all comments submitted are available for inspection and downloading at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT:
OCC: Chris Downey, Risk Specialist, Financial Markets Group, (202) 874–4660; Kevin Russell, Director, Retail Credit Risk, (202) 874–5170; Darrin Benhart, Director, Commercial Credit Risk, (202) 874–5670; or Jamey Basham, Assistant Director, or Carl Kaminski, Senior Attorney, Legislative and Regulatory Activities Division, (202) 874–5090, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

Board: Benjamin W. McDonough, Counsel, (202) 452–2036; April C. Snyder, Counsel, (202) 452–3099; Sebastian R. Astrada, Attorney, (202) 452–3594; or Flora H. Ahn, Attorney, (202) 452–2317, Legal Division; Thomas R. Boemio, Manager, (202) 452–2982; Donald N. Gabbai, Senior Supervisory Financial Analyst, (202) 452–3358; or Sviatlana A. Phelan, Financial Analyst, (202) 912–4306, Division of Banking Supervision and Regulation; Andreas Lehnert, Deputy Director, Office of Financial Stability Policy and Research, (202) 452–3325; or Brent Lattin, Counsel, (202) 452–3367, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551.

FDIC: Beverlea S. Gardner, Special Assistant to the Chairman, (202) 898–3640; Mark L. Handzlik, Counsel, (202) 898–3990; Phillip E. Sloan, Counsel, (703) 562–6137; or Petrina R. Dawson, Counsel, (703) 562–2688, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

Commission: Jay Knight, Attorney-Advisor in the Office of Rulemaking, or Katherine Hsu, Chief of the Office of Structured Finance, Division of Corporation Finance, at (202) 551–3753, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–3628.

FHFA: Patrick J. Lawler, Associate Director and Chief Economist, *Patrick.Lawler@fhfa.gov,* (202) 414–3746; Austin Kelly, Associate Director for Housing Finance Research, *Austin.Kelly@fhfa.gov,* (202) 343–1336; Phillip Millman, Principal Capital Markets Specialist, *Phillip.Millman@fhfa.gov,* (202) 343–1507; or Thomas E. Joseph, Senior Attorney Advisor, *Thomas.Joseph@fhfa.gov,* (202) 414–3095; Federal Housing Finance Agency, Third Floor, 1700 G Street, NW., Washington, DC 20552. The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877–8339.

HUD: Robert C. Ryan, Deputy Assistant Secretary for Risk Management and Regulatory Affairs, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 9106, Washington, DC 20410; telephone number 202–402–5216 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

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I. Introduction

The Agencies are requesting comment on proposed rules (proposal or proposed rules) to implement the requirements of section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Act, or Dodd-Frank Act),[1] which is codified as new section 15G of the Securities Exchange Act of 1934 (the Exchange Act).[2] Section 15G of the Exchange Act, as added by section 941(b) of the Dodd-Frank Act, generally requires the Board, the FDIC, the OCC (collectively, referred to as the Federal banking agencies), the Commission, and, in the case of the securitization of any "residential mortgage asset," together with HUD and FHFA, to jointly prescribe regulations that (i) require a securitizer to retain not less than five percent of the credit risk of any asset that the securitizer, through the issuance of an asset-backed security (ABS), transfers, sells, or conveys to a third party, and (ii) prohibit a securitizer from directly or indirectly hedging or otherwise transferring the credit risk that the securitizer is required to retain under section 15G and the Agencies' implementing rules.[3]

[1] Public Law 111–203, 124 Stat. 1376 (2010).
[2] 15 U.S.C. 78o–11.
[3] *See* 15 U.S.C. 78o–11(b), (c)(1)(A) and (c)(1)(B)(ii).

Section 15G of the Exchange Act exempts certain types of securitization transactions from these risk retention requirements and authorizes the Agencies to exempt or establish a lower risk retention requirement for other types of securitization transactions. For example, section 15G specifically provides that a securitizer shall not be required to retain any part of the credit risk for an asset that is transferred, sold, or conveyed through the issuance of ABS by the securitizer, if all of the assets that collateralize the ABS are qualified residential mortgages (QRMs), as that term is jointly defined by the Agencies.[4] In addition, section 15G states that the Agencies must permit a securitizer to retain less than five percent of the credit risk of commercial mortgages, commercial loans, and automobile loans that are transferred, sold, or conveyed through the issuance of ABS by the securitizer if the loans meet underwriting standards established by the Federal banking agencies.[5]

[4] *See* 15 U.S.C. 78o–11(c)(1)(C)(iii), (4)(A) and (B).

[5] *See id.* at sec. 78o–11(c)(1)(B)(ii) and (2).

As shown in tables A, B, C, and D below, the securitization markets are an important source of credit to U.S. households and businesses and state and local governments.[6]

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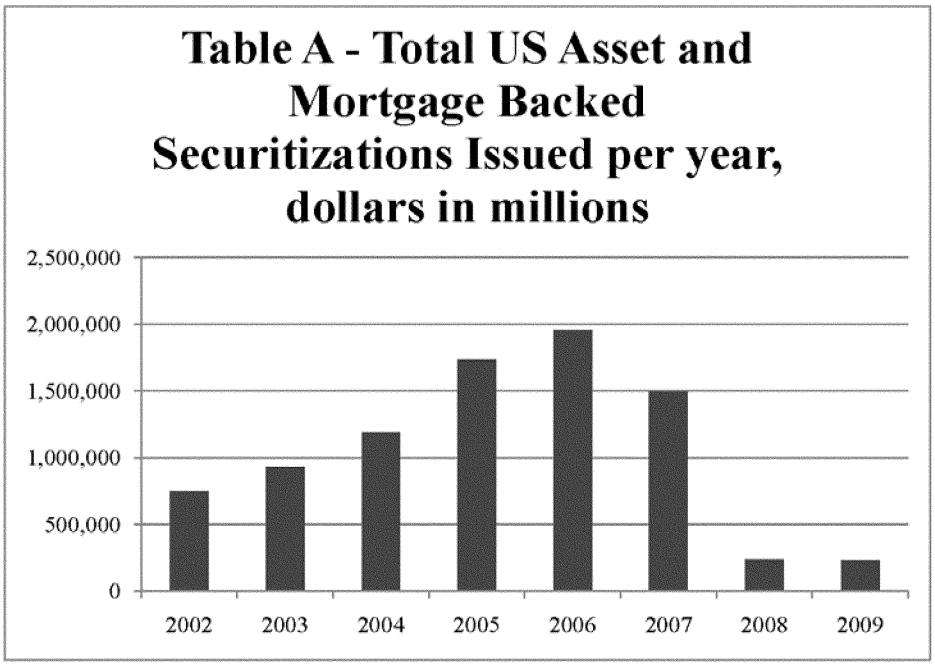
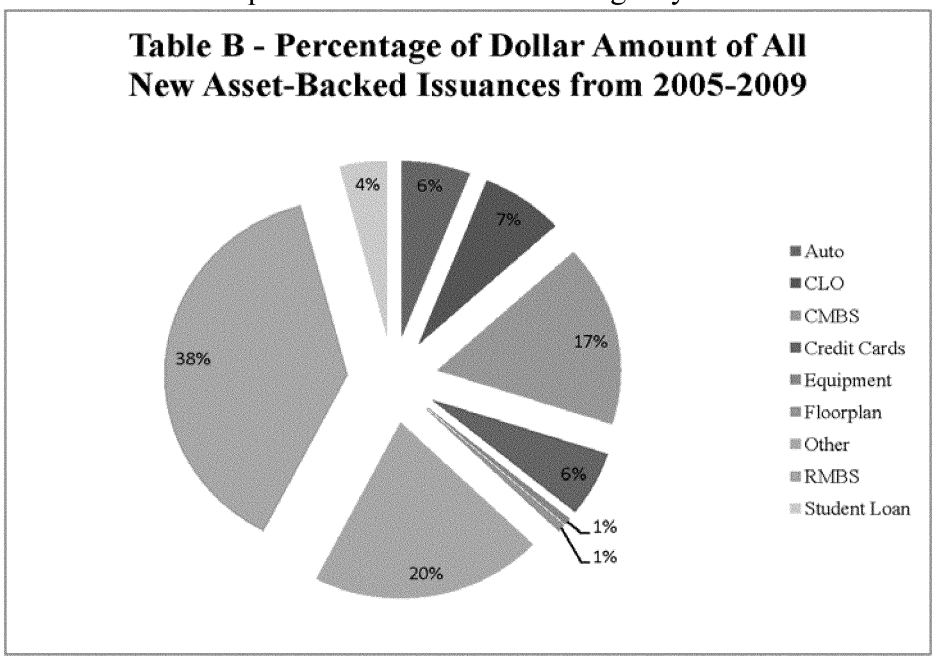
[6] Data are through September 2010. All data from Asset Backed Alert except: CMBS data from Commercial Mortgage Alert, CLO data from Securities Industry and Financial Markets Association. The tables do not include any data on securities issued or guaranteed by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation.



Note: This table is published in color in each Agency's website



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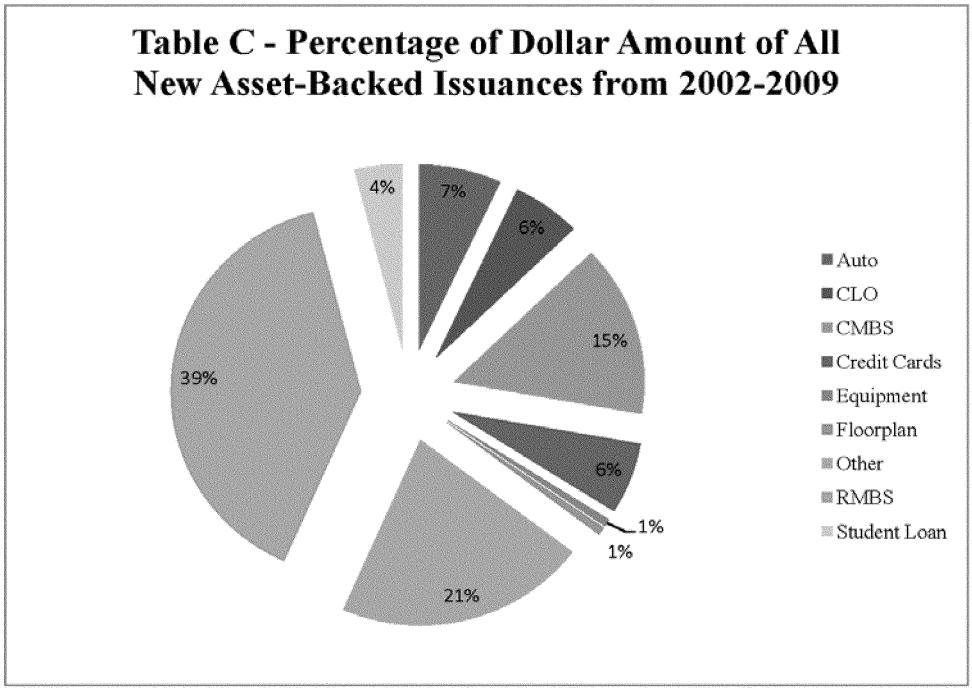

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TABLE D—TOTAL U.S. ASSET AND MORTGAGE BACKED SECURITIZATIONS ISSUED PER YEAR

[Dollars in millions]

	2002	2003	2004	2005	2006	2007	2008	2009	2010	Total 2002 3Q2010
Auto	95,484	86,350	72,881	103,717	82,000	66,773	35,469	53,944	43,104	639,724
CLO	30,388	22,584	32,192	69,441	171,906	138,827	27,489	2,033	.....	494,860
CMBS	89,900	107,354	136,986	245,883	305,714	319,863	33,583	38,750	27,297	1,305,329
Credit Cards	73,004	67,385	51,188	62,916	72,518	94,470	61,628	46,581	6,149	535,839
Equipment	7,062	9,022	6,288	9,030	8,404	6,066	3,014	7,240	5,010	61,137
Floorplan	3,000	6,315	11,848	12,670	12,173	6,925	1,000	4,959	8,619	67,510
Other	135,384	196,769	330,161	444,137	516,175	165,515	19,872	10,652	24,936	1,843,601
RMBS	287,916	396,288	503,911	724,115	723,257	641,808	28,612	48,082	39,830	3,393,819
Student Loan	25,367	40,067	45,759	62,212	65,745	5,812,212	28,199	20,839	13,899	360,210
Total	747,506	932,134	1,191,216	1,734,122	1,957,891	1,498,370	238,868	233,079	168,843	.....

Note: 2010 Data are through the month of September.

When properly structured, securitization provides economic benefits that lower the cost of credit to households and businesses.[7] However, when incentives are not properly aligned and there is a lack of discipline in the origination process, securitization can result in harm to investors, consumers, financial institutions, and the financial system. During the financial crisis, securitization displayed significant vulnerabilities to informational and incentive problems among various parties involved in the process.[8]

For example, as noted in the legislative history of section 15G, under the "originate to distribute" model, loans were made expressly to be sold into securitization pools, with lenders often not expecting to bear the credit risk of borrower default.[9] In addition, participants in the securitization chain may be able to affect the value of the ABS in opaque ways, both before and after the sale of the securities, particularly if those assets are resecuritized into complex instruments

[7] Securitization may reduce the cost of funding, which is accomplished through several different mechanisms. For example, firms that specialize in originating new loans and that have difficulty funding existing loans may use securitization to access more liquid capital markets for funding. In addition, securitization can create opportunities for more efficient management of the asset–liability duration mismatch generally associated with the funding of long-term loans, for example, with short-term bank deposits. Securitization also allows the structuring of securities with differing maturity and credit risk profiles that may appeal to a broad range of investors from a single pool of assets. Moreover, securitization that involves the transfer of credit risk allows financial institutions that primarily originate loans to particular classes of borrowers, or in particular geographic areas, to limit concentrated exposure to these idiosyncratic risks on their balance sheets. *See generally Report to the Congress on Risk Retention,* Board of Governors of the Federal Reserve System, at 8 (October 2010), *available at http://federalreserve.gov/boarddocs/rptcongress/securitization/riskretention.pdf* (Board Report).

[8] *See* Board Report at 8–9.

[9] *See* S. Rep. No. 111–176, at 128 (2010).

such as collateralized debt obligations (CDOs) and CDOs-squared.[10] Moreover, some lenders using an "originate-to-distribute" business model loosened their underwriting standards knowing that the loans could be sold through a securitization and retained little or no continuing exposure to the quality of those assets.[11]

The risk retention requirements added by section 15G are intended to help address problems in the securitization markets by requiring that securitizers, as a general matter, retain an economic interest in the credit risk of the assets they securitize. As indicated in the legislative history of section 15G, "When securitizers retain a material amount of risk, they have 'skin in the game,' aligning their economic interest with those of investors in asset-backed securities."[12] By requiring that the securitizer retain a portion of the credit risk of the assets being securitized, section 15G provides securitizers an incentive to monitor and ensure the quality of the assets underlying a securitization transaction, and thereby helps align the interests of the securitizer with the interests of investors. Additionally, in circumstances where the assets collateralizing the ABS meet underwriting and other standards that should ensure the assets pose low credit risk, the statute provides or permits an exemption.[13]

The credit risk retention requirements of section 15G are an important part of the legislative and regulatory efforts to address weaknesses and failures in the securitization process and the securitization markets. Section 15G complements other parts of the Dodd-Frank Act intended to improve the securitization markets. These include, among others, provisions that strengthen the regulation and supervision of nationally recognized statistical rating agencies (NRSROs) and improve the transparency of credit ratings;[14] provide for issuers of registered ABS offerings to perform a review of the assets underlying the ABS and disclose the nature of the review;[15] and require issuers of ABS to disclose the history of the repurchase requests they received and repurchases they made related to their outstanding ABS.[16]

In developing the proposed rules, the Agencies have taken into account the diversity of assets that are securitized, the structures historically used in securitizations, and the manner in which securitizers may have retained exposure to the credit risk of the assets they securitize.[17] As described in detail below, the proposed rules provide several options securitizers may choose from in meeting the risk retention requirements of section 15G, including, but not limited to, retention of a five percent "vertical" slice of each class of interests issued in the securitization or retention of a five percent "horizontal" first-loss interest in the securitization, as well as other risk retention options that take into account the manners in which risk retention often has occurred in credit card receivable and automobile loan and lease securitizations and in connection with the issuance of asset-backed commercial paper. The proposed rules also include a special "premium capture" mechanism designed to prevent a securitizer from structuring an ABS transaction in a manner that would allow the securitizer to effectively negate or reduce its retained economic exposure to the securitized assets by immediately monetizing the excess spread created by the securitization transaction.[18] In designing these options and the proposed rules in general, the Agencies have sought to ensure that the amount of credit risk retained is meaningful—consistent with the purposes of section 15G—while reducing the potential for the proposed rules to negatively affect the availability and costs of credit to consumers and businesses.

As required by section 15G, the proposed rules provide a complete exemption from the risk retention requirements for ABS that are collateralized solely by QRMs and establish the terms and conditions under which a residential mortgage would qualify as a QRM. In developing the proposed definition of a QRM, the Agencies carefully considered the terms and purposes of section 15G, public input, and the potential impact of a broad or narrow definition of QRMs on the housing and housing finance markets.

As discussed in greater detail in Part V of this Supplementary Information, the proposed rules would generally prohibit QRMs from having product features that contributed significantly to the high levels of delinquencies and foreclosures since 2007—such as terms permitting negative amortization, interest-only payments, or significant interest rate increases—and also would establish underwriting standards designed to ensure that QRMs are of very high credit quality consistent with their exemption from risk retention requirements. These underwriting standards include, among other things, maximum front-end and back-end debt-to-income ratios of 28 percent and 36 percent, respectively;[19] a maximum loan-to-value (LTV) ratio of 80 percent in the case of a purchase transaction (with a lesser combined LTV permitted for refinance transactions); a 20 percent down payment requirement in the case of a purchase transaction; and credit history restrictions.

The proposed rules also would not require a securitizer to retain any portion of the credit risk associated with a securitization transaction if the ABS issued are exclusively collateralized by commercial loans, commercial mortgages, or automobile loans that meet underwriting standards included in the proposed rules for the individual asset class. As for QRMs, these underwriting standards are designed to be robust and ensure that the loans backing the ABS are of very low credit risk. In this Supplementary Information, the Agencies refer to these assets (including QRMs) as "qualified assets."

The Agencies recognize that many prudently underwritten residential and mortgage loans, commercial loans, and automobile loans may not satisfy all the underwriting and other criteria in the proposed rules for qualified assets. Securitizers of ABS backed by such prudently underwritten loans would, as a general matter, be required to retain credit risk under the rule. However, as noted above, the Agencies have sought to structure the proposed risk retention requirements in a flexible manner that would allow the securitization markets for non-qualified assets to function in a

[10] *See id.*

[11] *See id.*

[12] *See id.* at 129.

[13] *See* 15 U.S.C. 78o–11(c)(1)(B)(ii), (e)(1)–(2).

[14] *See,* e.g., sections 932, 935, 936, 938, and 943 of the Dodd-Frank Act.

[15] *See* section 945 of the Dodd-Frank Act.

[16] *See* section 943 of the Dodd-Frank Act.

[17] Both the language and legislative history of section 15G indicate that Congress expected the agencies to be mindful of the heterogeneity of securitization markets. *See,* e.g., 15 U.S.C. 78o–11(c)(1)(E), (c)(2), (e); S. Rep. No. 111–76, at 130 (2010) ("The Committee believes that implementation of risk retention obligations should recognize the differences in securitization practices for various asset classes.")

[18] "Excess spread" is the difference between the gross yield on the pool of securitized assets less the cost of financing those assets (weighted average coupon paid on the investor certificates), charge-offs, servicing costs, and any other trust expenses (such as insurance premiums, if any).

[19] A front-end debt-to-income ratio measures how much of the borrower's gross (pretax) monthly income is represented by the borrower's required payment on the first-lien mortgage, including real estate taxes and insurance. A back-end debt-to-income ratio measures how much of a borrower's gross (pretax) monthly income would go toward monthly mortgage and nonmortgage debt service obligations.

manner that both facilitates the flow of credit to consumers and businesses on economically viable terms and is consistent with the protection of investors.

Section 15G allocates the authority for writing rules to implement its provisions among the Agencies in various ways. As a general matter, the Agencies collectively are responsible for adopting joint rules to implement the risk retention requirements of section 15G for securitizations that are backed by residential mortgage assets and for defining what constitutes a QRM for purposes of the exemption for QRM-backed ABS.[20] The Federal banking agencies and the Commission, however, are responsible for adopting joint rules that implement section 15G for securitizations backed by all other types of assets,[21] and also are the agencies authorized to adopt rules in several specific areas under section 15G.[22] In addition, the Federal banking agencies are responsible for establishing, by rule, the underwriting standards for non-QRM residential mortgages, commercial mortgages, commercial loans and automobile loans that would qualify ABS backed by these types of loans for a less than five percent risk retention requirement.[23] Accordingly, when used in this proposal, the term "Agencies" shall be deemed to refer to the appropriate Agencies that have rulewriting authority with respect to the asset class, securitization transaction, or other matter discussed. The Secretary of the Treasury, as Chairperson of the Financial Stability Oversight Council, coordinated the development of these joint proposed rules in accordance with the requirements of section 15G.[24]

For ease of reference, the proposed rules of the Agencies are referenced using a common designation of § __.1 to § __.23 (excluding the title and part designations for each Agency). With the exception of HUD, each Agency will codify the rules, when adopted in final form, within each of their respective titles of the Code of Federal Regulations.[25] Section __.1 of each Agency's proposed rules identifies the entities or transactions that would be subject to such Agency's rules.[26]

In light of the joint nature of the Agencies' rulewriting authority under section 15G, the appropriate Agencies will jointly approve any written interpretations, written responses to requests for no-action letters and legal opinions, or other written interpretive guidance concerning the scope or terms of section 15G and the final rules issued thereunder that are intended to be relied on by the public generally.[27] Similarly, the appropriate Agencies will jointly approve any exemptions, exceptions, or adjustments to the final rules.[28] For these purposes, the phrase "appropriate Agencies" refers to the Agencies with rulewriting authority for the asset class, securitization transaction, or other matter addressed by the interpretation, guidance, exemption, exceptions, or adjustments. The Agencies expect to coordinate with each other to facilitate the processing, review and action on requests for such written interpretations or guidance, or additional exemptions, exceptions or adjustments.

II. General Definitions and Scope

Section __.2 of the proposed rules defines terms used throughout the proposed rules. Certain of these definitions are discussed in this part of the Supplementary Information. Other terms are discussed together with the section of the proposed rules where they are used. For example, certain definitions that relate solely to the exemptions for securitizations based on QRMs and certain qualifying commercial, commercial real estate, and automobile loans, are contained in, and are discussed in the context of, those sections (*see* subpart C of the proposed rules).

A. Asset-Backed Securities, Securitization Transaction and ABS Interests

The proposed risk retention rules would apply to securitizers in securitizations that involve the issuance of "asset-backed securities" as defined in section 3(a)(77) of the Exchange Act, which also was added to the Exchange Act by section 941 of the Dodd-Frank Act.[29] Section 3(a)(77) of the Exchange Act generally defines an "asset-backed security" to mean "a fixed-income or other security collateralized by any type of self-liquidating financial asset (including a loan, lease, mortgage, or other secured or unsecured receivable) that allows the holder of the security to receive payments that depend primarily on cash flow from the asset."[30] The proposed rules incorporate by reference this definition of asset-backed security from the Exchange Act.[31] Consistent with this definition, the proposed rules also define the term "asset" to mean a self-liquidating financial asset, including loans, leases, or other

[20] *See id.* at sec. 78o–11(b)(2), (e)(4)(A) and (B).

[21] *See id.* at sec. 78o–11(b)(1).

[22] *See,* e.g. *id.* at sec. 78o–11(b)(1)(E) (relating to the risk retention requirements for ABS collateralized by commercial mortgages); (b)(1)(G)(ii) (relating to additional exemptions for assets issued or guaranteed by the United States or an agency of the United States); (d) (relating to the allocation of risk retention obligations between a securitizer and an originator); and (e)(1) (relating to additional exemptions, exceptions or adjustments for classes of institutions or assets).

[23] *See id.* at sec. 78o-11(b)(2)(B). Therefore, pursuant to section 15G, only the Federal banking agencies are proposing the underwriting definitions in § __.16 (except the asset class definitions of automobile loan, commercial loan, and commercial real estate loan, which are being proposed by the Federal banking agencies and the Commission), and the underwriting standards in §§ __.18(b)(1)–(6), __.19(b)(1)–(9), and __.20(b)(1)–(8) of the proposed rules. At the final rule stage, FHFA proposes to adopt only those provisions of the common rules that address the types of asset securitization transactions in which its regulated entities could be authorized to engage under existing law. The remaining provisions, such as those addressing underwriting standards for non-residential commercial loans and auto loans, would be designated as [reserved], and the provisions adopted would be numbered and otherwise designated so as to correspond to the equivalent provisions appearing in the regulations of the other Agencies.

[24] *See id.* at 78o–11(h).

[25] Specifically, the agencies propose to codify the rules as follows: 12 CFR part 43 (OCC); 12 CFR part 244 (Regulation RR) (Board); 12 CFR part 373 (FDIC); 17 CFR part 246 (Commission); 12 CFR part 1234 (FHFA). As required by section 15G, HUD has jointly prescribed the proposed rules for a securitization that is backed by any residential mortgage asset and for purposes of defining a qualified residential mortgage. HUD's codification in 24 CFR part 267 indicates that the proposed rules include exceptions and exemptions in Subpart D of each of these rules for certain transactions involving programs and entities under the jurisdiction of HUD.

[26] The joint proposed rules being adopted by the Agencies would apply to all sponsors that fall within the scope of 15G, including state and federal savings associations and savings and loan holding companies. These entities are currently regulated and supervised by the Office of Thrift Supervision (OTS), which is not among the Federal banking agencies with rulemaking authority under section 15G. Authority of the OTS under the Home Owners' Loan Act (12 U.S.C. 1461 *et seq.*) with respect to such entities will transfer from the OTS to the Board, FDIC, and OCC on the transfer date provided in section 311 of the Dodd-Frank Act. This transfer will take place well before the effective date of the Federal banking agencies' final rules under section 15G. Accordingly, the final rules issued by the appropriate Federal banking agency would include the relevant set of these entities in the agency's Purpose, Authority, and Scope section (§ __.1).

[27] These items would not include staff comment letters and informal written guidance provided to specific institutions or matters raised in a report of examination or inspection of a supervised institution, which are not intended to be relied on by the public generally.

[28] *See* 15 U.S.C. 78o–11(c)(1)(G)(i) and (e)(1); proposed rules at § __.22.

[29] *See* section 941(a) of the Dodd-Frank Act.

[30] *See* 15 U.S.C. § 78c(a)(77). The term also (i) includes any other security that the Commission, by rule, determines to be an asset-backed security for purposes of section 15G of the Exchange Act; and (ii) does not include a security that is issued by a finance subsidiary and held by the parent company of the finance subsidiary or a company that is controlled by such parent company provided that none of the securities issued by the finance subsidiary are held by an entity that is not controlled by the parent company.

[31] *See* proposed rules at § __.2 (definition of "asset-backed security").

receivables.[32] The proposal defines the term "securitized asset" to mean an asset that is transferred, sold, or conveyed to an issuing entity and that collateralizes the ABS interests issued by the issuing entity.[33]

Section 15G does not appear to distinguish between transactions that are registered with the Commission under the Securities Act of 1933 (the "Securities Act") and those that are exempt from registration under the Securities Act. For example, section 15G provides authority for exempting from the risk retention requirements certain securities that are exempt from registration under the Securities Act.[34] In addition, the statutory definition of asset-backed security is broader than the definition of asset-backed security in the Commission's Regulation AB,[35] which governs the disclosure requirements for ABS offerings that are registered under the Securities Act.[36] The definition of asset-backed security for purposes of section 15G also includes securities that are typically sold in transactions that are exempt from registration under the Securities Act, such as CDOs, as well as securities issued or guaranteed by a government sponsored entity (GSE), such as the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). In light of the foregoing, the proposed risk retention requirements would apply to securitizers of ABS offerings whether or not the offering is registered with the Commission under the Securities Act.

As discussed further below, the proposed rules generally apply the risk retention requirements to the securitizer in each "securitization transaction," which is defined as a transaction involving the offer and sale of ABS by an issuing entity.[37] Applying the risk retention requirements to the securitizer of each issuance of ABS ensures that the requirements apply in the aggregate to all ABS issued by an issuing entity, including an issuing entity—such as a master trust—that issues ABS periodically.

The proposed rules use the term "ABS interest" to refer to all types of interests or obligations issued by an issuing entity, whether or not in certificated form, including a security, obligation, beneficial interest or residual interest, the payments on which are primarily dependent on the cash flows on the collateral held by the issuing entity. The term, however, does not include common or preferred stock, limited liability interests, partnership interests, trust certificates, or similar interests in an issuing entity that are issued primarily to evidence ownership of the issuing entity, and the payments, if any, on which are not primarily dependent on the cash flows of the collateral held by the issuing entity.[38]

B. Securitizer, Sponsor, and Depositor

Section 15G generally provides for the Agencies to apply the risk retention requirements of the statute to a "securitizer" of ABS. Section 15G(a)(3) in turn provides that the term "securitizer" with respect to an issuance of ABS includes both "(A) an issuer of an asset-backed security; or (B) a person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer."[39]

The Agencies note that the second prong of this definition (i.e., the person who organizes and initiates the ABS transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer) is substantially identical to the definition of a "sponsor" of a securitization transaction in the Commission's Regulation AB governing disclosures for ABS offerings registered under the Securities Act.[40] In light of this, the proposed rules provide that a "sponsor" of an ABS transaction is a "securitizer" for the purposes of section 15G, and define the term "sponsor" in a manner consistent with the definition of that term in the Commission's Regulation AB.[41]

The proposal would, as a general matter, require that a sponsor of a securitization transaction retain the credit risk of the securitized assets in the form and amount required by the proposed rules. The Agencies believe that proposing to apply the risk retention requirement to the sponsor of the ABS—as permitted by section 15G—is appropriate in light of the active and direct role that a sponsor typically has in arranging a securitization transaction and selecting the assets to be securitized.[42] In circumstances where two or more entities each meet the definition of sponsor for a single securitization transaction, the proposed rules would require that one of the sponsors retain a portion of the credit risk of the underlying assets in accordance with the requirements of this proposal.[43] Each sponsor in the transaction, however, would remain responsible for ensuring that at least one

[32] *See* proposed rules at § __.2 (definition of "asset"). Because the term "asset-backed security" for purposes of section 15G includes only those securities that are collateralized by self-liquidating financial assets, "synthetic" securitizations are not within the scope of the proposed rules.

[33] *See* proposed rules at § __.2. Assets or other property collateralize an issuance of ABS interests if the assets or property serves as collateral for such issuance. Assets or other property serve as collateral for an ABS issuance if they provide the cash flow for the ABS interests issued by the issuing entity (regardless of the legal structure of the issuance), and may include security interests in assets or other property of the issuing entity, fractional undivided property interests in the assets or other property of the issuing entity, or any other property interest in such assets or other property. The term collateral includes leases that may convert to cash proceeds from the disposition of the physical property underlying the assets. The cash flow from an asset includes any proceeds of a foreclosure on, or sale of, the asset. *See* proposed rules at § __.2 (definition of "collateral" for an ABS transaction).

[34] *See,* e.g., 15 U.S.C. 78o–11(c)(1)(G) (authorizing exemptions from the risk retention requirements certain transactions that are typically exempt from Securities Act registration); 15 U.S.C. 78o–11(e)(3)(B)(providing for certain exemptions for certain assets, or securitizations based on assets, which are insured or guaranteed by the United States).

[35] 17 CFR 229.1100 through 17 CFR 229.1123.

[36] *See* 15 U.S.C. 78b.

[37] An "issuing entity" is defined to mean, with respect to a securitization transaction, the trust or other entity created at the direction of the sponsor that owns or holds the pool of assets to be securitized, and in whose name the ABS are issued. *See* proposed rules at § __.2.

[38] *See* proposed rules at § __.2. In securitization transactions where ABS interests are issued and some or all of the cash proceeds of the transaction are retained by the issuing entity to purchase, during a limited time period after the closing of the securitization, self-liquidating financial assets to support the securitization, the terms "asset," "collateral," and "securitized assets" should be construed to include such cash proceeds as well as the assets purchased with such proceeds and any assets transferred to the issuing entity on the closing date. Accordingly, the terms "asset-backed security" and "ABS interest" should also be construed to include securities and other interests backed by such proceeds. Such securitization transactions are commonly referred to as including a "pre-funding account."

[39] *See* 15 U.S.C. 78o–11(a)(3).

[40] *See* Item 1101 of the Commission's Regulation AB (17 CFR 229.1101) (defining a sponsor as "a person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity.")

[41] *See* proposed rules at § __.2. Consistent with the Commission's definition of sponsor, the Agencies interpret the term "issuer" as used in section 15G(a)(3)(B) to refer to the issuing entity that issues the ABS.

[42] For example, in the context of collateralized loan obligations (CLOs), the CLO manager generally acts as the sponsor by selecting the commercial loans to be purchased by an agent bank for inclusion in the CLO collateral pool, and then manages the securitized assets once deposited in the CLO structure.

[43] *See* proposed rules at § __.3(a). Because the term sponsor is used throughout the proposed rules, the term is separately defined in § __.2 of the proposed rules. The definition of "sponsor" in § __.2 is identical to the sponsor part of the proposed rules' definition of a "securitizer."

sponsor complied with the requirements.

As noted above, the definition of "securitizer" in section 15G(a)(3)(A) includes the "issuer of an asset-backed security." The term "issuer" when used in the federal securities laws may have different meanings depending on the context in which it is used. For example, for several purposes under the federal securities laws, including the Securities Act [44] and the Exchange Act [45] and the rules promulgated under these Acts,[46] the term "issuer" when used with respect to an ABS transaction is defined to mean the entity—the depositor—that deposits the assets that collateralize the ABS with the issuing entity. The Agencies interpret the reference in section 15G(a)(3)(A) to an "issuer of an asset-backed security" as referring to the "depositor" of the ABS, consistent with how that term has been defined and used under the federal securities laws in connection with ABS.[47] As noted above, the proposed rules generally would apply the risk retention requirements of section 15G to a sponsor of a securitization transaction (and not the depositor for the securitization transaction).

C. Originator

As permitted by section 15G, § __.13 of the proposed rules permit a sponsor to allocate its risk retention obligations to the originator(s) of the securitized assets in certain circumstances and subject to certain conditions. The proposed rules define the term originator in the same manner as section 15G, that is, as a person who, through the extension of credit or otherwise, creates a financial asset that collateralizes an asset-backed security, and sells the asset directly or indirectly to a securitizer (i.e., a sponsor or depositor). Because this definition refers to the person that "creates" a loan or other receivable, only the original creditor under a loan or receivable—and not a subsequent purchaser or transferee—is an "originator" of the loan or receivable for purposes of section 15G.[48]

Request for Comment

1. Do the proposed rules appropriately implement the terms "securitizer" and "originator" as used in section 15G and consistent with its purpose?

2. Are there other terms, beyond those defined in § __.2 of the proposed rules, that the Agencies should define?

3(a). As a general matter, is it appropriate to impose the risk retention requirements on the sponsor of an ABS transaction, rather than the depositor for the transaction? 3(b). If not, why?

4(a). With respect to the terms defined, would you define any of the terms differently? 4(b). If so, which ones would you define differently, and how would you define them? For example, credit risk is defined to mean, among other things, the risk of loss that could result from failure of the issuing entity to make required payments or from bankruptcy of the issuing entity.

5. Is it appropriate for the definition of credit risk to include risk of non-payment by the issuing entity unrelated to the assets, such as risk that the issuing entity is not bankruptcy remote?

6. Are all of the definitions in § __.2 of the proposed rules necessary? For instance, is a definition of "asset" necessary?

7(a). As proposed, where two or more entities each meet the definition of sponsor for a single securitization transaction, the proposed rules would require that one of the sponsors retain a portion of the credit risk of the underlying assets in accordance with the requirements of the rules. Is this the best approach to take when there are multiple sponsors in a single securitization transaction? 7(b). If not, what is a better approach and why? For example, should all sponsors be required to retain credit risk in some proportional amount, should the sponsor selling the greatest number of assets or with a particular attribute be required to retain the risk, or should the proposed rules only allow a sponsor that has transferred a minimum percentage (e.g., 10 percent, 20 percent, or 50 percent) of the total assets into the trust to retain the risk?

8(a). Should the proposed rules allow for allocation of risk to a sponsor (among multiple sponsors in a single transaction) similar to the proposed rules' parameters for allocation of risk among multiple originators? 8(b). Why or why not?

9. A securitization transaction is proposed to be defined as a transaction involving the offer and sale of asset-backed securities by an issuing entity. In a single securitization transaction, there may be intermediate steps; however, the proposed rules would only require the sponsor to retain risk for the securitization transaction as a whole.[49] Should the rules provide additional guidance for when a transaction with intermediate steps constitutes one or more securitization transactions that each should be subject to the rules' risk retention requirements?

III. General Risk Retention Requirement

A. Minimum 5 Percent Risk Retention Required

Section 15G of the Exchange Act generally requires that the Agencies jointly prescribe regulations that require a securitizer to retain not less than five percent of the credit risk for any asset that the securitizer, through the issuance of an ABS, transfers, sells, or conveys to a third party, unless an exemption from the risk retention requirements for the securities or transaction is otherwise available (e.g., if the ABS is collateralized exclusively by QRMs). Consistent with the statute, the proposed rules generally would require that a sponsor retain an economic interest equal to at least five percent of the aggregate credit risk of the assets collateralizing an issuance of ABS (the "base" risk retention requirement).[50]

[44] Section 2(a)(4) of Securities Act (15 U.S.C. 77b(a)(4)) defines the term "issuer" in part to include every person who issues or proposes to issue any security, except that with respect to certificates of deposit, voting-trust certificates, or collateral trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions), the term issuer means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which the securities are issued.

[45] *See* Exchange Act sec. 3(a)(8) (15 U.S.C. 78c(a)(8) (defining "issuer" under the Exchange Act).

[46] *See,* e.g., Securities Act Rule 191 (17 CFR 230.191) and Exchange Act Rule 3b–19 (17 CFR 240.3b-19).

[47] For asset-backed securities transactions where there is not an intermediate transfer of the assets from the sponsor to the issuing entity, the term depositor refers to the sponsor. For asset-backed securities transactions where the person transferring or selling the pool assets is itself a trust (such as in an issuance trust structure), the depositor of the issuing entity is the depositor of that trust. *See* proposed rules at § __.2. Securities Act Rule 191 and Exchange Act Rule 3b–19 also note that the person acting as the depositor in its capacity as depositor to the issuing entity is a different "issuer" from that person in respect of its own securities in order to make clear—for example—that any applicable exemptions from Securities Act registration that person may have with respect to its own securities are not applicable to the asset-backed securities. That distinction does not appear relevant here.

[48] *See* 15 U.S.C. 78o–11(a)(3).

[49] For example, in auto lease securitizations, the auto leases and car titles are originated in the name of a separate trust to avoid the administrative expenses of retitling the physical property underlying the leases. The separate trust will issue to the issuing entity for the asset-backed security a collateral certificate, often called a "special unit of beneficial interest" (SUBI). The issuing entity will then issue the asset-backed securities backed by the SUBI certificate.

[50] *See* proposed rules at § __.3 through § __.11. We note that the proposed rules, in some instances, permit a sponsor to allow another person to retain the required amount of credit risk (e.g., originators,

Continued

This exposure should provide a sponsor with an incentive to monitor and control the quality of the assets being securitized and help align the interests of the sponsor with those of investors in the ABS. As discussed in Part III.D of this Supplementary Information, the sponsor also would be prohibited from hedging or otherwise transferring this retained interest.

As required by section 15G, the proposed risk retention requirements would apply to all ABS transactions that are within the scope of section 15G, regardless of whether the sponsor is an insured depository institution, a bank holding company or subsidiary thereof, a registered broker-dealer, or other type of federally supervised financial institution. Thus, for example, it would apply to securitization transactions by any nonbank entity that is not an insured depository institution (such as an independent mortgage firm), as well as by Fannie Mae and Freddie Mac.

The Agencies note that the five percent risk retention requirement established by the proposed rules would be a regulatory *minimum.* The sponsor, originator, or other party to a securitization may retain, or be required to retain, additional exposure to the credit risk of assets that the sponsor, originator, or other party helps securitize beyond that required by the proposed rules, either on its own initiative or in response to the demands of private market participants. Moreover, the proposed rules would require that a sponsor, in certain circumstances, fund a premium capture cash reserve account in connection with a securitization transaction (see Part III.B.9 of this Supplementary Information). Any amount a sponsor might be required to place in a premium capture cash reserve account would be in addition to the five percent "base" risk retention requirement of the proposed rules.

Request for Comment

10. The Agencies request comment on whether the minimum five percent risk retention requirement established by the proposed rules for non-exempt ABS transactions is appropriate, or whether a higher risk retention requirement should be established for all non-exempt ABS transactions or for any particular classes or types of non-exempt ABS.

11. If a higher minimum requirement should be established, what minimum should be established and what factors should the Agencies take into account in determining that higher minimum? For example, should the amount of credit risk be based on expected losses, or a market-based test based on the interest rate spread relative to a benchmark index?

12(a). Would the minimum five percent risk retention requirement, as proposed to be implemented, have a significant adverse effect on liquidity or pricing in the securitization markets for certain types of assets (such as, for example, prudently underwritten residential mortgage loans that do not satisfy all of the requirements to be a QRM)? 12(b). If so, what markets would be adversely affected and how? What adjustments to the proposed rules (e.g., the minimum risk retention amount, the manner in which credit exposure is measured for purposes of applying the risk retention requirement, or the form of risk retention) could be made to the proposed rules to address these concerns in a manner consistent with the purposes of section 15G? Please provide details and supporting data.

B. Permissible Forms of Risk Retention

As recognized in recent studies and reports on securitization and risk retention that have examined historical market practices, there are several ways in which a sponsor or other entity may have retained exposure to the credit risk of securitized assets.[51] These include (i) a "vertical" slice of the ABS interests, whereby the sponsor or other entity retains a specified *pro rata* piece of every class of interests issued in the transaction; (ii) a "horizontal" first-loss position, whereby the sponsor or other entity retains a subordinate interest in the issuing entity that bears losses on the assets before any other classes of interests; (iii) a "seller's interest" in securitizations structured using a master trust collateralized by revolving assets whereby the sponsor or other entity holds a separate interest that is *pari passu* with the investors' interest in the pool of receivables (unless and until the occurrence of an early amortization event); or (iv) a representative sample, whereby the sponsor retains a representative sample of the assets to be securitized that exposes the sponsor to credit risk that is equivalent to that of the securitized assets. These examples are not exclusive.

The various forms of risk retention have developed, in part, due to the diversity of assets that are securitized and the structures commonly used in securitizing different types of assets. For example, due to the revolving nature of credit card accounts and the fact that multiple series of ABS collateralized by credit card receivables typically are issued using a single master trust structure, sponsors of ABS transactions collateralized by credit card receivables often have maintained exposure to the credit risk of the underlying loans through use of a seller's interest. On the other hand, sponsors of ABS backed by automobile loans where the originator of the loan is often a finance company affiliated with the sponsor will often retain a portion of the loans that would ordinarily be securitized, thus providing the sponsor some continuing exposure to the credit risk of those loans. In connection with the securitization of commercial mortgage-backed securities ("CMBS"), a form of horizontal risk retention often has been employed, with the horizontal first-loss position being initially held by a third-party purchaser that specifically negotiates for the purchase of the first-loss position and conducts its own credit analysis of each commercial loan backing the CMBS.[52] Sponsors across a wide range of asset classes may initially hold a horizontal piece of the securitization (such as a residual interest). Different forms of risk retention also may have different accounting implications for a sponsor or other entity.[53] Historically, whether or

third-party purchasers in commercial mortgage-backed securities transactions, and originator-sellers in asset-backed commercial paper conduit securitizations). However, in such circumstances the proposal includes limitations and conditions designed to ensure that the purposes of section 15G continue to be fulfilled. Further, we note that even when a sponsor would be permitted to allow another person to retain risk, the sponsor would still remain responsible under the rule for compliance with the risk retention requirements.

[51] *See* Board Report; *see also Macroeconomic Effects of Risk Retention Requirements,* Chairman of the Financial Stability Oversight Counsel (January 2011), *available at http://www.treasury.gov/initiatives/wsr/Documents/Section 946 Risk Retention Study (FINAL).pdf.*

[52] Section 15G(c)(1)(E) allows the Federal banking agencies and the Commission to determine that with respect to CMBS, a form of retention that satisfies the requirements includes retention of a first-loss position by a third-party purchaser that meets certain criteria. *See* 15 U.S.C. 78o–11(c)(1)(E).

[53] The determination whether a legal entity established to issue ABS must be included in the consolidated financial statements of the sponsor or another participant in the securitization chain is primarily addressed by the following generally accepted accounting principles issued by the Financial Accounting Standards Board (FASB): Accounting Standards Codification Topic 860, Transfers and Servicing (ASC 860, commonly called FAS 166); and FASB Accounting Standards Codification Topic 810, Consolidation (ASC 810, commonly called FAS 167). ASC 860 addresses whether securitizations and other transfers of financial assets are treated as sales or financings. ASC 810 addresses whether legal entities often used in securitization and other structured finance transactions should be included in the consolidated financial statements of any one of the parties involved in the transaction. Together, this guidance determines the extent to which an originator, sponsor, or another company is required to maintain securitized assets and corresponding liabilities on their balance sheets.

how a sponsor retained exposure to the credit risk of the assets it securitized was determined by a variety of factors including the rating requirements of the NRSROs, investor preferences or demands, accounting considerations, and whether there was a market for the type of interest that might ordinarily be retained (at least initially by the sponsor).

Section 15G expressly provides the Agencies the authority to determine the permissible forms through which the required amount of risk retention must be held.[54] Consistent with this flexibility, Subpart B of the proposed rules would provide sponsors with multiple options to satisfy the risk retention requirements of section 15G. The options in the proposed rules are designed to take into account the heterogeneity of securitization markets and practices, and to reduce the potential for the proposed rules to negatively affect the availability and costs of credit to consumers and businesses. However, importantly, each of the permitted forms of risk retention included in the proposed rules is subject to terms and conditions that are intended to help ensure that the sponsor (or other eligible entity) retains an economic exposure equivalent to at least five percent of the credit risk of the securitized assets. Thus, the forms of risk retention would help to ensure that the purposes of section 15G are fulfilled. In addition, as discussed further in Part III.D of this Supplementary Information below, the proposed rules would prohibit a sponsor from transferring, selling or hedging the risk that the sponsor is required to retain, thereby preventing sponsors from circumventing the requirements of the rules by selling or transferring the risk after the securitization transaction has been completed. The proposed rules also include disclosure requirements that are an integral part of and specifically tailored to each of the permissible forms of risk retention. The disclosure requirements are integral to the proposed rules because they would provide investors with material information concerning the sponsor's retained interests in a securitization transaction, such as the amount and form of interest retained by sponsors, and the assumptions used in determining the aggregate value of ABS to be issued (which generally affects the amount of risk required to be retained). Further, the disclosures are also integral to the rule because they would provide investors and the Agencies with an efficient mechanism to monitor compliance with the risk retention requirements of the proposed rules.[55]

Request for Comment

13. Is the proposed menu of options approach to risk retention, which would allow a sponsor to choose the form of risk retention (subject to all applicable terms and conditions), appropriate?

14(a). Should the Agencies mandate that sponsors use a particular form of risk retention (e.g., a vertical slice or a horizontal slice) for all or specific types of asset classes or specific types of transactions? 14(b). If so, which forms should be required for with which asset classes and why?

15. Does the proposed menu approach achieve the objectives of the statute to provide securitizers an incentive to monitor and control the underwriting quality of securitized assets and help align incentives among originators, sponsors, and investors?

16. Is each of the proposed forms of risk retention appropriate? In particular, the Agencies seek comment on the potential effectiveness of the proposed forms of risk retention in achieving the purposes of section 15G, their potential effect on securitization markets, and any operational or other problems these forms may present.

17. Are there any kinds of securitizations for which a particular form of risk retention is not appropriate?

18. How effective would each of the proposed risk retention options be in creating incentives to monitor and control the quality of assets that are securitized and in aligning the interests among the parties in a securitization transaction?

19(a). Are there other forms of risk retention that the Agencies should permit? 19(b). If so, please provide a detailed description of the form(s), how such form(s) could be implemented, and whether such form(s) would be appropriate for all, or just certain, classes of assets.

20. Should the proposed rules require disclosure as to why the sponsor chose a particular risk retention option?

21(a). Are there ways that sponsors could avoid the risk retention requirements in an effort to reduce or eliminate their risk retention requirements? 21(b). If so, how should we modify the proposed rules to address this potential?

22. Are the methodologies proposed for calculating the required five percent exposure under each of the options appropriate?

23(a). Are there other ways that the minimum five percent requirement should be calculated? 23(b). Would such calculation methods be difficult to enforce? 23(c). If so, how can we address those difficulties? 23(d). Are there other alternatives?

1. Vertical Risk Retention

As proposed, a sponsor may satisfy its risk retention requirements with respect to a securitization transaction by retaining at least five percent of each class of ABS interests issued as part of the securitization transaction.[56] A sponsor using this approach must retain at least five percent of each class of ABS interests issued in the securitization transaction regardless of the nature of the class of ABS interests (e.g., senior or subordinated) and regardless of whether the class of interests has a par value, was issued in certificated form, or was sold to unaffiliated investors. For example, if four classes of ABS interests were issued by an issuing entity as part of a securitization—a senior AAA-rated class, a subordinated class, an interest-only class, and a residual interest—a sponsor using this approach with respect to the transaction would have to retain at least five percent of each such class or interest.[57] The proposed rules do not specify a method of measuring the amount of each class, because the amount retained, regardless of method of measurement, should equal at least five percent of the par value (if any), fair value, and number of shares or units of each class.

Under the vertical risk retention option, by holding a five percent vertical slice in an ABS issuance, a sponsor is exposed to five percent of the credit risk that each class of investors has to the underlying collateral. This provides the sponsor an interest in the entire structure of the securitization transaction.

[54] *See* 15 U.S.C. 78o–11(c)(1)(C)(i); *see also* S. Rep. No. 111–176, at 130 (2010) ("The Committee [on Banking, Housing, and Urban Affairs] believes that implementation of risk retention obligations should recognize the differences in securitization practices for various asset classes.").

[55] The Agencies note that a variation of the vertical, horizontal, seller's interest and representative sample options described below are forms of eligible risk retention in the proposed European Union capital requirement directive relating to securitizations. *See* "Call for Technical Advice on the Effectiveness of a Minimum Retention Requirement for Securitizations," Committee of European Bank Supervisors (October 30, 2009) (CEBS proposal).

[56] *See* proposed rules at § __.4.

[57] As noted previously, the proposed definition of ABS interests does not include common or preferred stock, limited liability interests, partnership interests, trust certificates or similar interests that are issued primarily to evidence ownership of the issuing entity and the payments, if any, on which are not primarily dependent on the cash flows of the assets of the issuing entity. *See* proposed rules at § __.2 (definition of "ABS interests").

Under the proposed rules, a sponsor that elects to retain risk through the vertical slice option would be required to provide, or cause to be provided, to potential investors a reasonable time prior to the sale of the asset-backed securities in the securitization transaction and, upon request, to the Commission and to its appropriate Federal banking agency (if any), the amount (expressed as a percentage and a dollar amount) of each class of ABS interests in the issuing entity that the sponsor will retain (or did retain) at closing as well as the amount (expressed, again, as a percentage and dollar amount) that the sponsor is required to retain under the proposed rules. This disclosure would allow investors to know what risk the sponsor will actually retain in the transaction and compare this amount to the risk that the sponsor is required to retain under the proposed rules. In addition, the proposed rules would require a sponsor to disclose, or cause to be disclosed, the material assumptions and methodologies it used to determine the aggregate dollar amount of ABS interests issued by the issuing entity in the securitization transaction, including those pertaining to any estimated cash flows and the discount rate used. Disclosure of these assumptions and methodologies should help investors and the Agencies monitor the sponsor's compliance with its risk retention requirements because the five percent risk retention requirement is based on the aggregate amount of each class of ABS interests issued as part of the transaction.[58]

Request for Comment

24. Are the disclosures proposed sufficient to provide investors with all material information concerning the sponsor's retained interest in a securitization transaction, as well as to enable investors and the Agencies to monitor the sponsor's compliance with the rule?

25(a). Should additional disclosures be required? 25(b). If so, what should be required and why?

26. Are there any additional factors, such as cost considerations, that the Agencies should consider in formulating an appropriate vertical risk retention option?

2. Horizontal Risk Retention

As proposed, the second risk retention option permits a sponsor to satisfy its risk retention obligations by retaining an "eligible horizontal residual interest" in the issuing entity in an amount that is equal to at least five percent of the par value of all ABS interests in the issuing entity that are issued as part of the securitization transaction.[59] As discussed below, the eligible horizontal residual interest would expose the sponsor to a five percent first-loss exposure to the credit risk of the entire pool of securitized assets.

The proposed rules include a number of terms and conditions governing the structure of an eligible horizontal residual interest in order to ensure that the interest would be a "first-loss" position,[60] and could not be reduced in principal amount (other than through the absorption of losses) more quickly than more senior interests and, thus, would remain available to absorb losses on the securitized assets. Specifically, an interest qualifies as an "eligible horizontal residual interest" under the proposed rules only if it is an ABS interest that is allocated all losses on the securitized assets until the par value of the class is reduced to zero and has the most subordinated claim to payments of both principal and interest by the issuing entity.[61]

Moreover, until all other ABS interests in the issuing entity are paid in full, the eligible horizontal residual interest generally cannot receive any payments of principal made on a securitized asset. However, the interest may receive its proportionate share of scheduled payments of principal received on the securitized assets in accordance with the relevant transaction documents. For example, so long as any other ABS interests are outstanding, a sponsor, through its ownership of the eligible horizontal residual interest, would be prohibited from receiving any prepayments of principal made on the underlying assets because these are, by definition, unscheduled payments. This sponsor also would be prohibited from receiving principal payments made on the underlying assets derived from proceeds from the sale of, or foreclosure on, an underlying asset. The prohibition of unscheduled payments to the eligible horizontal residual interest is designed to ensure that unscheduled payments would not accelerate the payoff of the eligible horizontal residual interest before other ABS interests. Such acceleration would reduce the capacity of the eligible horizontal residual interest to absorb losses on the securitized assets as well as the duration of the sponsor's interest in the securitized assets. The proposed rules would, however, permit the eligible horizontal residual interest to receive its pro rata share of scheduled principal payments on the underlying assets.[62]

Similar to the vertical slice risk retention option, under the proposed rules, a sponsor using the horizontal risk retention option would be required to provide, or cause to be provided, to potential investors a reasonable period of time prior to the sale of ABS interests in the issuing entity and, upon request, to the Commission and its appropriate Federal banking agency (if any): the amount (expressed as a percentage and dollar amount) of the eligible horizontal residual interest that will be retained (or was retained) by the sponsor at closing, and the amount (expressed as a percentage and dollar amount) of the eligible horizontal residual interest required to be retained by the sponsor in connection with the securitization transaction; a description of the material terms of the eligible horizontal residual interest, such as when such interest is allocated losses or may receive payments; and the material assumptions and methodologies used in determining the aggregate dollar amount of ABS interests issued by the issuing entity in the securitization transaction, including those pertaining to any estimated cash flows and the discount rate used.

In lieu of holding an eligible horizontal residual interest, the proposed rules would allow a sponsor to cause to be established and funded, in cash, a reserve account at closing

[58] For similar reasons, disclosure of such assumptions and methodologies would be required under the other risk retention options where the amount of the sponsor's required amount of risk retention is based on the amount of interests issued by the issuing entity or the amount of the collateral underlying such interests. Depending on the circumstances, a sponsor may have an incentive to inflate the value of the underlying collateral and the ABS supported by such collateral (for example, to increase the proceeds from the securitization transaction) or to underestimate the value of such collateral and ABS (for example, to reduce the sponsor's risk retention requirement). The material assumptions relating to estimated cash flows likely would include those relating to the estimated default rate, prepayment rate, the time between default and recoveries on the underlying assets, as well as interest rate projections for assets with variable interest rates.

[59] *See* proposed rules at § __.4.

[60] As discussed in Part III.B.9 of this Supplemental Information, if a sponsor is required to establish and fund a premium capture cash reserve account in connection with a securitization transaction, such account would first bear losses on the securitized assets (even before an eligible horizontal residual interest) until the account was depleted.

[61] *See* proposed rules at § __.2 (definition of "eligible horizontal residual interest").

[62] Thus, an eligible horizontal residual interest with a par value of five percent of the aggregate par value of all ABS interests could, subject to its most subordinate place in the payments waterfall, (i) initially be entitled to receive up to five percent of scheduled principal payments received on the securitized assets, and (ii) if losses reduced the par value of the interest to three percent, receive no more than three percent of scheduled principal payments received on the securitized assets.

(horizontal cash reserve account) in an amount equal to at least five percent of the par value of all the ABS interests issued as part of the transaction (i.e., the same dollar amount as would be required if the sponsor held an eligible horizontal residual interest).[63] This horizontal cash reserve account would have to be held by the trustee (or person performing functions similar to a trustee) for the benefit of the issuing entity. The proposed rules include several important restrictions and limitations on such a horizontal cash reserve account. These limitations and restrictions are intended to ensure that a sponsor that establishes a horizontal cash reserve account would be exposed to the same amount and type of first-loss credit risk on the underlying assets as would be the case if the sponsor held an eligible horizontal residual interest.

Specifically, the proposed rules would provide that, until all ABS interests in the issuing entity are paid in full or the issuing entity is dissolved, the horizontal cash reserve account must be used to satisfy payments on ABS interests on any payment date when the issuing entity has insufficient funds from any source (including any premium capture cash reserve account established under § __.12 of the proposed rules) to satisfy an amount due on any ABS interest.[64] Thus, the amounts in the account would bear first loss on the securitized assets in the same way as an eligible horizontal residual interest. In addition, until all ABS interests in the issuing entity are paid in full or the issuing entity is dissolved, the proposed rules would prohibit any other amounts from being withdrawn or distributed from the account, with only two exceptions. The first exception would allow amounts in the account to be released to the sponsor (or any other person) due to receipt by the issuing entity of scheduled payments of principal on the securitized assets, provided that the issuing entity distributes such payments of principal in accordance with the transaction documents and the amount released from the horizontal cash reserve account on any date does not exceed the product of: (i) The amount of scheduled payments of principal on the securitized assets received by the issuing entity and for which the release is being made; and (ii) the ratio of the current balance in the horizontal cash reserve account to the aggregate remaining principal balance of all ABS interests in the issuing entity. This limitation is intended to ensure that, like an eligible horizontal residual interest, a horizontal cash reserve account would not be depleted by unscheduled payments of principal on the underlying assets. The second exception would be that the sponsor would be permitted to receive interest payments (but not principal payments) received by the horizontal cash reserve account on its permitted investments.[65]

A sponsor electing to establish and fund a horizontal cash reserve account would be required to provide disclosures similar to those required with respect to an eligible horizontal residual interest, except that these disclosures have been modified to reflect the different nature of the account.

Request for Comment

27. Do the conditions and limitations in the proposed rules effectively limit the ability of the sponsor to structure away its risk exposure?

28(a). Is the restriction on certain payments to the sponsor with respect to the eligible horizontal residual interest appropriate and sufficient? 28(b). Why or why not?

29(a). Is the proposed approach to measuring the size of horizontal risk retention (five percent of the par value of all ABS interests in the issuing entity that are issued as part of the securitization transaction) appropriate? 29(b). Would a different measurement be better? Please provide details and data supporting any alternative measurements.

30. Are the disclosures proposed sufficient to provide investors with all material information concerning the sponsor's retained interest in a securitization transaction, as well as enable investors and the Agencies to monitor whether the sponsor has complied with the rule?

31(a). Should additional disclosures be required? 31(b). If so, what should be required and why?

32. Are there any additional factors, such as accounting or cost considerations that the Agencies should consider with respect to horizontal risk retention?

33. Should a sponsor be prohibited from utilizing the horizontal risk retention option if the sponsor (or an affiliate) acts as servicer for the securitized assets?

34. Are the terms and conditions of the horizontal cash reserve account appropriate?

35. Do the terms and conditions ensure that such an account will expose the sponsor to the same type and amount of credit risk and have the same incentive effects as an eligible horizontal residual interest?

36(a). Should the eligible horizontal residual interest be required to be structured as a "Z bond" such that it pays no interest while principal is being paid down on more senior interests? 36(b). Why or why not?

3. L-Shaped Risk Retention

The next risk retention option in the proposed rules would allow a sponsor, subject to certain conditions, to use an equal combination of vertical risk retention and horizontal risk retention as a means of retaining the required five percent exposure to the credit risk of the securitized assets. This form of risk retention is referred to as an "L-Shaped" form of risk retention because it combines both vertical and horizontal forms. Specifically, § __.6 of the proposed rules would allow a sponsor to meet its risk retention obligations under the rules by retaining:

(i) Not less than 2.5 percent of each class of ABS interests in the issuing entity issued as part of the securitization transaction (the vertical component); and

(ii) An eligible horizontal residual interest in the issuing entity in an amount equal to at least 2.564 percent of the par value of all ABS interests in the issuing entity issued as part of the securitization transaction, other than those interests required to be retained as part of the vertical component (the horizontal component).[66]

The amount of the horizontal component is calibrated to avoid double counting that portion of an eligible horizontal residual interest that the sponsor is required to hold as part of the vertical component. This calibration also ensures that the combined amount of the vertical component and the horizontal component would be five percent of the aggregate transaction. For example, in a securitization transaction structured with three classes of interests: A certificated senior class whose par value is equal to $950, an

[63] *See* proposed rules at § __.4(b).

[64] *See* proposed rules at § __.4(b)(3)(i).

[65] Under the proposed rules, amounts in a horizontal cash reserve account may only be invested in (i) United States Treasury securities with remaining maturities of 1 year or less; and (ii) deposits in one or more insured depository institutions (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)) that are fully insured by federal deposit insurance. *See* proposed rules at § __.4(b)(2).

[66] As under the horizontal risk retention option itself, a sponsor would have the option of establishing and funding, in cash, a horizontal cash reserve account at the closing of the securitization transaction in this amount rather than holding an eligible horizontal residual interest. *See* proposed rules at § __.4(b). Any such horizontal cash reserve account would be subject to the same restrictions and limitations as under the horizontal risk retention option.

uncertificated subordinated class of $24 and an uncertificated eligible horizontal residual interest whose par value is equal to $26, a sponsor would be required to retain $23.75 of the senior class ($950*2.5%), $0.60 of the subordinated class ($24*2.5%) and $25.65 of the eligible horizontal residual interest (($26*2.5%) + ($1000 − ($23.75 + $0.60 + $0.65))*2.564%) for a total of $50 in risk retention requirements. Because the required size of the sponsor's retained eligible horizontal residual interest ($25.65) is less than the amount of the eligible horizontal residual interest, retention of the entire horizontal residual interest by the sponsor complies with the minimum L-shape retention requirements for the securitization.[67]

The proposal would require that a sponsor hold 50 percent of its required risk retention amount in the form of a vertical component and 50 percent in the form of a horizontal component in order to help ensure that each component is large enough to affect the sponsor's incentives and to help align the incentives of the sponsor and investors. In addition, requiring that each component represent 50 percent of the total minimum risk retention requirement should assist investors and the Agencies with monitoring compliance with the proposed rules.

Because a sponsor using the L-shape risk retention option would retain both a vertical and a horizontal component, the proposed rules would require that the sponsor provide the disclosures required under the vertical risk retention option, as well as those required under the horizontal risk retention option.

Request for Comment

37. Are the disclosures proposed sufficient to provide investors with all material information concerning the sponsor's retained interest in a securitization transaction, as well as enable investors and the Agencies to monitor whether the sponsor has complied with the rule?

38(a). Should additional disclosures be required? 38(b). If so, what should be required and why?

39. Are there any additional factors, such as cost considerations, that the Agencies should consider with respect to L-shape risk retention?

40(a). Should the Agencies permit or require that a higher proportion of the risk retention held by a sponsor under this option be composed of a vertical component or a horizontal component? 40(b). What implications might such changes have on the effectiveness of the option in helping achieving the purposes of section 15G?

4. Revolving Asset Master Trusts (Seller's Interest)

Securitizations backed by revolving lines of credit, such as credit card accounts or dealer floorplan loans, often are structured using a revolving master trust, which allows the trust to issue more than one series of ABS backed by a single pool of the revolving assets.[68] In these types of transactions, the sponsor typically holds an interest known as a "seller's interest." This interest is *pari passu* with the investors' interest in the receivables backing the ABS interests of the issuing entity until the occurrence of an early amortization event. A seller's interest is a direct, shared interest with all of the investors in the performance of the underlying assets and, thus, exposes the sponsor to the credit risk of the pool or receivables.

In light of and to accommodate those types of securitizations, the proposed rules would allow a sponsor of a revolving asset master trust that is collateralized by loans or other extensions of credit that arise under revolving accounts to meet its base risk retention requirement by retaining a seller's interest in an amount not less than five percent of the unpaid principal balance of all the assets held by the issuing entity.[69] The proposed rules define a "revolving asset master trust" as an issuing entity that (i) is a master trust; and (ii) is established to issue more than one series of ABS, all of which are collateralized by a single pool of revolving securitized assets that are expected to change in composition over time. The proposed rules also define a "seller's interest" as an ABS interest (i) in all of the assets that are held by the issuing entity and that do not collateralize any other ABS interests issued by the entity; (ii) that is *pari passu* with all other ABS interests issued by the issuing entity with respect to the allocation of all payments and losses prior to an early amortization event (as defined in the transaction documents); and (iii) that adjusts for fluctuations in the outstanding principal balances of the securitized assets. The definitions of a seller's interest and a revolving asset master trust are intended to be consistent with market practices and, with respect to seller's interest, designed to ensure that any seller's interest retained by a sponsor under the proposal would expose the sponsor to the credit risk of the underlying assets.

Under the proposed rules, a sponsor using the seller's interest option would be required to provide, or cause to be provided, in writing to potential investors a reasonable period of time prior to the sale of the asset-backed securities in the securitization transaction and, upon request, to the Commission and its appropriate Federal banking agency (if any) the amount (expressed as a percentage and dollar amount) of the seller's interest that the sponsor will retain (or has retained) in the transaction at closing and the amount (expressed as a percentage and dollar amount) that the sponsor is required to retain pursuant to § __.7 of the rule; a description of the material terms of the seller's interest; and the material assumptions and methodology used in determining the aggregate dollar amount of ABS interests issued by the issuing entity in the securitization transaction, including those pertaining to any estimated cash flows and the discount rate used.

Request for Comment

41(a). Should a sponsor of a revolving asset master trust be permitted to satisfy its base risk retention requirement by retaining the seller's interest, as proposed? 41(b). Why or why not?

42(a). Are there additional or different conditions that should be placed on this option? 42(b). If so, please explain in detail what other conditions would be appropriate.

43. Are there alternative methods of structuring risk retention for revolving asset master trust securitization transactions that should be permitted? Provide detailed descriptions and data or other support for any alternatives.

44. Are the proposed disclosures sufficient to provide investors with all material information concerning the sponsor's retained interest in a securitization transaction, as well as enable investors and the Agencies to monitor whether the sponsor has complied with the rule?

45(a). Should additional disclosures be required? 45(b). If so, what should be required and why?

46. Should a seller's interest form of risk retention be applied to any other types of securitization transactions? If so, explain in detail and provide data or other support for application to other types of securitization transactions.

5. Representative Sample

The next proposed risk retention option permits a sponsor of a

[67] This example is provided for simple illustration only.

[68] In a master trust securitization, assets (e.g., credit card receivables or dealer floorplan financings) may be added to the pool in connection with future issuances of the securities backed by the pool.

[69] *See* proposed rules at § __.7.

securitization transaction to meet its risk retention requirements by retaining a randomly selected representative sample of assets that is equivalent, in all material respects, to the assets that are transferred to the issuing entity and securitized, subject to certain conditions.[70] This method of risk retention has been used in connection with securitizations involving automobile loans where the underlying loans are not originated purely for distribution, but are securitized by the sponsor as part of a broader funding strategy. By retaining a randomly selected representative sample of assets, the sponsor retains exposure to substantially the same type of credit risk as investors in the ABS. Therefore, this structure provides a sponsor incentives to monitor and control the quality of the underwriting of the securitized assets and helps align the sponsor's incentives with those of investors in the ABS.

Consistent with other risk retention options, a sponsor using the representative sample approach would be required to retain at least five percent of the credit risk of the assets the sponsor identifies for securitization. Therefore, the unpaid principal balance of all the assets in the representative sample would be required to equal at least five percent of the aggregate unpaid principal balance of all the assets in the pool of assets initially identified for securitization (including those that end up in the representative sample). For example, if the assets that are identified for securitization have an aggregate unpaid principal balance of $100 million, the aggregate unpaid principal balance of the assets in the representative sample would be required to equal at least $5 million.[71]

To ensure that a sponsor that retains a representative sample remains exposed to substantially the same aggregate credit risks as investors in the ABS, the proposal would require the sponsor to construct a representative sample according to a specific process. As an initial step, the sponsor would need to designate a pool of at least 1,000 separate assets for securitization (the "designated pool"). The representative sample would be required to be drawn exclusively from the designated pool. Also, the designated pool would be prohibited from containing any assets other than those that are either securitized or selected for the representative sample. In the second step, the sponsor must use a random selection process to identify those loans from within the designated pool that will be included in the representative sample. This random selection process may not take account of any characteristic of the assets other than their unpaid principal balance.

After the sponsor randomly selects a representative sample from the designated pool, it would be required to assess that sample to ensure that, for each material characteristic of the assets, including the average unpaid principal balance, in the designated pool the mean of any quantitative characteristic, and the proportion of any characteristic that is categorical in nature, of the sample of assets randomly selected from the designated pool is within a 95 percent two-tailed confidence interval of the mean or proportion, respectively, of the same characteristic of all the assets in the designated pool.[72]

Without these statistical tests, a sample could be biased towards, for example, assets with a larger dollar value or assets with a lower expected risk of default. In summary, this process is designed to ensure that the assets randomly selected from the designated pool are, in fact, representative of the securitized pool. If this process does not produce a sample with equivalent material characteristics (as measured by the required two-tailed confidence level), the sponsor must repeat it as necessary in order to achieve an equivalent result or rely on another permissible option for retaining credit risk. The proposal permits this re-selection and testing process.

The proposal contains a variety of safeguards to ensure that the sponsor has constructed the representative sample in conformance with the requirements described above. For example, the sponsor would be required to have in place, and adhere to, policies and procedures for (i) identifying and documenting the material characteristics of the assets in the designated pool; (ii) selecting assets randomly from the designated pool for inclusion in the representative sample; (iii) testing the randomly selected sample of assets in the designated pool; (iv) maintaining, until all ABS interests are paid in full, documentation that clearly identifies the assets included in the representative sample; and (v) prohibiting, until all ABS interests are paid in full, assets in the representative sample from being included in the designated pool of any other securitization transaction.

In addition, prior to the sale of the asset-backed securities as part of the securitization transaction, the sponsor would be required to obtain an agreed upon procedures report from an independent, public accounting firm. At a minimum, the independent, public accounting firm must report on whether the sponsor has the policies and procedures mentioned above.[73] Once an acceptable agreed upon procedures report has been obtained, the sponsor may rely on such report for subsequent securitizations. However, if the sponsor's policies and procedures change in any material respect, a new agreed upon procedures report would be required. Under the proposal, the independent public accounting firm providing the agreed upon procedures report must report on the following minimum items:

(i) Policies and procedures that require the sponsor to identify and document the material characteristics of assets included in a designated pool of assets that meets the requirements of the proposal;

(ii) Policies and procedures that require the sponsor to select assets randomly in accordance with the proposal;

(iii) Policies and procedures that require the sponsor to test the randomly-selected sample of assets in accordance with the proposal of this section;

(iv) Policies and procedures that require the sponsor to maintain, until all ABS interests are paid in full, documentation that identifies the assets in the representative sample established in accordance with the proposal; and

[70] *See* proposed rules at § __.8.

[71] Stated otherwise, the unpaid principal balance of the assets comprising the representative sample must be no less than 5/95ths (5.264 percent) of the aggregate unpaid principal balance of all the assets that ultimately are securitized in the securitization transaction. The proposed rules use this approach to defining the minimum size of a representative sample. *See* proposed rules at § __.8(b)(1)(i).

[72] Depending on the type of assets involved in the securitization, the material characteristics other than the unpaid principal balance of the assets might include, for example, the geographical location of the property securing the loan, the debt-to-income ratio(s) of the borrower (DTI ratio), and the interest rate payable on the loan. Characteristics such as the DTI ratio and the interest rate payable on the loan would be considered quantitative characteristics, and characteristics such as the geographic location of the property securing the loan would be considered categorical characteristics. Assuming the factors above are material, a sponsor using the representative sample option would be required to test the *mean* of the DTI ratio of loans in the representative sample against the *mean* of the DTI ratio of all assets in the designated pool (including the ones selected for the random sample). In addition, the sponsor would be required to test the *proportion* of the number of assets from one geographic location in the representative sample to the total number of assets in the representative sample against the *proportion* of the number of assets from the same geographic location in the designated pool to the total number of assets in the designated pool.

[73] *See* proposed rules at § __.8(d)(2)(i)–(v).

(v) Policies and procedures that require the sponsor to prohibit, until all ABS interests are paid in full, assets in the representative sample from being included in the designated pool of any other securitization transaction.

Because the performance of the assets included in the representative sample could differ from the performance of the securitized assets if the two sets of assets were serviced under different standards or procedures, the proposal provides that, until such time as all ABS interests in the issuing entity have been fully paid or the issuing entity has been dissolved, servicing of the assets included in the representative sample must be conducted by the same entity and under the same contractual standards as the servicing of the securitized assets. In addition, the individuals responsible for servicing the assets comprising the representative sample or the securitized assets must not be able to determine whether an asset is held by the sponsor or held by the issuing entity.

A sponsor would also be required to comply with the hedging, transfer and sale restrictions in section __.14 with respect to the assets in the representative sample. Additionally, the sponsor would be prohibited from removing any assets from the representative sample and, until all ABS interests are repaid, causing or permitting the assets in the representative sample to be included in any other designated pool or representative sample established in connection with any other securitization transaction.[74]

To help ensure that potential investors and the Agencies can monitor and assess the sponsor's compliance with these requirements, the proposal would require the sponsor to provide, or cause to be provided, the following disclosures to potential investors a reasonable period of time prior to the sale of asset-backed securities as part of the securitization transaction and to provide, or cause to be provided, the same information, upon request, to the Commission and its appropriate Federal banking agency (if any):

(i) The amount (expressed as a percentage of the designated pool and dollar amount) of assets included in the representative sample to be retained by the sponsor;

(ii) The amount (expressed as a percentage of the designated pool and dollar amount) of assets required to be included in the representative sample and retained by the sponsor;

(iii) A description of the material characteristics of the designated pool and the representative sample, including, but not limited to, the average unpaid principal balance of the assets in the designated pool and the representative sample, the means of the quantitative characteristics and proportions of characteristics that are categorical in nature with respect to each of the material characteristics of the assets in the designated pool and the representative sample, of appropriate introductory and explanatory information to introduce the characteristics, the methodology used in determining or calculating the characteristics, and any terms or abbreviations used;[75]

(iv) A description of the policies and procedures that the sponsor used for ensuring that the process for identifying the representative sample complies with the proposal and that the representative sample has equivalent material characteristics to those of the pool of securitized assets;

(v) Confirmation that an agreed upon procedures report was obtained as required by the proposal; and

(vi) The material assumptions and methodology used in determining the aggregate dollar amount of ABS interests issued by the issuing entity in the securitization transaction, including those pertaining to any estimated cash flows and the discount rate used.

Further, after the sale of the ABS, the sponsor would be required to provide, or cause to be provided, to investors at the end of each distribution period (as specified in the governing transaction documents) a comparison of the performance of the pool of securitized assets for the related distribution period with the performance of the assets in the representative sample for the related distribution period. A sponsor selecting the representative sample option also would be required to provide investors disclosure concerning the assets in the representative sample in the same form, level, and manner as it provides, pursuant to rule or otherwise, concerning the securitized assets. Therefore, if loan-level disclosure concerning the securitized assets was required, by rule or otherwise, to be provided to investors, the same level of disclosure would also be required concerning the representative sample.

Request for Comment

47. Should we include the representative sample alternative as a risk retention option?

48. Are the mechanisms that we have proposed adequate to ensure monitoring of the randomization process if such an alternative were permitted?

49. Is the requirement that the designated pool contain at least 1000 assets appropriate, or should a greater number of assets be required or a lesser number be permitted?

50. Are there material characteristics other than the average unpaid principal balance of all the assets that should be identified in the rule for purposes of the equivalent risk determination and disclosure requirements?

51. Are there any better ways to ensure an adequate randomization process and the equivalence of the representative sample to the pool of securitized assets? For example, would it be appropriate and sufficient if the sponsor were required to use a third party to conduct the random selection with no subsequent testing to determine if the sample constructed has material characteristics equivalent to those of the securitized assets?

52(a). Alternatively, would it be adequate if the sponsor was required to provide a third-party opinion that the selection process was random and that retained exposures are equivalent (i.e., share a similar risk profile) to the securitized exposures? 52(b). Would this opinion resemble a credit rating, thereby raising concerns about undue reliance on credit ratings? 52(c). If this approach were adopted, should the Agencies impose any standards of performance to be followed by such a third party, or that such third party have certain characteristics?

53. If the Agencies adopt a representative sample option, should the same disclosures be required regarding the securitized assets subject to risk retention that are required for the assets in the pool at the time of securitization and on an ongoing basis?

54. Should the retained exposures, as proposed, be subject to the same servicing standards as the securitized exposures?

55. Are the disclosures proposed sufficient to provide investors with all material information concerning the sponsor's retained interest in a securitization transaction, as well as enable investors and the Agencies to monitor whether the sponsor has complied with the rule?

56(a). Should additional disclosures be required? 56(b). If so, what should be required and why?

[74] *See* proposed rules at § __.8(f).

[75] *See,* e.g., disclosure of pool characteristics required in registered transactions in the Commission's Regulation AB, Item 1111(b).

57(a). Is the condition that a sponsor obtain an agreed upon procedures report from an independent, public accounting firm appropriate? 57(b). If not, is there another mechanism that should be included in the option that helps ensure that the sponsor has constructed the representative sample in conformance with the requirements of the rule?

58(a). Is the requirement that the sponsor determine equivalency with a 95 percent two-tailed confidence appropriate? 58(b). If not, what measurement of equivalency do you recommend and why?

6. Asset-Backed Commercial Paper Conduits

The next risk retention option under the proposed rules is an option specifically designed for structures involving asset-backed commercial paper (ABCP) that is supported by receivables originated by one or more originators and that is issued by a conduit that meets certain conditions.[76] This option is designed to take account of the special structures through which this type of ABCP typically is issued, as well as the manner in which exposure to the credit risk of the underlying assets typically is retained by participants in the securitization chain for this type of ABCP.

ABCP is a type of liability that is typically issued by a special purpose vehicle (or conduit) sponsored by a financial institution or other sponsor. The commercial paper issued by the conduit is collateralized by a pool of assets, which may change over the life of the entity. Depending on the type of ABCP program being conducted, the assets collateralizing the ABCP may consist of a wide range of assets including auto loans, commercial loans, trade receivables, credit card receivables, student loans, and other securities. Like other types of commercial paper, the term of ABCP typically is short, and the liabilities are "rolled," or refinanced, at regular intervals. Thus, ABCP conduits generally fund longer-term assets with shorter-term liabilities.

As proposed, this risk retention option in § __.9 of the proposed rules would be available only for short-term ABCP collateralized by receivables or loans and supported by a liquidity facility that provides 100 percent liquidity coverage from a regulated institution. This risk retention option would not be available to entities or ABCP programs that operate as securities or arbitrage programs.[77] ABCP conduits that purchase loans or receivables from one originator or multiple originators are commonly referred to as single-seller ABCP programs and multi-seller ABCP programs, respectively. In each of these programs, the sponsor of the ABCP conduit approves the originators whose loans or receivables will collateralize the ABCP issued by the conduit. An "originator-seller" will sell the eligible loans or receivables to an intermediate, bankruptcy remote SPV established by the originator-seller. The credit risk of the receivables transferred to the intermediate SPV then typically is separated into two classes—a senior interest that is purchased by the ABCP conduit and a residual interest that absorbs first losses on the receivables and is retained by the originator-seller. The residual interest retained by the originator-seller typically is sized so that it is sufficiently large to absorb all losses on the underlying receivables.

The ABCP conduit, in turn, issues short-term ABCP that is collateralized by the senior interests purchased from the intermediate SPVs (which itself is supported by the subordination provided by the residual interest retained by the originator-seller). The sponsor of these types of ABCP conduit, which is usually a bank or other regulated financial institution, also typically provides (or arranges for another regulated financial institution to provide) 100 percent liquidity coverage on the ABCP issued by the conduit. This liquidity support typically requires the support provider to provide funding to, or purchase assets from, the ABCP conduit in the event that the conduit lacks the funds necessary to repay maturing ABCP issued by the conduit.

The proposal includes several conditions designed to ensure that this option is available only to the type of single-seller or multi-seller ABCP conduits described above. For example, this option is available only with respect to ABCP issued by an "eligible ABCP conduit," as defined by the proposal. The proposal defines an eligible ABCP conduit as an issuing entity that issues ABCP and that meets each of the following criteria.[78] First, the issuing entity must be bankruptcy remote or otherwise isolated for insolvency purposes from the sponsor and any intermediate SPV. Second, the ABS issued by an intermediate SPV to the issuing entity must be collateralized solely by assets originated by a single originator-seller.[79] Third, all the interests issued by an intermediate SPV must be transferred to one or more ABCP conduits or retained by the originator-seller. Fourth, a regulated liquidity provider must have entered into a legally binding commitment to provide 100 percent liquidity coverage (in the form of a lending facility, an asset purchase agreement, a repurchase agreement, or similar arrangement) to all the ABCP issued by the issuing entity by lending to, or purchasing assets from, the issuing entity in the event that funds are required to repay maturing ABCP issued by the issuing entity.[80]

Under the proposed risk retention option applicable to ABCP conduit structures, the sponsor of an eligible ABCP conduit would be permitted to satisfy its base risk retention obligations under the rule if each originator-seller that transfers assets to collateralize the ABCP issued by the conduit retains the same amount and type of credit risk as would be required under the horizontal risk retention option as if the originator-seller was the sponsor of the intermediate SPV. Specifically, the proposal provides that a sponsor of an ABCP securitization transaction would satisfy its base risk retention requirement with respect to the issuance of ABCP by an eligible ABCP conduit if each originator-seller retains an eligible horizontal residual interest in each intermediate SPV established by or on

[76] *See* proposed rules at § __.9.

[77] Structured investment vehicles (SIVs) and securities arbitrage ABCP programs both purchase securities (rather than receivables and loans from originators). SIVs typically lack liquidity facilities covering all of these liabilities issued by the SIV, while securities arbitrage ABCP programs typically have such liquidity support.

[78] *See* proposed rules at § __.2 (definition of "eligible ABCP conduit").

[79] Under the proposal, an originator-seller would mean an entity that creates assets through one or more extensions of credit and sells those assets (and no other assets) to an intermediate SPV, which in turn sells interests collateralized by those assets to one or more ABCP conduits. The proposal defines an intermediate SPV as a special purpose vehicle that is bankruptcy remote or otherwise isolated for insolvency purposes that purchases assets from an originator-seller and that issues interests collateralized by such assets to one or more ABCP conduits. *See* proposed rules at § __.2 (definitions of "originator-seller" and "intermediate SPV").

[80] The proposal defines a regulated liquidity provider as a depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)); a bank holding company (as defined in 12 U.S.C. 1841) or a subsidiary thereof; a savings and loan holding company (as defined in 12 U.S.C. 1467a) provided all or substantially all of the holding company's activities are permissible for a financial holding company under 12 U.S.C. 1843(k) or a subsidiary thereof; or a foreign bank (or a subsidiary thereof) whose home country supervisor (as defined in § 211.21 of the Federal Reserve Board's Regulation K (12 CFR 211.21)) has adopted capital standards consistent with the Capital Accord of the Basel Committee on Banking Supervision, as amended, provided the foreign bank is subject to such standards. *See http://www.bis.org/bcbs/index.htm* for more information about the Basel Capital Accord.

behalf of that originator-seller for purposes of issuing interests to the eligible ABCP conduit. The eligible horizontal residual interest retained by the originator-seller must equal at least five percent of the par value of all interests issued by the intermediate SPV. Accordingly, each originator-seller would be required to retain credit exposure to the receivables sold by that originator-seller to support issuance of the ABCP.

The eligible horizontal residual interest retained by the originator-seller would be subject to the same terms and conditions as apply under the horizontal risk retention option. Thus, for example, if an originator-seller transfers $100 of receivables to an intermediate SPV, which then issues senior interests and an eligible horizontal residual interest with an aggregate par value of $100, the originator-seller must retain an eligible horizontal residual interest with a par value of $5 or more.[81] Importantly, the originator-seller also would be prohibited from selling, transferring, and hedging the eligible horizontal residual interest that it is required to retain. This option is designed to accommodate the special structure and features of these types of ABCP programs.

Although the proposal would allow the originator-sellers (rather than the sponsor) to retain the required eligible horizontal residual interest, the proposal also imposes certain obligations directly on the sponsor in recognition of the key role the sponsor plays in organizing and operating an eligible ABCP conduit. Most importantly, the proposal provides that the sponsor of an eligible ABCP conduit that issues ABCP in reliance on this option would be responsible for compliance with the requirements of this risk retention option. The proposal also would require that the sponsor maintain policies and procedures to monitor the originator-sellers' compliance with the requirements of the proposal. In the event that the sponsor determines that an originator-seller no longer complies with the requirements of the rule (for example, because the originator-seller has sold the interest it was required to retain), the sponsor would be required to promptly notify, or cause to be notified, the investors in the securitization transaction of such noncompliance.

In addition, consistent with market practice, the proposal would require that the sponsor:

(i) Establish the eligible ABCP conduit;

(ii) Approve the originator-sellers permitted to sell or transfer assets, indirectly through an intermediate SPV, to the ABCP conduit;

(iii) Establish criteria governing the assets the originator-sellers are permitted to sell or transfer to an intermediate SPV;

(iv) Approve all interests in an intermediate SPV to be purchased by the eligible ABCP conduit;

(v) Administer the ABCP conduit by monitoring the interests acquired by the conduit and the assets collateralizing those interests, arranging for debt placement, compiling monthly reports, and ensuring compliance with the conduit documents and with the conduit's credit and investment policy; and

(vi) Maintain, and adhere to, policies and procedures for ensuring that the requirements of the rule have been met.[82]

The sponsor also would have to provide, or cause to be provided, to potential purchasers a reasonable period of time prior to the sale of any ABCP from the conduit, and to the Commission and its appropriate Federal banking agency, if any, upon request, the name and form of organization of each originator-seller that will retain (or has retained) an interest in the securitization transaction pursuant to § __.9 of the proposed rules (including a description of the form, amount, and nature of such interest), and of each regulated liquidity provider that provides liquidity support to the eligible ABCP conduit (including a description of the form, amount, and nature of such liquidity coverage).

Section 15G permits the Agencies to allow an originator (rather than a sponsor) to retain the required amount and form of credit risk and to reduce the amount of risk retention required of the sponsor by the amount retained by the originator.[83] In developing the proposed risk retention option for eligible ABCP conduits, the Agencies have considered the factors set forth in section 15G(d)(2) of the Exchange Act.[84] The terms of the proposed option for eligible ABCP conduits include conditions designed to ensure that the interests in the intermediate SPVs sold to an eligible ABCP conduit have low credit risk, and to ensure that originator-sellers have incentives to monitor the quality of the assets that are sold to an intermediate SPV and collateralize the ABCP issued by the conduit. In addition, the proposal is designed to effectuate the risk retention requirements of section 15G of the Exchange Act in a manner that facilitates reasonable access to credit by consumers and businesses through the issuance of ABCP backed by consumer and business receivables. Finally, as noted above, an originator-seller would be subject to the same restrictions on transferring the retained eligible horizontal residual interest to a third party as would apply to sponsors under the rule.

Request for Comment

59. Is the proposed risk retention option for eligible ABCP conduits appropriate?

60(a). Have the Agencies appropriately defined the terms (such as an eligible ABCP conduit, intermediate SPV and originator-seller) that govern use of this option? 60(b). Is the foregoing description of ABCP structures accurate? 60(c) Are there additional ABCP structures that are not easily adaptable to the risk retention options proposed? 60(d). If so, should the proposed ABCP option be revised to include these structures and if so, how?

61. Should the proposed option for securitizations structured using ABCP conduits require financial disclosure regarding the liquidity provider?

62(a). Also, should other entities be permitted to be liquidity providers for purposes of the rule? For example, should the rule permit an insurance company to be an eligible liquidity provider if the company is in the business of providing credit protection (such as a bond insurer or re-insurer) and is subject to supervision by a State insurance regulator or is a foreign insurance company subject to comparable regulation to that imposed by U.S. insurance companies?

62(b). Why or why not?

[81] As noted above, this would be the minimum amount of credit risk that must be retained as part of a securitization transaction.

[82] The sponsor of an ABCP conduit satisfies the definition of "sponsor" under the proposed rules. If the conduit does not satisfy the conditions for an "eligible ABCP conduit," the sponsor must retain credit risk in accordance with another risk retention option included in the proposal (unless an exemption for the transaction exists).

[83] *See* 15 U.S.C. 78o–11(1)(c)(G)(iv) and (d) (permitting the Commission and the Federal banking agencies to allow the allocation of risk retention from a sponsor to an originator).

[84] 15 U.S.C. 78o–11(d)(2). These factors are whether the assets sold to the securitizer have terms, conditions, and characteristics that reflect low credit risk; whether the form or volume of transactions in securitization markets creates incentives for imprudent origination of the type of loan or asset to be sold to the securitizer; and the potential impact of the risk retention obligations on the access of consumers and businesses to credit on reasonable terms, which may not include the transfer of credit risk to a third party.

63. In addition, the Agencies seek confirmation that the terms of this option effectively prevent structures such as SIVs and ABCP programs that operate as arbitrage programs from using this option.

64. Should the rule, as proposed, allow the liquidity provider to be a depository institution holding company or a subsidiary of a depository institution instead of just the depository institution?

65. Are the disclosures proposed sufficient to provide investors with all material information concerning the originator-seller that will retain an interest in the securitization transaction and of each regulated liquidity provider that provides liquidity support to the eligible ABCP conduit, as well as enable investors and the Agencies to monitor whether the sponsor has complied with the rule?

66(a). Should additional disclosures be required? 66(b). If so, what should be required and why? 66(c). For example, should a sponsor be required to disclose the material assumptions and methodology used in determining the aggregate dollar amount of interests issued by each intermediate SPV? 66(d). Would such a disclosure be beneficial to investors? 66(e). In light of the broad range of asset classes that underlie ABCP conduits, would such a disclosure pose any operational or other challenges for sponsors of ABCP conduits?

67(a). Should we, as proposed, require that the ABCP be for a term of 270 days or less? 67(b). Should we allow for a longer term, such as up to one year?

7. Commercial Mortgage-Backed Securities

Section 15G(c)(1)(E) of the Exchange Act provides that, with respect to securitizations involving commercial mortgages, the regulations prescribed by the Agencies may provide for "retention of the first-loss position by a third-party purchaser that specifically negotiates for the purchase of such first loss position, holds adequate financial resources to back losses, provides due diligence on all individual assets in the pool before the issuance of the asset-backed securities, and meets the same standards for risk retention as the Federal banking agencies and the Commission require of the securitizer[.]" [85] In light of this provision, the Agencies are proposing to permit a sponsor of ABS that is collateralized by commercial real estate loans to meet its risk retention requirements if a third-party purchaser acquires an eligible horizontal residual interest in the issuing entity in the same form, amount, and manner as the sponsor would have been required to retain under the horizontal risk retention option and certain additional conditions are met.

The allocation of a first-loss position to a third-party purchaser has been common practice in CMBS transactions for a number of years.[86] The third-party purchaser has been commonly referred to in the CMBS marketplace as a "B-piece buyer" [87] because the CMBS tranche or tranches purchased by this investor were either unrated by the credit rating agencies or assigned a below-investment grade credit rating. Typically a B-piece buyer purchases at a discount to face value the most subordinate tranche in the cash flow waterfall of the CMBS transaction. In order to manage its risk, the B-piece buyer often is involved early in the securitization process and has significant influence over the selection of pool assets. For example, the B-piece buyer often performs "due diligence" on the pool assets, which often means a review of the loans in the pool at the property and loan level. As a result of this review, a B-piece buyer may request that specific loans be removed from the pool prior to securitization.

Additionally, a B-piece buyer is often designated as the "controlling class" under the terms of the pooling and servicing agreement governing the CMBS transaction, and in accordance with its rights as the controlling class, a B-piece buyer often names itself, or an affiliated company, as the "special servicer" in the transaction. Such servicer typically is the servicer authorized to service loans in default or having other non-payment issues. The control of special servicing rights by the B-piece buyer has the potential to create conflicts of interest with the senior certificate holders to the securitization. For example, the control of special servicing rights would allow the B-piece buyer to directly or indirectly manage any loan modifications. While some CMBS transactions required an "operating advisor" to oversee the servicing activities of the special servicer, in many instances this operating advisor works on behalf of the controlling class (i.e., the B-piece buyer unless and until losses reduced its junior tranche to zero). To help better address the potential conflict created by special servicer arrangements involving B-piece buyers, newly issued CMBS for which investors received financing through the Term-Asset Backed Securities Lending Facility ("TALF") were required to have an independent operating advisor that acted on behalf of the investors as a collective whole, had consultative rights over major decisions of the special servicer, and had the ability to recommend replacement of the special servicer.[88] These operating advisor requirements also were coupled with enhanced disclosures to investors regarding major decisions by the B-piece buyer and special servicer. Aspects of these TALF requirements have been incorporated into recent CMBS transactions undertaken after the closing of the TALF to new financings.

In light of the specific provisions of Section 15G(c)(1)(E) and the historical market practice of third-party purchasers acquiring first-loss positions in CMBS transactions, the Agencies' proposal would allow a sponsor to meet its risk retention requirements under the rule if a third-party purchaser retains the necessary exposure to the credit risk of the underlying assets provided six conditions are met. These conditions are designed to help ensure that the form, amount, and manner of the third-party purchaser's risk retention are consistent with the purposes of section 15G of the Exchange Act. This option would be available only for securitization transactions where commercial real estate loans constitute at least 95 percent of the unpaid principal balance of the assets being securitized.[89]

The first condition requires that the third-party purchaser retain an eligible

[85] 15 U.S.C. 78o–11(c)(1)(E)(iv).

[86] *See,* e.g., Board Report.

[87] We note that under the proposal there is no requirement that the tranche or tranches purchased by the third-party purchaser be assigned any particular credit rating.

[88] The TALF was a special lending facility established by the Federal Reserve and the Treasury Department in response to the financial crisis to assist the financial markets in accommodating the credit needs of consumers and businesses of all sizes by facilitating the issuance of ABS collateralized by a variety of consumer and business loans. The TALF also was intended to improve the market conditions for ABS more generally. Additional information concerning the TALF is available on the public Web sites of the Board (*see http://www.federalreserve.gov/monetarypolicy/bst_lendingother.htm*) and the Federal Reserve Bank of New York (see *http://www.newyorkfed.org/markets/talf.html*).

[89] *See* proposed rules at § __.10(a). "Commercial real estate loan" is defined in § __.16 of the proposed rules to mean a loan secured by a property with five or more single family units, or by nonfarm nonresidential real property, the primary source (fifty (50) percent or more) of repayment for which is expected to be derived from the proceeds of the sale, refinancing, or permanent financing of the property; or rental income associated with the property other than rental income derived from any affiliate of the borrower. A commercial real estate loan does not include a land development and construction loan (including 1- to 4-family residential or commercial construction loans); any other land loan; a loan to a real estate investment trust (REIT); or an unsecured loan to a developer.

horizontal residual interest in the securitization in the same form, amount, and manner as would be required of the sponsor under the horizontal risk retention option (proposed § __.5).[90] Accordingly, the interest acquired by the third-party purchaser must be the most junior interest in the issuing entity, and must be subject to the same limits on payments as would apply if the eligible horizontal residual interest were held by the sponsor pursuant to the horizontal risk retention option.

The second condition would require that the third-party purchaser pay for the first-loss subordinated interest in cash at the closing of the securitization without financing being provided, directly or indirectly, from any other person that is a party to the securitization transaction (including, but not limited to, the sponsor, depositor, or an unaffiliated servicer), other than a person that is a party solely by reason of being an investor.[91] This would prohibit the third-party purchaser or an affiliate of the third-party purchase from obtaining financing from any such person as well as from any affiliate of any such person. These requirements should help ensure that the third-party purchaser has sufficient financial resources to fund the acquisition of the first-loss subordinated interest and absorb losses on the underlying assets to which it would be exposed through this interest.[92]

The third condition relates to the third-party purchaser's review of the assets collateralizing the ABS. This proposed condition would require that the third-party purchaser perform a review of the credit risk of each asset in the pool prior to the sale of the asset-backed securities. This review must include, at a minimum, a review of the underwriting standards, collateral, and expected cash flows of each commercial loan in the pool.

The fourth condition is intended to address the potential conflicts of interest that can arise when a third-party purchaser serves as the "controlling class" of a CMBS transaction. This condition would prohibit a third-party purchaser from (i) being affiliated with any other party to the securitization transaction (other than investors); or (ii) having control rights in the securitization (including, but not limited to acting as servicer or special servicer) that are not collectively shared by all other investors in the securitization. The proposed prohibition of control rights related to servicing, would be subject to an exception, however, if the underlying securitization transaction documents provide for the appointment of an independent operating advisor (Operating Advisor) with certain powers and responsibilities.[93] Under the proposal, an "Operating Advisor" would be defined as a party that (i) is not affiliated with any other party to the securitization, (ii) does not directly or indirectly have any financial interest in the securitization other than in fees from its role as Operating Advisor, and (iii) is required to act in the best interest of, and for the benefit of, investors as a collective whole.

The Agencies believe that the introduction of an independent Operating Advisor would minimize the ability of third-party purchasers to manipulate cash flows through special servicing. In approving loans for inclusion in the securitization, the third-party purchaser will be mindful of the limits on its ability to offset the consequences of poor underwriting through servicing tactics if a loan becomes troubled, thereby providing stronger incentive for the third-party purchaser to be diligent in assessing credit quality of the pool assets at the time of securitization. For these types of securitization transactions, the third-party purchaser's review of each loan can serve as an effective check on the underwriting quality and credit risk of the underlying loans and the reliability of key information utilized.

Further, in order for a third-party purchaser to have servicing rights in connection with the securitization transaction, the securitization transaction documents must require that the Operating Advisor have certain powers and responsibilities in order to ensure that the Operating Advisor can effectively fulfill its advisory role in the transaction.[94] For example, as proposed, the transaction documents must require that, if the third-party purchaser or an affiliate acts as servicer, the servicer consult with the Operating Advisor in connection with, and prior to, any major decision in connection with the servicing of the securitized assets. Major decisions would include, without limitation, any material modification of, or waiver with respect to, any provision of a loan agreement, any foreclosure upon or comparable conversion of the ownership of a property, and any acquisition of a property.

The securitization transaction documents must also provide that the Operating Advisor is responsible for reviewing the actions of any servicer that is, or is, affiliated with the third-party purchaser and for issuing a report to investors and the issuing entity, on a periodic basis, concerning whether the Operating Advisor believes, in its sole discretion exercised in good faith, the servicer is in compliance with any standards required of the servicer as provided in the applicable transaction documents, and if not, the standard(s) with which the servicer is out of compliance. In addition, the securitization transaction documents must also provide that the Operating Advisor has the authority to recommend that a servicer that is, or is affiliated with, the third-party purchaser be replaced by a successor servicer if the Operating Advisor determines, in its sole discretion exercised in good faith, that the servicer has failed to comply with any standard required of the servicer as provided in the applicable transaction documents and that such replacement would be in the best interest of the investors as a collective whole. The relevant transaction documents must provide that, if such a recommendation is made, the servicer that is, or affiliated with, the third-party purchaser must be replaced unless a majority of each class of certificate holders eligible to vote on the matter votes to retain the servicer.

Consistent with other disclosure requirements under the proposed rules, the fifth proposed condition requires that the sponsor provide, or cause to be provided, potential purchasers certain information concerning the third-party purchaser and other information concerning the transaction. Specifically, the proposal would require that a sponsor disclose to potential investors a reasonable time before the sale of asset-backed securities and, upon request, to the Commission and its appropriate Federal banking agency (if any) the name and form of organization of the third-party purchaser, a description of the third-party purchaser's experience in investing in CMBS, and any other information regarding the third-party purchaser or the third-party purchaser's retention of the eligible horizontal residual interest that is material to

[90] *See* proposed rules at § __.10.

[91] *See* proposed rules at § __.10.

[92] This requirement is consistent with section 15G(b)(1)(E)(ii) of the Exchange Act, which provides that the Agencies may consider whether a third-party purchaser of CMBS "holds adequate financial resources to back losses."

[93] *See* proposed rules at § __.10(a)(4)(i). The proposal also includes a *de minimis* exception to the general prohibition on affiliation with other parties to the securitization transaction. Under this *de minimis* exception, the third-party purchaser would be permitted to be affiliated with one or more originators of the securitized assets so long as the assets contributed by such originator(s) collectively comprise less than 10 percent of the assets in the pool (as measured by dollar volume). *See* proposed rules at § __.10(a)(4)(ii).

[94] *See* proposed rules at § __.10(a)(4)(B)–(E).

investors in light of the circumstances of the particular securitization transaction.

Additionally, a sponsor would be required to disclose the amount of the eligible horizontal residual interest that the third-party purchaser will retain (or has retained) in the transaction (expressed as a percentage of ABS interests in the issuing entity and as a dollar amount); the purchase price paid for such interest; the material terms of such interest; and the amount of the interest that the sponsor would have been required to retain if the sponsor had retained an interest in the transaction pursuant to the horizontal menu option. The material assumptions and methodology used in determining the aggregate amount of ABS interests of the issuing entity, including any estimated cash flows and the discount rate used, also must be included in the disclosure. The proposed rules would require that the sponsor provide, or cause to be provided, to potential investors the representations and warranties concerning the securitized assets, the schedule of any securitized assets that are determined not to comply with such representations and warranties, and what factors were used to make the determination that a securitized asset should be included in the pool notwithstanding that it did not comply with such representations and warranties, such as compensating factors or a determination that the exceptions(s) were not material.

Finally, the sixth condition would require that any third-party purchaser acquiring an eligible horizontal residual interest under this option comply with the hedging, transfer and other restrictions applicable to such interest under the proposed rules if the third-party purchaser was a sponsor who had acquired the interest under the horizontal risk retention option.

Although the third-party purchaser may retain the credit risk required under § __.3 of the proposed rules, the proposal provides that the sponsor remains responsible for compliance with the requirements described above. Therefore, consistent with the menu option available to eligible ABCP conduits, the proposal would require that the sponsor maintain and adhere to policies and procedures to monitor the third-party purchaser's compliance with these requirements. In the event that the sponsor determines that the third-party purchaser no longer complies with the requirements of the rule (for example, because the third-party purchaser has sold the interest it was required to retain), the sponsor must promptly notify the investors in the securitization transaction of such noncompliance.

Request for Comment

68(a). Should the rules allow a third-party purchaser to retain the required amount of risk in a CMBS transaction as described above?

68(b). Why or why not?

69(a). Should a third-party purchaser option be available to other asset classes besides CMBS? Would expanding this option to other asset classes fulfill the purposes of section 15G? 69(b). If so, would any adjustments or requirements be necessary?

70. Should the use of this option be conditioned, as proposed, on a requirement that the third-party purchaser separately examine the assets in the pool and/or not sell or hedge the interest it is required to retain?

71(a). Should the use of this option be conditioned, as proposed, on the requirement that the sponsor disclose the actual purchase price paid by the third-party purchaser for the eligible horizontal residual interest? 71(b). Why or why not?

72. Is any disclosure concerning the financial resources of the third-party purchaser necessary in light of the requirement that the third-party purchaser fund the acquisition of the eligible horizontal residual interest in cash without direct or indirect financing from a party to the transaction?

73(a). Should the rule specify the particular types of information about a third-party purchaser that should be disclosed, rather than requiring disclosure of any other information regarding the third-party purchaser that is material to investors in light of the circumstances of the particular securitization transaction? 73(b). Should the specific types of information about a third-party purchaser be in addition to any other information regarding the third-party purchaser that is material to investors in light of the circumstances of the particular securitization transaction?

74. Are the conditions relating to servicing, including those related to an Operating Advisor, appropriate or should they be modified or supplemented?

75(a). Should the Agencies require any other disclosure relating to representations and warranties concerning the assets for CMBS?

76(a). We are aware of at least one industry group developing model representations and warranties for CMBS.[95] Should the rule require that a blackline of the representations and warranties for the securitization transaction against an industry-accepted standard for model representations and warranties be provided to investors at a reasonable time prior to sale? 76(b). Would this provide more information regarding the adequacy of the representation and warranties being provided? 76(c). Would this be a costly requirement? 76(d). Could investors easily create their own blacklines if needed?

77. Are the disclosures proposed sufficient to provide investors with all material information concerning the third-party purchaser's retained interest in the securitization transaction, as well as to enable investors and the Agencies to monitor whether the sponsor has complied with the rule?

78(a). Should additional disclosures be required? 78(b). If so, what should be required and why?

8. Treatment of Government-Sponsored Enterprises

Section __.11 of the proposed rules would govern the credit risk retention requirements for the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (jointly, the "Enterprises") while operating under the conservatorship or receivership of FHFA, as well as for any limited-life regulated entity succeeding to the charter of either Fannie Mae or Freddie Mac pursuant to section 1367 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act).[96] The primary business of the Enterprises under their respective charter acts is to pool conventional mortgage loans and to issue securities backed by these mortgages that are fully guaranteed as to the timely payment of principal and interest by the issuing Enterprise.[97] Because of these activities, Fannie Mae or Freddie Mac (or a successor limited-life regulated entity) would be the sponsor of the asset-backed securities that it issues for purposes of section 15G.

In considering how to address in the proposal the risk retention requirements of section 15G with respect to the mortgage-backed securities issued, and fully guaranteed as to timely payment of principal and interest, by the Enterprises or a successor limited-life regulated entity, the Agencies considered several factors. Because Fannie Mae and Freddie Mac fully guarantee the timely payment of

[95] *See,* e.g., comment letter to the Commission from CRE Finance Council dated January 19, 2011, available at *http://www.sec.gov/comments/df-title-ix/asset-backed-securities/assetbackedsecurities-37.pdf.*

[96] 12 U.S.C. 4617.

[97] *See* 12 U.S.C. 1451, *et seq.* (Freddie Mac); 12 U.S.C. 1716, *et seq.* (Fannie Mae).

principal and interest on the mortgage-backed securities they issue, the Enterprises are exposed to the entire credit risk of the mortgages that collateralize those securities.[98]

Both Fannie Mae and Freddie Mac have been operating under the conservatorship of FHFA since September 6, 2008. As conservator, FHFA has assumed all powers formerly held by each Enterprise's officers, directors, and shareholders. In addition, FHFA, as conservator, is authorized to take such actions as may be necessary to restore each Enterprise to a sound and solvent condition and that are appropriate to preserve and conserve the assets and property of each Enterprise.[99] The primary goals of the conservatorships are to help restore confidence in the Enterprises, enhance their capacity to fulfill their mission, mitigate the systemic risk that contributed directly to instability in financial markets, and maintain the Enterprises' secondary mortgage market role until their future is determined through legislation. To these ends, FHFA's conservatorship of the Enterprises is directed toward minimizing losses, limiting risk exposure, and ensuring that the Enterprises price their services to adequately address their costs and risk. Any limited-life regulated entity established by FHFA to succeed to the charter of an Enterprise also would operate under the direction and control of FHFA, acting as receiver of the related Enterprise.[100]

Concurrently with being placed in conservatorship under section 1367 of the Safety and Soundness Act, each Enterprise entered into a Senior Preferred Stock Purchase Agreement (PSPA) with the United States Department of the Treasury (Treasury). Under each PSPA, Treasury purchased senior preferred stock of each Enterprise. In addition, if FHFA determines that the Enterprise's liabilities have exceeded its assets under generally accepted accounting principles (GAAP), Treasury will contribute cash capital to that Enterprise in an amount equal to the difference between its liabilities and assets. In exchange for this cash contribution, the liquidation preference of the senior preferred stock purchased from each Enterprise under the respective PSPA increases in an equivalent amount. The senior preferred stock of each Enterprise purchased by Treasury is senior to all other preferred stock, common stock or other capital stock issued by the Enterprise, and dividends on the aggregate liquidation preference of the senior preferred stock purchased by Treasury are payable at a rate of 10 percent per annum.[101] Under each PSPA, Treasury's commitment to each Enterprise is the greater of (1) $200 billion, or (2) $200 billion plus the cumulative amount of the Enterprise's net worth deficit as of the end of any calendar quarter in 2010, 2011 and 2012, less any positive net worth as of December 31, 2012.[102] Accordingly, the PSPAs provide support to the relevant Enterprise should the Enterprise have a net worth deficit as a result of the Enterprise's guaranty of timely payment on the asset-backed securities it issues. By their terms, the PSPA with an Enterprise may not be assigned or transferred, or inure to the benefit of, any limited-life regulated entity established with respect to the Enterprise without the prior written consent of Treasury.

In light of the foregoing, § __.11 of the proposed rules provides that the guaranty provided by an Enterprise while operating under the conservatorship or receivership of FHFA with capital support from the United States will satisfy the risk retention requirements of the Enterprise under section 15G of the Exchange Act with respect to the mortgage-backed securities issued by the Enterprise. Similarly, an equivalent guaranty provided by a limited-life regulated entity that has succeeded to the charter of an Enterprise, and that is operating under the direction and control of FHFA under section 1367(i) of the Safety and Soundness Act, will satisfy the risk retention requirements, provided that the entity is operating with capital support from the United States. If either Enterprise or a successor limited-life regulated entity were to begin to operate other than as provided in the proposed rules, that Enterprise or entity would no longer be able to avail itself of the credit risk retention option set forth in § __.11.

For similar reasons, the proposed rules provide that the premium capture cash reserve account requirements in § __.12, as well as the hedging and financing prohibitions in § __.14(b), (c), and (d), of the proposed rules shall not apply to an Enterprise while operating under the conservatorship or receivership of FHFA with capital support from the United States, or to a limited-life regulated entity that has succeeded to the charter of an Enterprise and that is operating under the direction and control of FHFA with capital support from the United States. In the past, the Enterprises have sometimes acquired pool insurance to cover a percentage of losses on the mortgage loans comprising the pool.[103] Because § __.11 requires each Enterprise, while in conservatorship or receivership, to hold 100 percent of the credit risk on MBS that it issues, the prohibition on hedging related to the credit risk that the retaining sponsor is required to retain would limit the ability of the Enterprises to require such pool insurance in the future. Because the exception would continue only so long as the relevant Enterprise operates under the control of FHFA and with capital support from the United States, the proposed exception from these restrictions should be consistent with the maintenance of quality underwriting standards, in the public interest, and consistent with the protection of investors.

A sponsor utilizing this section shall provide to investors, in written form under the caption "Credit Risk Retention" and, upon request, to FHFA and the Commission, a description of the manner in which it has met the credit risk retention requirement of this part.

The Agencies recognize both the need for, and importance of, reform of the Enterprises. In recent months, the Administration and Congress have been considering a variety of proposals to reform the housing finance system and the Enterprises. The Agencies expect to revisit and, if appropriate modify § __.11 of the proposed rules after the future of the Enterprises and of the statutory and regulatory framework for the Enterprises becomes clearer.

Request for Comment

79. Is our proposal regarding the treatment of the Enterprises appropriate?

80. Would applying the hedging prohibition to all of the credit risk that the Enterprises are required to retain when using § __.11 to satisfy the risk retention requirements be an unduly burdensome result for the Enterprises?

[98] The charters of Fannie Mae and Freddie Mac also place limitations on the types of mortgages that the Enterprises may guarantee and securitize.

[99] *See* 12 U.S.C. 4617(b)(2)(D).

[100] *See* 12 U.S.C. 4617(i). The affairs of a limited-life regulated entity must be wound up not later than two years after its establishment, subject to the potential for a maximum of three one-year extensions at the discretion of the Director of FHFA.

[101] Under the PSPAs, the rate rises to 12 percent per annum if the dividends are not paid in cash.

[102] The PSPAs also provide for the retained portfolios of each Enterprise to be reduced over time.

[103] Typically, insurers would pay the first losses on a pool of loans, up to one or two percent of the aggregate unpaid principal balance of the pool.

81(a). Instead of the broad exception from the hedging prohibition for the Enterprises, when satisfying the risk retention requirements pursuant to § __.11, should the rules prohibit an Enterprise from hedging five percent of the total credit risk in any securitization transaction where the Enterprise acts as a sponsor (thus ensuring the Enterprise retains at least that amount of exposure to the credit risk of the assets)? 81(b). Would this be consistent with statutory intent? 81(c). Would that be feasible for the Enterprises to monitor?

9. Premium Capture Cash Reserve Account

In many securitization transactions, particularly those involving residential and commercial mortgages, conducted prior to the financial crisis, sponsors sold premium or interest-only tranches in the issuing entity to investors, as well as more traditional obligations that paid both principal and interest received on the underlying assets. By selling premium or interest-only tranches, sponsors could thereby monetize at the inception of a securitization transaction the "excess spread" that was expected to be generated by the securitized assets over time. By monetizing excess spread before the performance of the securitized assets could be observed and unexpected losses realized, sponsors were able to reduce the impact of any economic interest they may have retained in the outcome of the transaction and in the credit quality of the assets they securitized. This created incentives to maximize securitization scale and complexity, and encouraged aggressive underwriting.

In order to achieve the goals of risk retention, the Agencies propose to adjust the required amount of risk retention to account for any excess spread that is monetized at the closing of a securitization transaction. Otherwise, a sponsor could effectively negate or reduce the economic exposure it is required to retain under the proposed rules. Furthermore, prohibiting sponsors from receiving compensation in advance for excess spread income expected to be generated by securitized assets over time should better align the interests of sponsors and investors and promote more robust monitoring by the sponsor of the credit risk of securitized assets, thereby encouraging the use of sound underwriting in connection with securitized loans. It also should promote simpler and more coherent securitization structures as sponsors would receive excess spread over time and would not be able to reduce the economic exposure they are required to retain.

Accordingly, as proposed, if a sponsor structures a securitization to monetize excess spread on the underlying assets—which is typically effected through the sale of interest-only tranches or premium bonds—the proposed rule would "capture" the premium or purchase price received on the sale of the tranches that monetize the excess spread and require that the sponsor place such amounts into a separate "premium capture cash reserve account." [104] The amount placed into the premium capture cash reserve account would be separate from and in addition to the sponsor's base risk retention requirement under the proposal's menu of options, and would be used to cover losses on the underlying assets before such losses were allocated to any other interest or account. As a likely consequence to this proposed requirements, the Agencies expect that few, if any, securitizations would be structured to monetize excess spread at closing and, thus, require the establishment of a premium capture cash reserve account, which should provide the benefits described above.

Specifically, the proposal would require that a sponsor retaining credit risk under the vertical, horizontal, L-shaped, or revolving asset master trust options of the proposed rules establish and fund (in cash) at closing a premium capture cash reserve account in an amount equal to the difference (if a positive amount) between (i) the gross proceeds received by the issuing entity from the sale of ABS interests in the issuing entity to persons other than the sponsor (net of closing costs paid by a sponsor or the issuing entity to unaffiliated parties); and (ii) 95 percent of the par value of all ABS interests in the issuing entity issued as part of the transaction. The 95 percent of par value amount is designed to take into account the five percent interest that the sponsor is required to retain in the issuing entity under each of these options.

If the sponsor will retain (or caused to be retained) credit risk under the representative sample, ABCP, or CMBS third-party purchaser options of the proposed rules, the sponsor would have to fund in cash at closing a premium capture cash reserve account in an amount equal to the difference (if a positive amount) between (i) the gross proceeds received by the issuing entity from the sale of ABS interests to persons other than the sponsor (net of the closing costs described above), and (ii) 100 percent of the par value of the ABS interests in the issuing entity issued as part of the transaction. In these cases, the proposal uses 100 percent (rather than 95 percent) of the par value of the ABS interests issued because the relevant menu options do not require that the sponsor itself retain any of the ABS interests issued in the transaction and, accordingly, potentially all of such interests could be sold to third parties.

Under the proposed rules, a premium capture cash reserve account would have to be established and funded whenever a positive amount resulted from the relevant calculation described in the preceding paragraphs. These calculations are designed to capture the amount of excess spread that a sponsor may seek to immediately monetize at closing such as through the issuance of an interest-only tranche (which may have a nominal value assigned to it, but does not have a par value) or premium bonds that are sold for amounts in excess of their par value. On the other hand, the proposal would not require a sponsor to establish and fund a premium capture cash reserve account if the sponsor does not structure the securitization to immediately monetize excess spread, thus resulting in no "premium" that would be captured by the calculations described above. Accordingly, existing types of securitization structures that do not monetize excess spread at closing would not trigger establishment of a premium capture reserve account. Going forward, sponsors would have the ability to structure their securitization transactions in a manner that does not monetize excess spread at closing and would not require the establishment of such a premium capture cash reserve account.

The proposed rules include a number of conditions and limitations on a premium capture cash reserve account. Specifically, the proposed rules would require that the premium capture cash reserve account be held by the trustee, or person performing functions similar to a trustee, in the name and for the benefit of the issuing entity. In addition, until all ABS interests in the issuing entity (including junior or residual interests) are paid in full or the issuing entity is dissolved, amounts in the account would be required to be released to satisfy payments on ABS interests in the issuing entity (in order of the securitization transaction's priority of payments) on any payment date where the issuing entity has insufficient funds to make such payments. The proposal specifies that, the determination of whether insufficient funds are available must be made *prior* to the allocation of any

[104] *See* proposed rules at § __.12.

losses to (i) any eligible horizontal residual interest held under the horizontal, L-shaped, ABCP, or CMBS third-party purchaser risk retention options; or (ii) the class of ABS interests in the issuing entity that is allocated losses before other classes if no eligible horizontal residual interest in the issuing entity is held under such options (or if the contractual terms of the securitization transaction do not provide for the allocation of losses by class, the class of ABS interests that has the most subordinate claim to payment of principal or interest by the issuing entity). Thus, amounts in a premium capture reserve account would be used to cover losses on the underlying assets first before any other interest in or account of the issuing entity, including an eligible horizontal residual interest or a horizontal cash reserve account.[105]

In order to prevent a sponsor from circumventing the premium capture requirements of the proposal by taking back at closing, and then reselling, additional ABS interests (thereby reducing the gross proceeds received at closing from the sale of interests to third parties), the proposal includes a special anti-evasion provision. Under this provision, the retaining sponsor would need to add to the "gross proceeds" amount that is used to calculate the amount (if any) that must be placed in the premium capture cash reserve account an amount equal to the par value of any ABS interest (or the fair value of the ABS interest if it does not have a par value) in the issuing entity that is directly or indirectly transferred to the sponsor in connection with the closing of the securitization transaction and that (i) the sponsor does not intend to hold to maturity; or (ii) represents a contractual right to receive some or all of the interest, and no more than a minimal amount of principal payments received by the issuing entity, and that has a priority of payment of interest (or principal, if any) senior to the most subordinated class of interests in the issuing entity. The condition in (i) above is designed to capture proceeds from those interests that the sponsor retains at closing, but expects to sell to third parties after closing. ABS interests retained and expected to be held to maturity by the sponsor increase the sponsor's exposure to the credit risk of the underlying assets, thus mitigating the concerns of a sponsor trying to evade the risk retention requirements.

A sponsor could, however, seek to achieve the same economic benefits that could be achieved from the sale of an interest-only tranche by retaining an interest-only tranche at or near the top of the waterfall that diverts to the sponsor excess spread on the underlying assets before other interests are paid. For this reason, the proposal requires that the value of any interest-only tranche that the sponsor retains at closing be included in the calculation of the premium capture reserve account (regardless of whether the sponsor intends to hold it to maturity) if such tranche has priority of payment senior to the most subordinated class of interests in the issuing entity.[106]

Sponsors required to fund a premium capture cash reserve account under the proposed rules would be required to provide potential investors before the sale of asset-backed securities as part of the securitization transaction and, upon request, the Commission and its appropriate Federal banking agency (if any) disclosures describing the dollar amount the sponsor was required to place in the account and the actual amount the sponsor will deposit (or has deposited) in the account at closing. The sponsor would also be required to disclose the material assumptions and methodology used in (i) determining the fair value of any ABS interest in the issuing entity that does not have a par value (and that was used in calculating the amount required for the premium capture cash reserve account) and is subject to the anti-evasion provisions described above; and (ii) the aggregate amount of ABS interests in the issuing entity, including those pertaining to any estimated cash flows and the discount rate used.

Request for Comment

82. Do you believe the premium capture cash reserve account will be an effective mechanism at capturing the monetization of excess spread, promoting sponsor monitoring of credit quality, and promoting the sound underwriting of securitized assets?

83. The Agencies seek input on alternative methods for removing incentives to monetize excess spread and whether the proposed premium capture reserve account would have any adverse effects on securitizations that are inconsistent with the purposes of section 15G. For example, is the method of calculating the premium capture cash reserve account appropriate or are there alternative methodologies that would better achieve the purpose of the account?

84. Should amounts from the premium capture reserve account be used only for amounts due to the senior-most class of ABS interests?

85(a). Alternatively, are the conditions imposed on the premium capture cash reserve account more than what is needed to achieve the objectives of the account? 85(b). If so, how?

C. Allocation to the Originator

As a general matter, the proposed rules would provide that the sponsor of a securitization transaction is solely responsible for complying with the risk retention requirements established under section 15G of the Exchange Act. However, subject to a number of considerations, section 15G authorizes the Agencies to allow a sponsor to allocate at least a portion of the credit risk it is required to retain to the originator(s) of securitized assets.[107] Accordingly, subject to conditions and restrictions discussed below, § __.13 of the proposed rules permits a sponsor to reduce its required risk retention obligations in a securitization transaction by the portion of risk retention obligations assumed by the originator(s) of the securitized assets.

When determining how to allocate the risk retention requirements, the Agencies are directed to consider whether the assets sold to the sponsor have terms, conditions, and characteristics that reflect low credit risk; whether the form or volume of the transactions in securitization markets creates incentives for imprudent origination of the type of loan or asset to be sold to the sponsor; and the potential impact of the risk retention obligations on the access of consumers

[105] Until needed to cover losses, amounts in a premium capture cash reserve account may be invested in U.S. Treasury securities with remaining maturities of 1 year or less and in fully-insured deposits at one or more insured depository institutions. Interest received on such investments could be released from the account to any person (including the sponsor), but the principal amount invested must remain in the account and available to absorb losses.

[106] To avoid double counting, the calculation would not include any interest-only tranche required to be retained by a sponsor using the vertical or L-shaped options to meet its risk retention requirement. Also, because an eligible horizontal residual interest, by definition, must have the most subordinated claim to payments of both principal and interest, a sponsor selecting this option of risk retention would be required to include the value of any excess spread tranche retained by the sponsor in its calculation of gross proceeds received by the issuing entity.

[107] As discussed above, 15 U.S.C. 78o–11(a)(4) defines the term "originator" as a person who, through the extension of credit or otherwise, creates a financial asset that collateralizes an asset-backed security; and who sells an asset directly or indirectly to a securitizer (i.e., a sponsor or depositor). Because this definition refers only to the person that "creates" a loan or other receivable, only the original creditor of a loan or receivable—and not a subsequent purchaser or transferee—would be deemed to be the "originator" for purposes of the proposed rules. *See* 15 U.S.C. 78o–11(c)(1)(G)(iv); (d).

and businesses to credit on reasonable terms, which may not include the transfer of credit risk to a third party.[108]

The Agencies are proposing a framework that would permit a sponsor of a securitization to allocate a portion of its risk retention obligation to an originator that contributes a significant amount of assets to the underlying asset pool. The Agencies have endeavored to create appropriate incentives for both the securitization sponsor and the originator(s) to maintain and monitor appropriate underwriting standards, respectively, without creating undue complexity, which potentially could mislead investors and confound supervisory efforts to monitor compliance. Importantly, the proposal does not mandate allocation to an originator. Therefore, it does not raise the types of concerns about credit availability that might arise if certain originators, such as mortgage brokers or small community banks (that may experience difficulty obtaining funding to retain risk positions), were required to do so. Mandatory allocation of risk retention to the originator of the securitized assets also could pose significant operational and compliance problems, as a loan may be sold or transferred several times between origination and securitization and, accordingly, an originator may not know when a loan it has originated is included in a securitization transaction.

The proposed rules would permit a securitization sponsor that satisfies its base risk retention obligation either under the vertical risk retention option as set forth in § __.4 or under the horizontal risk retention option through the acquisition of an eligible horizontal interest as set forth in § __.5, to allocate a portion of its risk retention obligation under such option to any originator of the underlying assets that contributed at least 20 percent of the underlying assets in the pool. The amount of the retention interest held by each originator that is allocated credit risk in accordance with the proposal must be at least 20 percent, but could not exceed the percentage of the securitized assets it originated. The originator would also have to hold its allocated share of the risk retention obligation in the same manner as would have been required of the sponsor and subject to the same restrictions on transferring, hedging, and financing the retained interest that would apply to the sponsor. Thus, for example, if the sponsor satisfies its risk retention requirements by acquiring an eligible horizontal residual interest under the horizontal risk retention option, an originator allocated risk under § __.13 of the proposal would have to acquire a portion of that horizontal first-loss interest, in an amount not exceeding the percentage of pool assets created by the originator. The sponsor's risk retention requirements would be reduced by the amount allocated to the originator.

The Agencies believe this approach is a relatively straightforward way to allow both the sponsor and the originator to retain credit risk in securitized assets, on a basis that should reduce the potential for confusion by investors in asset-backed securities.

By limiting this option to originators that have originated at least 20 percent of the asset pool, the Agencies have sought to ensure that the originator retains risk in an amount significant enough to function as an actual incentive for the originator to monitor the quality of all the assets being securitized (and to which it would retain some credit risk exposure). In addition, by restricting originators to holding no more than their proportional share of the risk retention obligation, the proposal seeks to prevent sponsors from circumventing the purpose of the risk retention obligation by transferring an outsized portion of the obligation to an originator that may be seeking to acquire a speculative investment. These requirements should also reduce the proposal's potential complexity and facilitate investor and regulatory monitoring.

Request for Comment

86(a). Should the proposed rules permit allocation to originators where the sponsor is using other menu options, such as the L-shaped risk retention option in § __.6 of the proposed rules, and if so, under what specific conditions and requirements? 86(b). In what cases is it likely that this alternative approach actually would be used? 86(c). What are the specific benefits of an alternative approach, and do they outweigh concerns regarding complexity?

87. Should the rule permit allocation to originators if the sponsor elects the horizontal cash reserve account option in proposed § __.5(b)?

88(a). Should the proposed rules permit allocation of risk to originators that have originated less than 20 percent of the asset pool? 88(b). Alternately, is the minimum 20 percent threshold sufficient to ensure that an originator allocated risk has an incentive to monitor the quality of the entire collateral pool?

89(a). Are there alternative mechanisms for allocating risk to an originator that should be permitted by the Agencies? For example, should the rules permit or require that an originator that is allocated risk retention by a sponsor retain exposure *only* to the assets that the originator itself originates? 89(b). If so, how might such an allocation mechanism feasibly be structured, incorporated into the rule, and monitored by investors and supervisors?

90. Should the rules permit sponsors to allocate risk to a third party, and if so, how to ensure that incentives between the sponsor and investors are aligned in a manner that promotes quality underwriting standards?

91. Are the proposed disclosures sufficient to provide investors with all material information concerning the originator's retained interest in a securitization transaction, as well as to enable investors to monitor the originator(s) and the Agencies to assess the sponsor's compliance with the rule?

92(a). Should additional disclosures be required? 92(b). If so, what should be required and why?

93(a). As proposed, the retaining sponsor is responsible for compliance with the rule and must maintain and adhere to policies and procedures reasonably designed to monitor compliance by each originator retaining credit risk, including the anti-hedging restrictions. 93(b). What are the practical implications if the originator fails to comply?

94(a). To help ensure that the originator has sufficient incentive to retain its interest in accordance with the rule, should the rule require that a sponsor obtain a contractual commitment from the originator to retain the interest in accordance with the rule? 94(b). If so, how should the Agencies implement this requirement?

95. Are there other methods that could be implemented to help ensure that a sponsor satisfies its obligations under the rule?

D. Hedging, Transfer and Financing Restrictions

Section 15G(a)(1)(A) provides that the risk retention regulations prescribed shall "prohibit a securitizer from directly or indirectly hedging or otherwise transferring the credit risk that the securitizer is required to retain

[108] 15 U.S.C. 78o–11(d)(2). The Agencies note that section 15G(d) appears to contain an erroneous cross-reference. Specifically, the reference at the beginning of section 15G(d) to "subsection (c)(1)(E)(iv)" is read to mean "subsection (c)(1)(G)(iv)", as the former subsection does not pertain to allocation, while the latter is the subsection that permits the Agencies to provide for the allocation of risk retention obligations between a securitizer and an originator in the case of a securitizer that purchases assets from an originator.

with respect to an asset."[109] Consistent with this statutory directive, the proposed rules would prohibit a sponsor from transferring any interest or assets that it is required to retain under the rule to any person other than an affiliate whose financial statements are consolidated with those of the sponsor (a consolidated affiliate). The rule permits a transfer to one or more consolidated affiliates because the required risk exposure would remain within the consolidated organization and, thus, would not reduce the organization's financial exposure to the credit risk of the securitized assets.

The proposal also would prohibit a sponsor or any consolidated affiliate from hedging the credit risk the sponsor is required to retain under the rule. The proposal extends the hedging prohibition to a sponsor's consolidated affiliates because the rule would allow a sponsor to transfer the risk it is required to retain to a consolidated affiliate. Moreover, even absent such a transfer, if a consolidated affiliate was permitted to hedge the risks required to be retained by a sponsor, the net effect of the hedge on the organization controlling the sponsor would offset the credit risk required to be retained and defeat the purposes of section 15G.

The proposal prohibits a sponsor and its consolidated affiliates from purchasing or selling a security or other financial instrument, or entering into an agreement (including an insurance contract), derivative or other position, with any other person if: (i) Payments on the security or other financial instrument or under the agreement, derivative, or position are materially related to the credit risk of one or more particular ABS interests, assets, or securitized assets that the retaining sponsor is required to retain, or one or more of the particular securitized assets that collateralize the asset-backed securities; and (ii) the security, instrument, agreement, derivative, or position in any way reduces or limits the financial exposure of the sponsor to the credit risk of one or more of the particular ABS interests, assets, or securitized assets, or one or more of the particular securitized assets that collateralize the asset-backed securities. The statutory hedging prohibition is focused on the credit risk associated with the interest or assets that a sponsor is required to retain, which itself is dependent on the credit risk of the particular securitized assets that underlie the ABS interests. Therefore, hedge positions that are not materially related to the credit risk of the particular ABS interests or exposures required to be retained by the sponsor or its affiliate would not be prohibited under the proposal. Such positions would include hedges related to overall market movements, such as movements of market interest rates (but not the specific interest rate risk, also known as spread risk, associated with the ABS interest that is otherwise considered part of the credit risk), currency exchange rates, home prices, or of the overall value of a particular broad category of asset-backed securities. Likewise, hedges tied to securities that are backed by similar assets originated and securitized by other sponsors, also would not be prohibited. On the other hand, a security, instrument, derivative or contract generally would be "materially related" to the particular interests or assets that the sponsor is required to retain if the security, instrument, derivative or contract refers to those particular interests or assets or requires payment in circumstances where there is or could reasonably be expected to be a loss due to the credit risk of such interests or assets (e.g., a credit default swap for which the particular interest or asset is the reference asset).

The proposal also addresses other hedges based on indices that may include one or more tranches from a sponsor's asset-backed securities transactions, as well as tranches of asset-backed securities transactions of other sponsors. The proposal provides that holding a security tied to the return of an index (such as the subprime ABX.HE index) would not be considered a prohibited hedge by the retaining sponsor so long as: (i) Any class of ABS interests in the issuing entity that were issued in connection with the securitization transaction and that are included in the index represented no more than 10 percent of the dollar-weighted average of all instruments included in the index, and (ii) all classes of ABS interests in all issuing entities that were issued in connection with any securitization transaction in which the sponsor was required to retain an interest pursuant to the proposal and that are included in the index represent, in the aggregate, no more than 20 percent of the dollar-weighted average of all instruments included in the index. These restrictions are designed to prevent a sponsor (or a consolidated affiliate) from evading the hedging restrictions through the purchase of instruments that are based on an index that is composed, to a significant degree, of asset-backed securities from securitization transactions in which a sponsor is required to retain risk under the proposed rules.

The proposal would also prohibit a sponsor and a consolidated affiliate from pledging as collateral for any obligation (including a loan, repurchase agreement, or other financing transaction) any interest or asset that the sponsor is required to retain unless the obligation is with full recourse to the sponsor or consolidated affiliate. Because the lender of a loan that is not with full recourse to the borrower has limited rights against the borrower on default, and may rely more heavily on the collateral pledged (rather than the borrower's assets generally) for repayment, a limited recourse financing supported by a sponsor's risk retention interest may transfer some of the risk of the retained interest to the lender during the term of the loan. If the sponsor or consolidated affiliate pledged the interest or asset to support recourse financing and subsequently allowed (whether by consent, pursuant to the exercise of remedies by the counterparty or otherwise) the interest or asset to be taken by the counterparty to the financing transaction, the sponsor will have violated the prohibition on transfer.

The proposed rules would specify that the issuing entity in a securitization would not be deemed a consolidated affiliate of the sponsor for the securitization even if its financial statements are consolidated with those of the sponsor under applicable accounting standards.[110] This provision is designed to ensure that an issuing entity may continue to engage in hedging activities itself because such activities would be for the benefit of all investors in the asset-backed securities.[111] However, if an issuing entity were to obtain credit protection or hedge the exposure on the particular interests or assets that the sponsor is required to retain under the proposal, such credit protection or hedge could negate or limit the sponsor's credit exposure to the securitized assets. Accordingly, under the proposal, any credit protection by or hedging protection obtained by an issuing entity may not cover any ABS interest or asset that the sponsor is required to retain under the rule. For example, if the sponsor uses the vertical approach to

[109] 15 U.S.C. 78o–11(a)(1)(A).

[110] *See* proposed rules at § __.2 (definition of "consolidated affiliate").

[111] For example, the proposal would not prohibit an issuing entity (and indirectly its investors) from being the beneficiary of loan-level private mortgage insurance (PMI) taken out by borrowers in connection with the underlying assets that are securitized.

risk retention, an issuing entity may purchase (or benefit from) a credit insurance wrap that covers up to 95 percent of the tranches, but not the five percent of such tranches required to be retained by the sponsor.

Request for Comment

96(a). Under the proposal, a sponsor would not be permitted to sell or otherwise transfer any interest or assets that the sponsor is required to retain to any person other than an entity that is and remains a consolidated affiliated. Is the permitted transfer to consolidated affiliates appropriate?

96(b). Why or why not?

97. Is the proposed hedging prohibition appropriately structured?

98(a). Would the proposal inadvertently capture any kinds of hedging that should be permissible? 98(b). If so, please provide specific recommendations on how we can appropriately tailor the requirements.

99. Does the proposed approach appropriately implement the statutory requirement to prohibit direct and indirect hedging?

100(a). Does the proposal permit hedging that is inconsistent with risk retention and should be prohibited? 100(b). If so, please provide specific recommendations on how we can more appropriately tailor the requirements.

101. Are the proposed provisions concerning the pledging of retained assets appropriate? Should the rule instead prohibit the pledging of retained assets even where the financial transaction is recourse to the sponsor or consolidated affiliate?

102(a). Under the proposal, a sponsor (or a consolidated affiliate) would be prohibited from transferring the retained interest or assets until the retained interest or assets were fully repaid or extinguished. Is this appropriate, or should a sponsor be permitted to freely transfer or hedge its retained exposure after a specified period of time? 102(b). If so, should a period of time be established for different types of securitizations?

103. Are the proposal's requirements pertaining to index hedging appropriate?

104. Are the 10 percent and 20 percent thresholds discussed above consistent with market practice and the underlying goals of the statutory risk retention requirements?

105. Should credit protection and hedging by the issuing entity of any portion of the credit risk on the securitized assets be permitted or, because such credit protection and hedges could limit the incentive of investors to conduct due diligence on the securitized assets, should all credit protection and hedging by the issuing entity (other than interest rate and currency risk) be prohibited?

IV. Qualified Residential Mortgages

Section 15G provides that the risk retention requirements shall not apply to an issuance of ABS if all of the assets that collateralize the ABS are QRMs.[112] Section 15G also directs all of the Agencies to define jointly what constitutes a QRM, taking into consideration underwriting and product features that historical loan performance data indicate result in a lower risk of default.[113] Moreover, section 15G requires that the definition of a QRM be "no broader than" the definition of a "qualified mortgage" (QM), as the term is defined under section 129C(b)(2) of the Truth in Lending Act (TILA) (15 U.S.C. 1639C(b)(2)), as amended by the Dodd-Frank Act, and regulations adopted thereunder.[114]

A. Overall Approach to Defining Qualifying Residential Mortgages

In considering how to define a QRM for purposes of the proposed rules, the Agencies were guided by several factors and principles. The sponsor of an ABS that is collateralized solely by QRMs is completely exempt from the risk retention requirement with respect to such securitization. Accordingly, under the statute, a sponsor will not be required to retain any portion of the credit risk associated with the securitization of residential mortgages that meet the requirements to be a QRM. This requirement suggests that the underwriting standards and product features for QRMs should help ensure that such residential mortgages are of very high credit quality.

In considering how to determine if a mortgage is of sufficient credit quality, the Agencies also examined data from several sources. For example, the Agencies reviewed data on mortgage performance supplied by the Applied Analytics division (formerly McDash Analytics) of Lender Processing Services (LPS). To minimize performance differences arising from unobservable changes across products, and to focus on loan performance through stressful environments, for the most part, the Agencies considered data for prime fixed-rate loans originated from 2005 to 2008. This dataset included underwriting and performance information on approximately 8.9 million mortgages.

As is typical among data provided by mortgage servicers, the LPS data do not include detailed information on borrower income and on other debts the borrower may have in addition to the mortgage. For this reason, the Agencies also examined data from the 1992 to 2007 waves of the triennial Survey of Consumer Finances (SCF).[115] Because families' financial conditions will change following the origination of a mortgage, the analysis of SCF data focused on respondents who had purchased their homes either in the survey year or the previous year. This data set included information on approximately 1,500 families. The Agencies also examined a combined data set of loans purchased or securitized by the Enterprises from 1997 to 2009. This data set consisted of more than 75 million mortgages, and included data on loan products and terms, borrower characteristics (*e.g.*, income and credit score), and performance data through the third quarter of 2010.[116]

Based on these and other data, the underwriting and product features established by the Agencies for QRMs include standards related to the borrower's ability and willingness to repay the mortgage (as measured by the borrower's debt-to-income (DTI) ratio); the borrower's credit history; the borrower's down payment amount and sources; the loan-to-value (LTV) ratio for the loan; the form of valuation used in underwriting the loan; the type of

[112] *See* 15 U.S.C. 78o–11(c)(1)(C)(iii).

[113] *See id.* at sec. 78o–11(e)(4).

[114] *See id.* at sec. 78o–11(e)(4)(C). As adopted, the text of section 15G(e)(4)(C) cross-references section 129C(c)(2) of TILA for the definition of a QM. However, section 129C(b)(2), and not section 129C(c)(2), of TILA contains the definition of a "qualified mortgage." The legislative history clearly indicates that the reference in the statute to section 129C(c)(2) of TILA (rather than section 129C(b)(2) of TILA) was an inadvertent technical error. *See* 156 *Cong. Rec.* S5929 (daily ed. July 15, 2010) (statement of Sen. Christopher Dodd) ("The [conference] report contains the following technical errors: the reference to 'section 129C(c)(2)' in subsection (e)(4)(C) of the new section 15G of the Securities and Exchange Act, created by section 941 of the [Dodd-Frank Act] should read 'section 129C(b)(2).' In addition, the references to 'subsection' in paragraphs (e)(4)(A) and (e)(5) of the newly created section 15G should read 'section.' We intend to correct these in future legislation.").

[115] The SCF is conducted every three years by the Board, in cooperation with the Treasury, to provide detailed information on the finances of U.S. families. The SCF collects information on the balance sheet, pension, income, and other demographic characteristics of U.S. families. To ensure the representativeness of the study, respondents are selected randomly using a scientific sampling methodology that allows a relatively small number of families to represent all types of families in the nation. Additional information on the SCF is available at *http://www.federalreserve.gov/pubs/oss/oss2/method.html.*

[116] Additional information concerning the Enterprise data used by the Agencies in developing the proposed QRM standards is provided in Appendix A in the proposed common rule.

mortgage involved; and the owner-occupancy status of the property securing the mortgage. A substantial body of evidence, both in academic literature and developed for this rulemaking, supports the view that loans that meet the minimum standards established by the Agencies have low credit risk even in stressful economic environments that combine high unemployment with sharp drops in house prices.[117]

Any set of fixed underwriting rules likely will exclude some creditworthy borrowers. For example, a borrower with substantial liquid assets might be able to sustain an unusually high DTI ratio above the maximum established for a QRM. As this example indicates, in many cases sound underwriting practices require judgment about the relative weight of various risk factors (*e.g.*, the tradeoff between LTV and DTI ratios). These decisions are usually based on complex statistical default models or lender judgment, which will differ across originators and over time. However, incorporating all of the tradeoffs that may prudently be made as part of a secured underwriting process into a regulation would be very difficult without introducing a level of complexity and cost that could undermine any incentives for sponsors to securitize, and originators to originate, QRMs.

The Agencies recognize that many prudently underwritten residential mortgage loans will not meet the proposed definition of a QRM. Sponsors of ABS backed by these mortgages will be required to retain some of the credit risk of these mortgage loans in accordance with the proposed regulation (unless another exemption is available). However, as discussed further in Part III.B of this Supplementary Information, the Agencies have sought to provide sponsors with several options for complying with the risk retention requirements of section 15G so as to reduce the potential for these requirements to disrupt securitization markets, including those for non-QRM residential mortgages, or materially affect the flow or pricing of credit to borrowers and businesses. Moreover, the amount of non-QRM residential mortgages should be sufficiently large, and include enough prudently underwritten loans, so that ABS backed by non-QRM residential mortgages may be routinely issued and purchased by a wide variety of investors. As a result, the market for such securities should be relatively liquid, all else being equal. Indeed, the broader the definition of a QRM, the less liquid the market ordinarily would be for residential mortgages falling outside the QRM definition.

The Agencies also have sought to make the standards applicable to QRMs transparent to, and verifiable by, originators, securitizers, investors and supervisors. As discussed further below, whether a residential mortgage meets the definition of a QRM can and will be determined at or prior to the time of origination of the mortgage loan. For example, the DTI ratio and the LTV ratio are measured at or prior to the closing of the mortgage transaction. The Agencies believe that this approach should assist originators of all sizes in determining whether residential mortgages will qualify for the QRM exemption, and assist ABS issuers and investors in assessing whether a pool of mortgages will meet the requirements of the QRM exemption. In addition, the approach taken by the proposal would allow individual QRM loans to be modified after securitization without the loan ceasing to be a QRM in order to avoid creating a disincentive to engage in appropriate loan modifications.

In developing the proposed criteria for a QRM, the Agencies also considered how best to address the interaction between the definitions and standards for QRM and QM, as mandated by the Dodd-Frank Act.[118] The Board currently has sole rulemaking authority for the QM standards, which authority will transfer to the Consumer Financial Protection Bureau (the CFPB) on the designated transfer date, which is set as July 21, 2011 (transfer date). In addition, while Section 15G's risk retention requirements are to be prescribed by the Agencies no later than 270 days after enactment of the Dodd-Frank Act (April 17, 2011), the Dodd-Frank Act provides that the rules implementing the QM standards must be prescribed before the end of the 18-month period beginning on the transfer date.

In light of these provisions, the Agencies propose to incorporate the statutory QM standards, in addition to other requirements, into the QRM requirements and apply those standards strictly in setting the QRM requirements in order to ensure that, consistent with Congress' directive, the definition of a QRM be no broader than a QM. The Agencies have proposed this approach to minimize any potential for conflicts between the QRM standards in the proposed rules and the QM standards that ultimately will be proposed or adopted under TILA, as well as to provide the public a reasonable opportunity to comment on the proposed QRM standards, including those that are bounded by the statutory QM standards. The proposed approach also helps reinforce the goal of ensuring that QRMs are of very high credit quality.

As noted above, rulemaking authority for the QM standards is vested initially in the Board and, after the transfer date, the CFPB. TILA provides the QM rulewriting agency with the authority to establish key aspects of the QM definition (*e.g.*, any qualifying ratios of the borrower's total debt to monthly income) and to revise, add to, or subtract from the criteria for a residential mortgage loan to qualify as a QM.[119] Accordingly, the Agencies expect to monitor the rules adopted under TILA to define a QM and will review those rules to determine whether changes to the definition of QRM are necessary or appropriate to ensure that the definition of a QRM is "no broader" than the definition of a QM as defined in section 129C(b)(2) of TILA and to appropriately implement the risk retention requirement of section 15G.[120] In light of the different purposes and effects of the QRM and the QM standards,[121] as well as the different

[117] For the importance of loan-to-value ratio at origination, see Quigley, J. and R. Van Order. "Explicit tests of contingent claims models of mortgage default," *Journal of Real Estate Finance and Economics*, *11*, 99–117 (1995) and the extensive literature that has followed, including Foote, C., K. Gerardi and P. Willen, "Negative equity and foreclosures: Theory and evidence," Federal Reserve Bank of Boston Public Policy Discussion Papers Number 08–3. (2008) *http://www.bos.frb.org/economic/ppdp/2008/ppdp0803.pdf*; for the importance of credit history, *see* Barakova, I., R. Bostic, P. Calem, and S. Wachter, "Does credit quality matter for homeownership?" *Journal of Housing Economics*, 12, 318–336 (2003); for several other underwriting criteria see Foote, C., K. Gerardi and P. Willen, "Negative equity and foreclosures: theory and evidence," Federal Reserve Bank of Boston Public Policy Discussion Papers Number 08–3 (2008). *http://www.bos.frb.org/economic/ppdp/2008/ppdp0803.pdf*, Mayer, C., K. Pence and S. M. Sherlund "The rise in mortgage defaults: facts and myths," Manuscript, Federal Reserve Board, Washington, DC. (2008), and S. Sherlund, "The past, present, and future of subprime mortgages," Finance and Economics Discussion Series No. 2008–63, Federal Reserve Board, Washington, DC (2008). *http://www.federalreserve.gov/pubs/feds/2008/200863/200863abs.html.*

[118] *See* 15 U.S.C. 78o–11(e)(4)(C).

[119] *See* Section 129C(b)(3)(B)(i) of TILA.

[120] Under section 15G(e)(4)(C), future changes to the QM definition do not, in and of themselves, alter the QRM definition. The QRM definition will not change until the Agencies have determined, through joint rulemaking, that the QRM definition should be altered.

[121] The function of the QM standard is to provide lenders with a presumption of compliance with the requirement in section 129C(a) of TILA to assess a borrower's ability to repay a residential mortgage loan. The purposes of these provisions are to ensure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect

agencies responsible for implementing these standards, the proposed standards for QRMs should not be interpreted in any way as reflecting or suggesting the way in which the QM standards under TILA may be defined either in proposed or final form.

As required by section 15G, the Agencies also considered information regarding the credit risk mitigation effects of mortgage guarantee insurance or other credit enhancements obtained at the time of origination.[122] If such guarantees are backed by sufficient capital, they likely lower the credit risk faced by lenders or purchasers of securities because they typically pay out when borrowers default. Such guarantees have historically been required for loans with higher LTV ratios, where borrowers have relatively thin equity cushions.[123] Mortgage insurance companies charge a risk-based premium for this insurance, as well as impose additional underwriting restrictions. The Agencies considered a variety of information and reports relative to such guarantees and other credit enhancements. While this insurance protects creditors from losses when borrowers default, the Agencies have not identified studies or historical loan performance data adequately demonstrating that mortgages with such credit enhancements are less likely to default than other mortgages, after adequately controlling for loan underwriting or other factors known to influence credit performance, especially considering the important role of LTV ratios in predicting default. Therefore, the Agencies are not proposing to include any criteria regarding mortgage guarantee insurance or other types of insurance or credit enhancements at this time. The Agencies note that mortgage guarantee insurance is a form of credit enhancement accepted by the Enterprises for mortgages with higher LTV ratios that allows such mortgages to be securitized through mortgage-backed securities guaranteed by the Enterprises. For the reasons explained in Part III.B.8 of this Supplemental Information, under § __.11 of the proposed rules, the guarantee provided by an Enterprise while operating under the conservatorship or receivership of FHFA with capital support from the United States would satisfy the risk retention requirements of the Enterprise with respect to the mortgage-backed securities issued by the Enterprise.

A number of the proposed standards developed for the QRM exemption (e.g., the DTI ratios and acceptable sources of borrower funds) are dependent upon certain definitions, calculations and verification requirements that are critical to the robustness of the QRM standards. The Agencies believe that it is important to provide clarity on what these definitions, calculations, and verification requirements include for purposes of the QRM standards. The Agencies considered how best to achieve this goal in a manner that is transparent, uniform, and familiar to the mortgage industry. After carefully considering a variety of options, the Agencies propose to incorporate and use certain definitions and key terms established by HUD and required to be used by lenders originating residential mortgages that are insured by the Federal Housing Administration (FHA). Specifically, the proposed rules incorporate the definitions and standards currently set out in the HUD Handbook 4155.1 (New Version), Mortgage Credit Analysis for Mortgage Insurance, as in effect on December 31, 2010 (HUD Handbook)[124] for determining and verifying borrower funds and the borrower's monthly housing debt, total monthly debt and monthly gross income. This proposed approach provides a transparent, uniform and well-known basis for lenders to determine whether a residential mortgage loan qualifies as a QRM, without requiring the Agencies to establish and maintain—and lenders to comply with—new requirements.

In order to facilitate the use of these standards for QRM purposes, the Agencies propose to include in the Additional QRM Standards Appendix of the proposed rules all of the standards in the HUD Handbook that are used for QRM purposes. The only modifications made to the relevant standards in the HUD Handbook would be those necessary to remove those portions unique to the FHA underwriting process (*e.g.,* TOTAL Scorecard instructions). The proposed rules and the Additional QRM Standards Appendix would not affect or change any of the standards in the HUD Handbook as they apply to FHA-insured mortgages. Moreover, HUD continues to have sole authority to modify the HUD Handbook. Any such amendments would not affect the Additional QRM Standards Appendix of the proposed rules unless separately adopted by the Agencies under section 15G.

Request for Comment

106. Is the overall approach taken by the Agencies in defining a QRM appropriate?

107. What impact might the proposed rules have on the market for securitizations backed by QRM and non-QRM residential mortgage loans?

108. What impact, if any, might the proposed QRM standards have on pricing, terms, and availability of non-QRM residential mortgages, including to low and moderate income borrowers?

109(a). The Agencies seek general comment on the overall approach of using certain longstanding HUD standards for certain definitions and standards within the QRM exemption and whether the Agencies should adopt a different approach. 109(b). Are there any other existing, transparent, and widely recognized standards that the Agencies should use for ensuring that lenders follow consistent and sound processes in determining whether a residential mortgage loan meets the qualifications for a QRM?

110. The Agencies seek comment on all aspects of the proposed definition of a QRM, including the specific terms and conditions discussed in the following section.

111(a). The Agencies seek comment on whether mortgage guarantee insurance or other types of insurance or credit enhancements obtained at the time of origination would or would not reduce the risk of default of a residential mortgage that meets the proposed QRM criteria but for a higher adjusted LTV ratio. Commenters are requested to provide historical loan performance data or studies and other factual support for their views if possible, particularly if they control for loan underwriting or other factors known to influence credit performance. 111(b). If the information indicates that such products would reduce the risk of default, should the LTV ratio limits be increased to account for the insurance or credit enhancement? 111(c). If so, by how much?

112(a). If the proposed QRM criteria were adjusted for the inclusion of mortgage guarantee insurance or other types of insurance or credit enhancements, what financial eligibility standards should be incorporated for mortgage insurance or financial product providers and how might those standards be monitored and enforced?

112(b). What disclosure regarding the entity would be appropriate?

113. Are there additional ways that the Agencies could clarify the standards

their ability to repay the loans and that are understandable and not unfair, deceptive, or abusive. *See* section 129B(a)(2) of TILA.

[122] *See* 15 U.S.C. 78o–11(e)(4)(B)(iv).

[123] *See* National Association of Realtors, "Financing the Home Purchase: The Real Estate Professional's Guide 1993," Chicago: National Association of Realtors, at 20 and 117.

[124] *See* HUD Handbook, *available at http://www.fhaoutreach.gov/FHAHandbook/prod/contents.asp?address=4155-1.*

applicable to QRMs to reduce the potential for uncertainty as to whether a residential mortgage loan qualifies as a QRM at origination?

B. Exemption for QRMs

Consistent with section 15G, § __.15(b) of the proposed rules provides that a sponsor is exempt from the risk retention requirements of the proposed rules with respect to any securitization transaction if all of the securitized assets that collateralize the ABS are QRMs, and none of the securitized assets that collateralize the ABS are other ABS. These conditions implement the requirements in 15 U.S.C. 78o–11(c)(1)(C)(iii) and (e)(5).

Section __.15(b) of the proposed rules includes two additional requirements for a securitization transaction to qualify for the QRM exemption. First, the proposal would require that, at the closing of the securitization transaction, each QRM collateralizing the ABS is currently performing (*i.e.,* the borrower is not 30 days or more past due, in whole or in part, on the mortgage).[125] Because QRMs are completely exempt from the risk retention requirements, the proposed rules would not permit a residential mortgage loan that satisfied the conditions to be a QRM upon origination to be included in an ABS transaction exempt under § __.15(c) of the proposed rules if the loan was not currently performing at the time of closing of the securitization transaction. Second, the depositor[126] for the ABS must certify that it evaluated the effectiveness of its internal supervisory controls for ensuring that all of the assets that collateralize the ABS are QRMs and that it has determined that its internal supervisory controls are effective. This evaluation must be performed as of a date within 60 days prior to the cut-off date (or similar date) for establishing the composition of the collateral pool. The sponsor also must provide, or cause to be provided, a copy of this certification to potential investors a reasonable period of time prior to the sale of ABS and, upon request, to the Commission and its appropriate Federal banking agency, if any. These evaluation and certification conditions implement the requirements in 15 U.S.C. 78o–11(e)(6).[127]

C. Eligibility Criteria

1. Eligible Loans, First Lien, No Subordinate Liens, Original Maturity and Written Application Requirements

The proposed definition limits a QRM to a closed-end first-lien mortgage to purchase or refinance a one-to-four family property, at least one unit of which is the principal dwelling of a borrower.[128] Under the proposal, construction loans, "bridge" loans with a term of twelve months or less, loans to purchase time-share properties, and reverse mortgages could not be QRMs. Construction loans, bridge loans and other loans designed to offer temporary financing have typically not been securitized in the past, and their underwriting is notably more complex than that of standard mortgage loans. Thus, expanding the definition of QRMs to include such loans would be complex and seem to offer few, if any, benefits. Any loan relating to a time share also may not be a QRM, as these types of loans are excluded from the definition of a "residential mortgage loan" that may be a QM under section 103(cc)(5) of TILA.

Even before the financial crisis, the overwhelming majority of reverse mortgages were insured by the FHA.[129] Reverse mortgages insured by the FHA are separately exempted from the risk retention requirements of section 15G.[130] In addition, reverse mortgages may be QMs only to the extent that they meet certain standards to be determined by regulation by the Board or CFPB under section 129C(b)(2)(A)(ix) of TILA. Because the extent to which reverse mortgages may be considered a QM under TILA is not yet known, the Agencies have excluded reverse mortgages from potential QRM status.

Under the proposal, a QRM must be secured by a first-lien, perfected in accordance with applicable law, on the one-to-four family property to be purchased or refinanced. In addition, consistent with the QM requirement under section 129C(b)(2) of TILA, the maturity date of a QRM, at the closing of the mortgage transaction, must not exceed 30 years. A one-to-four family property is defined to mean real property that is (i) held in fee simple, or on leasehold under a lease for not less than 99 years which is renewable, or under a lease having a period that is at least 10 years longer than the mortgage, and (ii) improved by a residential structure that contains one to four units.[131] A one-to-four family property may include an individual condominium or cooperative unit, as well as a manufactured home that is constructed in conformance with the National Manufactured Home Construction and Safety Standards and erected on, or otherwise affixed to, a foundation in accordance with requirements established by the FHA.

If the mortgage transaction is to purchase a one-to-four family property, no other recorded or perfected liens on the one-to-four family property can, to the creditor's knowledge, exist at the time of the closing of the mortgage transaction. Thus, the proposed rules prohibit the use of a junior lien in conjunction with a QRM to purchase a home. Data indicate that, controlling for other factors, including combined LTV ratio, the use of junior liens at origination to decrease down payments—so-called "piggyback" mortgages—significantly increased the risk of default.[132] The proposal would not prohibit the existence of junior liens in connection with the refinancing of an existing loan secured by an owner-occupied one-to-four family property, provided that the combined LTV ratio at closing of the mortgage transaction does not exceed certain thresholds established by the proposed rules.[133] The Agencies have not proposed to prohibit the existence of a junior lien in connection with a refinancing transaction (subject to certain combined LTV limits) because the Agencies recognize that some borrowers may have existing home equity loans or lines of credit and are currently performing on all of their mortgage obligations.[134] A prohibition on junior liens in connection with a refinancing transaction would force such performing borrowers to terminate their existing home equity loans or lines of credit and obtain a new home equity loan or line of credit shortly thereafter, with additional transaction costs

[125] *See* proposed rules at § __.15(a) (definition of "currently performing" for QRM purposes).

[126] *See* proposed rules at § __.2 (definition of "depositor").

[127] For these purposes, the Agencies interpret the term "issuer" as used in section 15G(e)(6) to refer to the depositor for the transaction.

[128] Closed-end credit and the related terms consumer credit and open-end credit are defined in a manner consistent with the definition of such terms under the Board's Regulation Z, which implements TILA.

[129] *See* Hui Shan, "Reversing the Trend: The Recent Expansion of the Reverse Mortgage Market Finance and Economics Discussion Series," Board of Governors of the Federal Reserve System, 2009–42 (2009), available at *http://www.federalreserve.gov/pubs/feds/2009/200942/200942pap.pdf* .

[130] *See* 15 U.S.C. 78o–11(e)(3)(B).

[131] *See* proposed rules at § __.15(a) (definition of "one-to-four family property").

[132] *See* Kristopher Gerardi, Andreas Lehnert, Shane Sherlund, and Paul S. Willen, "Making Sense of the Subprime Crisis," *Brookings Papers on Economic Activity* (Fall 2008), at 86, Table 3.

[133] *See* proposed rules at § __.15(d)(9).

[134] As discussed further below, the proposed rules would require that the borrower be currently performing on all of the borrower's debt obligations—including any current first mortgage, home equity loan or line of credit—for any new mortgage to qualify as a QRM.

(including a loan origination fee). To help ensure that the borrower continues to have the ability and incentive to repay a QRM that is originated as part of a refinancing transaction, the proposal includes certain combined LTV limits on refinancing transactions and DTI limits both of which assume that any home equity loan or line of credit is fully drawn.

The proposed rules also would require that the borrower complete and submit to the creditor a written application for the mortgage transaction. The application, as supplemented or amended prior to closing of the mortgage transaction, must include an acknowledgement by the borrower that the information provided in the application is true and correct as of the date executed by the borrower, and that any intentional or negligent misrepresentation of the information provided in the application may result in civil liability and/or criminal penalties under 18 U.S.C. 1001.[135] This standard is consistent with the written acknowledgement in the Uniform Residential Loan Application (Form 1003) used by the Enterprises.

Request for Comment

114(a). The Agencies request comment on each of these conditions for QRM eligibility. In addition, should a loan be disqualified from being a QRM if the creditor has "reason to know" of another recorded or perfected lien on the property in a purchase transaction? 114(b). If so, what would constitute a "reason to know" by the creditor?

2. Borrower Credit History

The Agencies' own analysis, as well as work published in academic journals,[136] indicates that borrower credit history is among the most important predictors of default. In many datasets, credit history is proxied using a credit score, often the FICO score determined under the credit scoring model devised by Fair Isaac Corporation. Among the residential mortgage loans in the LPS dataset described above, 13 percent of all loans defaulted (defined as ever having missed three or more consecutive payments or ever being in foreclosure). However, 24.5 percent of residential mortgage loans taken out by borrowers with a FICO score of 690 or below defaulted, compared to a default rate of 7.7 percent among residential mortgage loans taken out by borrowers with a FICO score greater than 690. Even among the higher-FICO group, differences remained: borrowers with FICO scores of 691 to 740 had a default rate of 11.4 percent, while borrowers with FICO scores above 740 had a default rate of 4 percent. Thus, in these data, mortgage borrowers with a FICO score of 690 or below were more than six times as likely to default as borrowers with FICO scores of above 740.

A similar pattern emerges from the SCF data described above. Although the SCF data do not record the borrower's credit score, they do report several important contributors to low credit scores. The most important predictor of whether a household in the SCF data set was delinquent on its mortgage payment was whether it currently was behind on any non-mortgage debt. The second-most important variable was whether the household had filed for bankruptcy within the past five years. Households that were current on their non-mortgage obligations and had not filed for bankruptcy within the previous five years had a mortgage delinquency rate of 0.2 percent, compared to a delinquency rate of 17.9 percent for other households.

Data on residential mortgages purchased or securitized by the Enterprises also show the importance of borrower credit scores as a predictor of default. From 1997 through 2002, loans that are estimated to meet the proposed QRM requirements (except for credit history) had cumulative rates of serious delinquency ranging from 31 to 44 basis points if the borrower's credit score was above 690, but ranged from 267 to 356 basis points for borrowers with credit scores of 690 or lower. The data show that, in the peak years of the housing bubble (from 2005 to 2007), rates of serious delinquency for loans that were estimated to meet the proposed QRM standards with credit scores above 690 ranged from 186 to 272 basis points, while similar loans to borrowers with lower credit scores ranged from 833 to 1,103 basis points.[137]

In developing the proposal, the Agencies carefully considered how to incorporate a borrower's credit history into the standards for a QRM. The Agencies are aware that credit scores are used often by originators in the loan underwriting process. However, the Agencies do not propose to use a credit score threshold as part of the QRM definition because such a standard would require reliance on credit scoring models developed and maintained by privately owned entities and such models may change materially at the discretion of such entities. There also may be inconsistencies across the various credit scoring models used by consumer reporting agencies, as well as among different scoring models used by a single provider. Consequently, in order to ensure that creditors could continue to choose among different credit score providers, the Agencies would have to determine a cutoff score under multiple scoring models and periodically revise the regulation in response to new scoring models that might arise.

Instead, the proposed rules define a set of so-called "derogatory factors" relating to a borrower that would disqualify a mortgage for such borrower from qualifying as a QRM. The Agencies considered how these derogatory factors related to the credit scores observed in the data. A 2007 report to Congress by the Board found that, among all persons with a FICO score, 42 percent had scores below 700, 18 percent had scores between 700 and 749, and 40 percent had scores of 750 or above.[138] Thus, the median FICO score is somewhere between 700 and 749. The analysis of the LPS data found that borrowers with prime fixed-rate mortgages with FICO scores below 700 were substantially more likely than the average of such borrowers to default. The Board's report to Congress also found that any major derogatory factor, including being substantially late on any debt payment (not just a mortgage), as well as bankruptcy or foreclosure, would push a borrower's credit score down substantially. Thus, the relatively stringent set of credit history derogatory factors set forth in § __.15(d)(5) of the proposed rules is designed to be a reasonable proxy for the credit score thresholds associated with low delinquency rates in the data.

Specifically, under the proposal, a mortgage loan could qualify as a QRM only if the borrower was not currently 30 or more days past due, in whole or in part, on any debt obligation, and the borrower had not been 60 or more days past due, in whole or in part, on any

[135] *See* proposed rules at § __.15(d)(9).

[136] *See, e.g.,* Avery, Robert B., Raphael Bostic, Paul S. Calem, and Glenn B. Canner, "Credit Risk, Credit Scoring, and the Performance of Home Mortgages," Federal Reserve Bulletin 82(7) 621–48 (1996); Pennington-Cross, Anthony, "Credit History and the Performance of Prime and Nonprime Mortgages," Journal of Real Estate Finance and Economics 27(3) 279–301 (2003); Calem, Paul and Susan Wachter, "Community Reinvestment and Credit Risk: Evidence from an Affordable-Home-Loan Program," Real Estate Economics 27(1) 105–134 (1999).

[137] *See* Appendix A in the proposed common rule.

[138] *See* Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit, Board of Governors of the Federal Reserve System (August 2007), available at *http://www.federalreserve.gov/boarddocs/rptcongress/creditscore/creditscore.pdf.*

debt obligation within the preceding 24 months. Further, a borrower must not have, within the preceding 36 months, been a debtor in a bankruptcy proceeding, had property repossessed or foreclosed upon, engaged in a short sale or deed-in-lieu of foreclosure, or been subject to a Federal or State judgment for collection of any unpaid debt.

The proposal would require that the originator verify and document, within 90 days prior to the closing of the mortgage transaction, that the borrower satisfied these credit history requirements. The Agencies are proposing a safe harbor that would allow an originator to satisfy the documentation and verification requirements regarding a borrower's credit history by obtaining, no more than 90 days before the closing of the mortgage, credit reports from at least two consumer reporting agencies that compile and maintain files on consumers on a nationwide basis.[139] Such credit reports must demonstrate that the borrower satisfies the credit history requirements for a QRM and the originator must maintain paper or electronic copies of such credit reports in the loan file for the mortgage transaction. This safe harbor would not be available if the creditor later obtained an additional credit report before closing of the mortgage which indicated that the borrower did not meet the proposed rules' credit history requirements.

Request for Comment

115. Are the proposed credit history standards useful and appropriate indicators of the likelihood that a borrower might default on a new residential mortgage loan?

116. Are there additional or different standards that should be used in considering how a borrower's credit history may affect the likelihood that the borrower would default on a new mortgage?

117(a). Should the Agencies include minimum credit score thresholds as an additional or alternative QRM standard? 117(b). If so, how might the rules incorporate privately developed credit scoring models in a manner that (i) ensures that borrowers, originators, and investors have adequate notice, and an opportunity to comment on, changes to scoring methodologies that may affect a borrower's eligibility for a QRM, (ii) maintains a level competitive playing field for providers and developers of credit scores, and (iii) ensures that any credit scoring methodology used for QRM purposes is and remains predictive of a borrower's default risk?

118. The Agencies request comment on the appropriateness of the safe harbor that would allow an originator to satisfy the documentation and verification requirements regarding a borrower's credit history by obtaining credit reports from at least two consumer reporting agencies that compile and maintain files on consumers on a nationwide basis.

3. Payment Terms

Section __.15(d)(6) of the proposed rules addresses the payment terms of a QRM, based on the terms of the mortgage transaction at closing. Consistent with the requirements for a QM under section 129C(b)(2)(A)(i) of TILA, the proposed rules would prohibit QRMs from having, among other features, payment terms that allow interest-only payments or negative amortization. Under the proposed rules, regularly scheduled principal and interest payments on the mortgage transaction may not result in an increase of the unpaid principal balance of the mortgage and may not allow the borrower to defer payment of interest or repayment of principal.

In addition, consistent with the requirements for a QM under section 129C(b)(2)(A)(ii) of TILA, the proposed rules would prohibit the terms of a QRM from permitting any "balloon payment," defined for these purposes as a scheduled payment of principal and interest that is more than twice as large as any earlier scheduled payment of principal and interest. This definition of a balloon payment is consistent with the current definition of that term under the Board's Regulation Z,[140] and somewhat more restrictive than the definition of a balloon payment in section 129C(b)(2)(A)(ii) of TILA and applicable to a QM.[141]

Under the proposed rules, both fixed-rate and adjustable-rate mortgages may qualify as a QRM. However, the Agencies are proposing to limit the amount by which interest rates may increase on adjustable-rate loans that are QRMs to reduce the risk of default on QRMs by limiting the potential for consumers to face a "payment shock" in the event that their monthly mortgage payments were to rise rapidly due to expiration of "teaser rate" periods in the early years of a mortgage loan or other interest rate increases. Section 15G(e)(4)(B)(iii) provides that one of the underwriting and product features the Agencies may take into consideration in defining a QRM are those that mitigate "the potential for payment shock on adjustable rate mortgages through product features and underwriting standards." Under § __.15(d)(6)(iii) of the proposed rules, in order for a mortgage that allows the annual rate of interest to increase after the closing of the mortgage transaction to be a QRM, the terms of the mortgage must provide that any such increase may not exceed: (a) Two percent (200 basis points) in any twelve month period and (b) six percent (600 basis points) over the life of the mortgage transaction.[142]

Section __.15(d)(6)(iv) of the proposed rules also would prohibit a QRM from containing any prepayment penalty. The term "prepayment penalty" would be defined as a penalty imposed solely because the mortgage obligation is prepaid in full or in part. For purposes of this definition, a prepayment penalty would not include, for example, fees imposed for preparing and providing documents in connection with prepayment, such as a loan payoff statement, a reconveyance, or other document releasing the creditor's security interest in the one-to-four family property securing the loan.

When defining a QRM, section 15G directs the Agencies to take into consideration underwriting and product features that historical loan performance data indicate result in a lower risk of default, such as a prohibition or restriction on the use of prepayment penalties.[143] In addition, under section 129C(c)(1)(B) of TILA, prepayment penalties are prohibited or subject to significant limitations for certain loans even if those loans otherwise meet the QM definition under section 129C(b)(2) of TILA.[144]

[139] The proposal defines a "consumer reporting agency that compiles and maintains files on a nationwide basis" by reference to the definition of that term in the Fair Credit Reporting Act (15 U.S.C. 1681a(p)). *See* the proposed rules at § __.15(a)(7).

[140] *See* 12 CFR 226 Supplement I, comment 32(d)(1)(i)–1 and 12 CFR 226.18(s)(5)(i).

[141] Section 129C(b)(2)(A)(ii) of TILA defines a balloon payment for QM purposes as a scheduled payment that is more than twice as large as the average of earlier scheduled payments.

[142] As described more fully below, an originator also would be required to calculate the borrower's front-end and back-end DTI ratios based on the maximum interest rate permitted during the first five years of the mortgage transaction. Consequently, originators of adjustable-rate mortgages would have to determine that a borrower had acceptable DTI ratios even if rates rose as rapidly as possible under the terms of the mortgage (subject to the annual and lifetime caps described above).

[143] 15 U.S.C. 78o–11(e)(4)(B)(v).

[144] TILA's prepayment penalty restriction scheme is quite complex. Specifically, section 129C(c)(1)(B) of TILA prohibits prepayment penalties for any residential mortgage loan with an adjustable rate, or for those loans where the annual percentage rate exceeds certain thresholds over the average prime offer rate for a comparable transaction, based on the loan's amount and lien status. In addition, where permitted, prepayment penalties may not exceed three percent of the outstanding balance of the loan

Request for Comment

119(a). The Agencies request comment on all aspects of the proposed rules' limits on the payment terms of a QRM. In addition, the Agencies request comment on the following matters. 119(b). Should additional or different payment terms be established for QRMs? Commenters requesting additional or different limits are encouraged to provide data indicating that such additional or different terms would result in a lower risk of default. 119(c). Would different interest rate caps, such as a one percent (100 basis points) increase in any twelve month period, be more appropriate than the caps set forth in the proposal? 119(d). Recognizing the very damaging effects that prepayment penalties had on some borrowers during the recent housing market distress, the proposed rules do not permit any loans with prepayment penalties to qualify as a QRM. Often, the borrower that suffered because of the existence of such penalties were those with large, unaffordable payment shocks as low initial rates expired or those whose credit standing improved after origination of the loan, but who were not able to benefit from such improvements by refinancing into a potentially lower rate loan. Given the tight credit and product standards proposed for QRMs, such conditions are less likely to be relevant to QRM borrowers, and some QRM borrowers might reasonably benefit from an opportunity to obtain a mortgage with modest prepayment penalties in the early years of the loan in exchange for lower interest rate. Should the Agencies permit prepayment penalties in QRM loans (to the extent otherwise possible within the limits established for QMs)? 119(e). If so, what, if any, limitations should apply to such penalties?

4. Loan-to-Value Ratio

Borrowers with substantial equity in their properties—that is, a low LTV ratio—should in principle default infrequently. If faced with financial hardship, such borrowers typically can sell their homes or otherwise tap their accumulated home equity. To ensure that QRMs have low default risk consistent with their complete exemption from risk retention requirements, the Agencies are proposing that the QRM definition require a sizable equity contribution.

The figure below shows the default rate among loans in the LPS dataset considered by the Agencies (and described above) with the data further restricted to those loans with fully documented income in order to better match the proposed underwriting characteristics of QRMs. These loans are divided by their purpose: To purchase a home, to refinance an existing loan without increasing its principal balance (a so-called "rate and term" refinancing), or to refinance an existing loan and increase the principal balance (a so-called "cash out" refinancing). Different types of mortgage transactions (*i.e.,* purchase, rate and term refinancing, and cash-out refinancing) had varying rates of default.

As shown in the figure below, default rates increase noticeably among loans used to purchase homes at LTV ratios above 80 percent. The precise size of this increase and the LTV ratio at which it occurs are likely to vary across datasets and over time. Nonetheless, lenders have long experience underwriting loans with LTV ratios of 80 percent or less and there is substantial data indicating that loans with LTV ratios of 80 percent or less perform noticeably better than those with LTV ratios above 80 percent.[145] Data from the Enterprises concerning loans purchased or securitized by the Enterprises also show that first-lien purchase loans with high LTV ratios are riskier. The data show that purchase loans estimated to meet other QRM standards, but that exceeded the proposed LTV ratio cap, had serious delinquency rates 80 to 128 basis points higher when examining loans originated from 1997 to 2002, and 287 to 443 basis points higher for loans originated from 2005 to 2007.[146] Based on historical loan performance data, the Agencies are proposing a requirement for a LTV ratio of 80 percent for purchase mortgage transactions.

According to the LPS dataset, loans used to refinance existing mortgages have a greater likelihood of default at every LTV ratio level than those used to purchase homes; moreover, the default rates are steeper for refinance loans than for purchase loans, suggesting that refinance loans are more sensitive to the LTV ratio. Thus, to control risk of default in a manner consistent with the complete exemption afforded QRMs, the Agencies are proposing that these loans have tighter LTV ratio requirements than purchase loans.

The proposed rules put a combined LTV ratio cap for QRMs of 75 percent on rate and term refinance loans and 70 percent for cash-out refinance loans.[147] Again, estimates of the performance of these loans vary across datasets. However, because they have historically performed worse than purchase loans, and because they are more sensitive to LTV ratios than purchase loans, the lower combined LTV ratio caps on refinance loans should work to reduce risk of default on these loans.

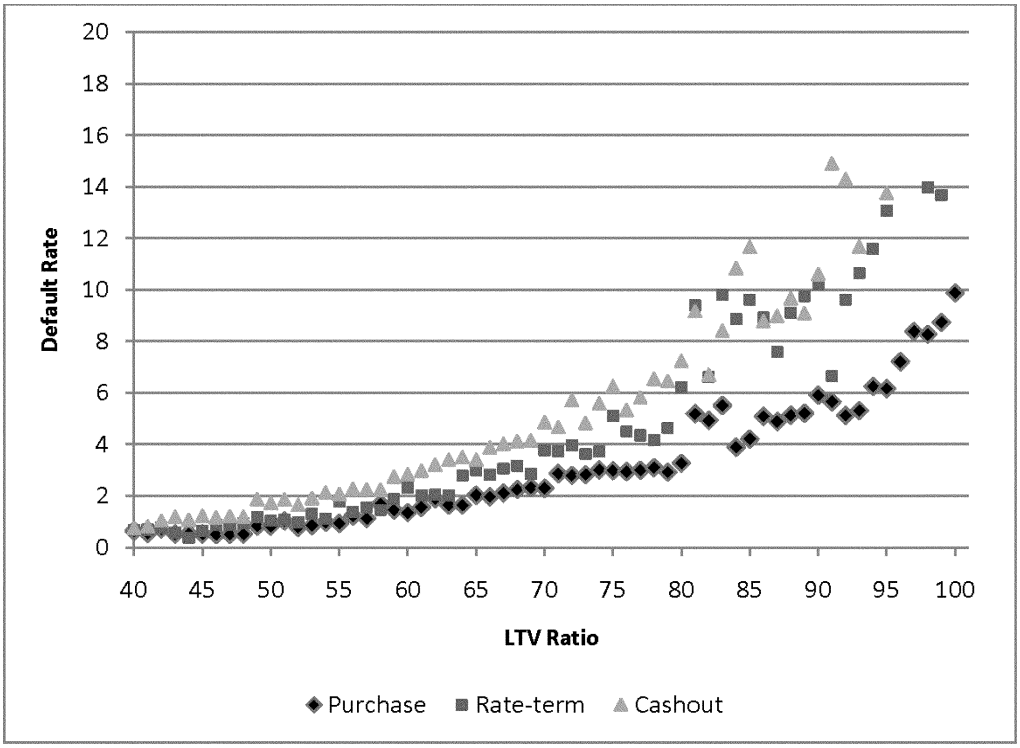
Again, the data from the Enterprises indicates that these LTV ratio caps should significantly reduce the default rate on QRMs that are refinancing transactions. These data show that rate and term refinancings that are estimated to meet other QRM standards, but are estimated to have exceeded the proposed combined LTV cap, had serious delinquency rates 32 to 70 basis points higher when examining loans originated from 1997 to 2002, and 196 to 539 basis points higher for loans originated from 2005 to 2007. For cash-out refinancings that are estimated to meet other QRM standards, but are estimated to have exceeded the proposed combined LTV cap, such loans had serious delinquency rates 42 to 81 basis points higher when examining loans originated between 1997 and 2002, and 255 to 405 basis points higher when examining loans originated from 2005 to 2007.

in the first year, two percent in the second year, and one percent in the third year. Creditors who offer a consumer a loan with a prepayment penalty must also offer the consumer a loan without a prepayment penalty. Under section 129C(b)(2)(A)(vii) of TILA, the total "points and fees" for a QM may not exceed three percent of the total loan amount, and under section 103(aa)(4) of TILA, the definition of "points and fees" now includes the maximum prepayment penalties and fees which may be charged or collected under the terms of the credit transaction. TILA also limits prepayment penalties in section 103(aa)(1)(A)(iii), which defines a "high-cost" mortgage loan as any mortgage (regardless of its cost or other terms) in which the creditor may charge prepayment fees or penalties more than 36 months after the closing of the transaction, or in which the fees or penalties exceed, in the aggregate, more than two (2) percent of the amount prepaid. And under section 129(c) of TILA, as amended by the Dodd-Frank Act, high-cost mortgage loans may not contain prepayment penalties.

[145] While many creditworthy homebuyers seeking to purchase a home will likely not have the 20 percent down payment required for a QRM, sound underwriting of these loans may well require the prudent use of judgment about the borrower's ability to repay the loan and other risk mitigants that are likely to change over time and vary from borrower to borrower. Such judgments are difficult to incorporate accurately and effectively into a rule without introducing substantial complexity and cost.

[146] *See* Appendix A in the proposed common rule.

[147] *See* proposed rules at § __.15(a) for the proposed definition of a "rate and term refinancing" and a "cash-out refinancing."



Request for Comment

120. The Agencies seek comment on the appropriateness of the proposed LTV and combined LTV ratios for the different types of mortgage transactions.

5. Down Payment

If a mortgage transaction is for the purchase of a one-to-four family property, then the proposed rules require that the borrower provide a cash down payment in an amount equal to at least the sum of:

(i) The closing costs payable by the borrower in connection with the mortgage transaction;

(ii) 20 percent of the lesser of—

(A) The estimated market value of the one-to-four family property as determined by a qualifying appraisal (as described in the following section); and

(B) The purchase price of the one-to-four family property to be paid in connection with the mortgage transaction; and

(iii) If the estimated market value of the one-to-four family property as determined by a qualifying appraisal is less than the purchase price of the one-to-four family property to be paid in connection with the mortgage transaction, the difference between these amounts.

For example, the down payment amount would equal $30,000 on a mortgage transaction with $10,000 in borrower-paid closing costs, and where the purchase price equaled $100,000 on a property with a qualifying appraisal that reflects a $100,000 market value as follows: (i) $10,000 in closing costs; plus (ii) $20,000 (based on 20 percent of the $100,000 purchase price which is less than or equal to the $100,000 market value); plus (iii) $0 (due to purchase price being less than or equal to the market value of the property). However, the down payment amount would equal $40,000 on a mortgage transaction with $10,000 in closing costs, and where the purchase price equaled $110,000 on a property with a qualifying appraisal that reflects a $100,000 market value as follows: (i) $10,000 in closing costs; plus (ii) $20,000 (based on 20 percent of the $100,000 market value which is less than the $110,000 purchase price); plus (iii) $10,000 (difference between the $110,000 purchase price and the $100,000 market value).

Because historical data indicate that borrowers with a meaningful equity interest in their properties exhibit a lower risk of default,[148] the proposal does not permit the dilution of a borrower's equity position by allowing the financing of closing costs.

The proposal also provides that the funds used by the borrower to meet the 20 percent down payment requirement must come from one or more acceptable sources of the borrower's own funds as specified in the Additional QRM Standards Appendix to the proposed rules. The acceptable sources of funds included in the Additional QRM Standards Appendix are those that would be considered acceptable sources under the "*Acceptable Sources of Borrower Funds*" section in the HUD Handbook (*e.g.,* savings and checking accounts, cash saved at home, stocks and bonds, and gifts, including eligible downpayment assistance programs).

While the down payment must come from acceptable sources of borrower funds, which as noted above can include gifts, the Agencies are proposing to prohibit the use of any funds subject to a contractual obligation by the borrower to repay and any funds from a person or entity with an interest in the sale of the property (other than the borrower). In addition, the Agencies are proposing to require originators to verify and document the borrower's compliance with the down payment requirements in accordance with the verification and documentation standards set forth in the Additional QRM Standards Appendix. Again, these standards are based on the standards in the HUD Handbook.

Request for Comment

121. The Agencies request comment on the proposed amount and acceptable sources of funds for the borrower's down payment.

[148] *See* Austin Kelly, "Skin in the Game: Zero Down Payment Mortgage Default," Federal Housing Finance Agency, Journal of Housing Research, Vol. 19, No. 2, 2008, available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1330132.*

6. Qualifying Appraisal

After considering a variety of valuation information sources, the Agencies are proposing that a QRM be supported by a written appraisal that conforms to generally accepted appraisal standards, as evidenced by the Uniform Standards of Professional Appraisal Practice, the appraisal requirements of the Federal banking agencies, and applicable laws.[149] The Agencies believe these requirements will help ensure that the appraisal is prepared by an independent third party with the experience, competence, and knowledge necessary to provide an accurate and objective valuation based on the property's actual physical condition. These requirements are intended to ensure the integrity of the appraisal process and the accuracy of the estimate of the market value of the residential property.

Request for Comment

122. Should other valuation approaches be considered in determining the value of the real property pledged on the mortgage transaction?

7. Ability To Repay

Section 15G provides that, in defining QRMs, the Agencies should take into consideration underwriting and product features that historical loan performance data indicate result in a lower risk of default, such as standards with respect to the borrower's residual income,[150] after taking account of all monthly obligations, the ratio of the borrower's housing payment to the borrower's monthly income, or the ratio of the borrower's total monthly installment payments to the borrower's income.[151]

Intuitively, a measure of a borrower's debt service burden ought to be an important predictor of default. These burdens are often measured as the ratio of the borrower's mortgage payment to his gross income (often known as the "front-end ratio") and the ratio of all of the borrower's debt payments to his gross income (often known as the "back-end ratio").[152]

The Agencies' review found that historical loan performance data did not always contain information on the borrowers' monthly income and debt obligations and, where such data were provided, the information was not always captured in a consistent manner, making it difficult to aggregate for statistical analysis. For example, the loan performance data from the Enterprises reflect that borrowers with lower DTI ratios had lower default rates before consideration of other underwriting factors. These data show that, among all loan types, loans that are estimated to meet the other proposed QRM standards, but had a front-end ratio of more than 28 percent or a back-end ratio of more than 36 percent, had serious delinquency rates 20 to 39 basis points higher when examining loans originated from 1997 to 2002, and 236 to 359 basis points higher for loans originated from 2005 to 2007.[153]

However, in the LPS data described above, payment to income ratios did not add significant predictive power once the effects of credit history, loan type, and LTV were considered. These results could be due to different originators using different definitions of income and non-mortgage debt burdens. Additionally, loan officers and brokers may only verify and report the minimum income necessary to qualify a borrower for a loan (or for the type of loan or interest rate sought). For example, two borrowers with the same loan type and the same reported front-end DTI ratio might actually have different incomes because one borrower's spouse works, but this additional income was not necessary to qualify for the loan and so was not reported.

The rule proposes a front-end ratio limit of 28 percent and a back-end ratio limit of 36 percent, which are consistent with the overall conservative nature of the QRM standards. These ratios are consistent with the standards widely used in the early 1990s that limited front-end ratios to a maximum of 25 to 28 percent and back-end ratios to a maximum of 33 to 36 percent, with the higher ratios only available to borrowers with relatively large down payments.[154] As noted above and described more fully in Appendix A to this Supplementary Information, loan performance data from the Enterprises indicate that these ratios are likely to help contribute to a set of QRM standards indicative of loans of very high credit quality.

For purposes of calculating these proposed ratios, the proposal would require originators to use the borrower's monthly gross income, as determined in accordance with the effective income standards set forth in the HUD Handbook, which have been incorporated into the Additional QRM Standards Appendix to the proposed rules. In addition, originators would be required to use the borrower's monthly housing debt in calculating the front-end ratio, and the borrower's total monthly debt in calculating the back-end ratio, as such debt amounts are defined in the HUD Handbook and incorporated into the Additional QRM Standards Appendix. The proposed rules, however, specifically provide that an originator must include in the borrower's monthly housing debt and total monthly debt any monthly pro rata payments for real estate taxes, insurance, ground rent, special assessments, and homeowner and condominium association dues. This requirement is intended to help ensure that the borrower has the capacity to meet these ongoing, housing-related monthly obligations, even where the borrower does not pay these obligations on a monthly basis.

The proposed rules also require that originators verify and document the borrower's monthly gross income, monthly housing debt, and monthly total debt in accordance with the verification and documentation standards of the HUD Handbook, as incorporated into the Additional QRM Standards Appendix.[155] The proposed rules also require the originator to determine the amount of the monthly first-lien mortgage payment and, in the case of refinancing transactions, the monthly payment for other debt secured by the property (including any open-end credit transaction as if fully drawn) that to the creditor's knowledge would exist at the closing of the refinancing

[149] The appraisal regulations and guidance promulgated by the Federal banking agencies generally do not apply to real estate-related financial transactions that qualify for sale to a U.S. government agency or to the Enterprises, or in which the appraisal conforms to the appropriate Enterprise's appraisal standards applicable to that category of real estate. *See* 12 CFR 34.43(a)(10) (OCC); 12 CFR 225.63(a)(10); (Board); 12 CFR 323(a)(10) (FDIC). The Interagency Appraisal and Evaluation Guidelines clarify that such transactions are expected to meet all of the underwriting requirements of the appropriate agency or Enterprise, including its appraisal requirements. Residential mortgage loans sold to the Enterprises will, in any case, continue to be required to meet appraisal standards of the appropriate Enterprise applicable to that category of real estate.

[150] Residual income is the borrower's remaining or "residual" monthly income after all of the borrower's monthly obligations, including the residual mortgage loan, have been paid.

[151] *See* 15 U.S.C. 78o–11(e)(4)(B)(ii).

[152] The Agencies' assessment of the available information suggested that the residual income method for assessing the borrowers' ability to repay is neither widely used nor consistently calculated. Therefore, the Agencies are not proposing to require the use of the residual income method for purposes of determining a borrower's ability to repay.

[153] *See* Appendix A to this Supplementary Information.

[154] *See* National Association of Realtors, "Financing the Home Purchase: The Real Estate Professional's Guide," Chicago: National Association of Realtors (1993), at 20.

[155] Section 129C(b)(2)(A)(iii) of TILA requires that the originator of a QM verify and document the income and financial resources relied upon in qualifying the borrower for the loan.

transaction. These determinations would be based on the maximum interest rate chargeable during the first five years after the date on which the first regular periodic payment will be due and a payment schedule that fully amortizes the mortgage over the full term of the loan, which cannot exceed 30 years. These requirements are based on those that apply to QMs under section 129C of TILA.[156]

Request for Comment

123. The Agencies seek comment on the appropriateness of the proposed front-end ratio limit of 28 percent and the proposed back-end ratio limit of 36 percent.

8. Points and Fees

Section __.15(d)(7) of the proposed rules reflects the restriction on "points and fees" for QMs contained in section 129C(b)(2)(A)(vii) of TILA. As with other standards set forth in TILA for QMs, the Agencies have considered the statutory provisions governing points and fees for QMs and have sought to ensure that the standards applicable to QRMs would be no broader than those that may potentially apply to QMs.[157] Under the proposal, in order for a mortgage to be a QRM, the total points and fees payable by the borrower in connection with the mortgage transaction may not exceed three percent of the total loan amount, which would be calculated in the same manner as in Regulation Z.[158] Under Regulation Z, the "total loan amount" is calculated by taking the "amount financed," as defined in 12 CFR 226.18(b), and deducting any "points and fees" that are financed by the creditor and not otherwise deducted in calculating the amount financed. In this way, the three percent limit on points and fees for QRMs will be based on the amount of credit extended to the borrower without taking into account the financed points and fees themselves.

For QRMs, the proposed rules would define "points and fees" consistent with the current definition of "points and fees" under the Board's Regulation Z, but would include the additional items added to the TILA definition of "points and fees" by the Dodd-Frank Act. Specifically, the term "points and fees" would include: (1) All items required to be disclosed as "finance charges" under Regulation Z (12 CFR 226.4(a) and 226.4(b)), except interest or the time-price differential; (2) All compensation paid directly or indirectly by a consumer or creditor to a "mortgage originator" (as defined in section 103(cc)(2) of TILA) from any source,[159] including a mortgage originator that is also the creditor in a table-funded transaction;[160] (3) All items excluded from the "finance charge" under Regulation Z listed in 12 CFR 226.4(c)(7) (other than amounts held for future payment of taxes), *unless* the charge is reasonable, the creditor and mortgage originator receive no direct or indirect compensation in connection with the charge, and the charge is not paid to an affiliate of the creditor or mortgage originator; (4) Premiums or other charges payable at or before closing for any credit life, credit disability, credit unemployment, or credit property insurance, or any other accident, loss-of-income, life or health insurance, or any payments made directly or indirectly for any debt cancellation or suspension agreement or contract;[161] and (5) All prepayment fees or penalties that are incurred by the consumer if the consumer refinances a previous loan made or currently held by the same creditor or an affiliate of the same creditor.[162]

Items excluded from the finance charge under 12 CFR 226.4(c), 226.4(d) and 226.4(e) would be excluded from the proposal's definition of "points and fees," *unless* those items are specifically included elsewhere in the definition of "points and fees." The proposed rules do not exclude "bona fide discount points" or certain bona fide third-party charges from "points and fees." The Agencies are also not proposing an adjustment to the limitation on points and fees for smaller loans as required for QMs under section 129C(b)(2)(D) of TILA.

Request for Comment

124(a). The Agencies request comment on all aspects of the proposed definition of "points and fees" for QRM purposes. In addition, the Agencies seek comment on the following matters. 124(b). Should the exclusion for "bona fide discount points" and certain bona fide third-party charges be included in the final rule? 124(c). If so, in what manner? 124(d) Would an adjustment to the limitation on points and fees for smaller loans, if implemented under section 129C(b)(2)(D) of TILA, be appropriate for QRMs?

9. Assumability Prohibition

Under the proposed rules, a QRM could not be assumable by any person who was not a borrower under the

[156] *See* section 129C(b)(2)(A)(iv) and (v) of TILA.

[157] Section 129C(b)(2)(C) of TILA defines the term "points and fees" with reference to the definition of "points and fees" in section 103(aa)(4) of TILA, which deals with "high-cost" mortgages. Under section 103(aa)(4) of TILA, as amended by the Dodd-Frank Act, points and fees include: (i) All items included in the "finance charge" under TILA, except interest or the time-price differential; (ii) All compensation paid directly or indirectly by a consumer or creditor to a mortgage originator (as defined in section 103(cc)(2) of TILA) from any source, including a mortgage originator that is also the creditor in a table-funded transaction; (iii) Each of the charges listed in section 106(e) of TILA (except an escrow for future payment of taxes) that are excluded from the definition of the "finance charge" (under section 106(e) of TILA, the following items when charged in connection with any extension of credit secured by an interest in real property are not included in the computation of the finance charge with respect to that transaction: fees or premiums for title examination, title insurance, or similar purposes; fees for preparation of loan-related documents; escrows for future payments of taxes and insurance; fees for notarizing deeds and other documents; appraisal fees, including fees related to any pest infestation or flood hazard inspections conducted prior to closing; and fees or charges for credit reports), *unless* the charge is reasonable, the creditor receives no direct or indirect compensation, and the charge is paid to a third party unaffiliated with the creditor; (iv) Premiums or other charges payable at or before closing for any credit life, credit disability, credit unemployment, or credit property insurance, or any other accident, loss-of-income, life or health insurance, or any payments made directly or indirectly for any debt cancellation or suspension agreement or contract, except that insurance premiums or debt cancellation or suspension fees calculated and paid in full on a monthly basis are not considered financed by the creditor; (v) The maximum prepayment fees and penalties that may be charged or collected under the terms of the credit transaction; (vi) All prepayment fees or penalties that are incurred by the consumer if the consumer refinances a previous loan made or currently held by the same creditor or an affiliate of the creditor; and (vii) Such other charges as the Board determines to be appropriate.

For purposes of a "qualified mortgage," section 129C(b)(2)(C) of TILA provides some exceptions to the definition of "points and fees" under section 103(aa)(4) of TILA. In calculating points and fees for purposes of the three percent limit applicable to QMs, points and fees do not include bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or mortgage originator. *See* section 129C(b)(2)(C)(i) of TILA. In addition, for purposes of computing the total points and fees for the three percent QM limit, the total points and fees excludes certain bona fide discount points if certain conditions are met. *See* section 129C(b)(2)(C)(ii)–(iv) of TILA.

[158] *See* 12 CFR 226.32(a)(1)(ii) and (b)(1).

[159] Under section 103(aa)(4)(B) of TILA, as amended by the Dodd-Frank Act, compensation paid to a mortgage originator "from any source" is included in "points and fees."

[160] For clarity, the proposal does not include the phrase "from any source" because the proposal would include all compensation paid directly or indirectly by a consumer or creditor to a mortgage originator, which would necessarily include compensation from any source.

[161] All such charges are included in "points and fees" under section 103(aa)(4)(D) of TILA and, thus, are included in points and fees under the proposal. Another amendment to TILA added by the Dodd-Frank Act (Section 129C(d) of TILA), restricts creditors from financing certain of these charges. This prohibition will be implemented when the Board or CFPB implements that section of TILA.

[162] Section 103(aa)(4) of TILA also includes in "points and fees" the maximum prepayment fees and penalties which may be charged or collected under the terms of the credit transaction. However, under the proposed rule, QRMs would not be permitted to have prepayment penalties.

original mortgage transaction. If a mortgage were assumable after origination or its securitization, it is possible that the new borrower would not satisfy the QRM requirements, which could result in the credit quality of the mortgage being significantly and negatively affected. While the rule could require that the loan essentially be re-underwritten using the QRM standards in connection with an assumption to address these concerns, such a requirement could impose significant costs on the holder or servicer of the mortgage, and potentially increase the cost and reduce the liquidity of QRMs.

10. Default Mitigation

The proposed rules also would require that the originator of a QRM incorporate into the mortgage transaction documents certain requirements regarding servicing policies and procedures for the mortgage, including requirements regarding loss mitigation actions, subordinate liens, and responsibility for assumption of these requirements if servicing rights with respect to the QRM are sold or transferred. Timely initiation of loss mitigation activities often reduces the risk of subsequent default on mortgages backing the securitization transaction. Disclosure of the policies and procedures governing loss mitigation activities also will inform borrowers and provide clarity regarding the consequences of default.

Specifically, the proposed rules would require that the QRM mortgage transaction documents include a provision obliging the creditor of the QRM to have servicing policies and procedures to promptly initiate activities to mitigate risk of default on the mortgage loan (within 90 days after the mortgage loan becomes delinquent, if such delinquency has not been cured) and to take loss mitigation actions, such as engaging in loan modifications, in the event the estimated net present value of such action exceeds the estimated net present value of recovery through foreclosure, without regard to whether the particular loss mitigation action benefits the interests of a particular class of investors in a securitization. The loss mitigation policies and procedures must also take into account the borrower's ability to repay and other appropriate underwriting criteria. The policies and procedures must include servicing compensation arrangements that are consistent with the creditor's commitment to engage in loss mitigation activities.

In addition, under the proposal, the creditor's policies and procedures would be required to provide that the creditor will implement procedures for addressing any whole loan owned by the creditor (or any of its affiliates) and secured by a subordinate lien on the same property that secures a QRM if the borrower becomes more than 90 days past due on the QRM. If the QRM will collateralize any asset-backed securities, the creditor must disclose those procedures or require them to be disclosed to potential investors within a reasonable period of time prior to the sale of the asset-backed securities. The Agencies are proposing inclusion of this element in the policies and procedures because modification of the QRM could affect the status of subordinate mortgages, and the existence of a subordinate mortgage could affect the structuring of actions to mitigate losses on the QRM.

As proposed, the mortgage originator must provide disclosure of the foregoing default mitigation commitments to the borrower at or prior to the closing of the mortgage transaction. Also, the mortgage originator would be required to include terms in the mortgage transaction documents under which the creditor commits to include in its servicing policies and procedures that it will not sell transfer, or assign servicing rights for the mortgage loan unless the transfer agreement requires the purchaser, transferee or assignee servicer to abide by the default mitigation commitments of the creditor as if the purchaser, transferee or assignee were the creditor under this section of the proposed rule.[163]

It is noted that there is an ongoing interagency effort among certain Federal regulatory agencies, including some of the Agencies joining in this proposed rulemaking, to develop national mortgage servicing standards that would apply to servicers of residential mortgages, including bank and bank-affiliated servicers and servicers that are not affiliated with a bank.[164] These standards would apply to residential mortgages regardless of whether the mortgages are QRMs, are securitized or are held in portfolio by a financial institution. The primary objective of this separate interagency effort is to develop a comprehensive, consistent, and enforceable set of servicing standards for residential mortgages that servicers would have to meet. In addition to servicing matters covered in this proposal, the separate interagency effort on national mortgage servicing standards is taking into consideration a number of other aspects of servicing, including the quality of customer service provided throughout the life of a mortgage; the processing and handling of customer payments; foreclosure processing; operational and internal controls; and servicer compensation and payment obligations. The agencies participating in this separate effort currently anticipate requesting comment on proposed standards later this year, with the goal of having final standards issued shortly afterward. At this time, with respect to specific servicing standards, the Agencies are requesting comment only on those particular standards included in this proposed rulemaking.

Request for Comment

125. The Agencies solicit comment on whether the definition of QRM should include servicing requirements.

126(a). Should the proposed servicing requirements be more or less robust? 126(b) If so, how should the proposed servicing requirements be changed?

127(a). Should servicers be required, as is proposed, to have policies and procedures that provide for loss mitigation activities if the borrower is 90 days delinquent, but default may not have occurred under the mortgage loan transaction documents?

127(b). Should the policies and procedures require, or at least not prohibit, initiation of loss mitigation activities, including loan modifications, when default is reasonably foreseeable?

127(c). What would be the practical implications of such an approach?

128(a). Should servicers be required, as is proposed, to have policies and

[163] As noted above, the policies and procedures prescribed under the proposed rule require the creditor's procedures with respect to subordinate liens held by the creditor or affiliates on the mortgaged property to be disclosed to potential investors if the creditor subsequently securitizes the QRM. In addition, the Agencies expect the creditor's commitments to have servicing policies and procedures as specified in the proposed rule would be reflected in the servicing agreement(s) for the securitization, which set forth the terms under which the servicer will service the securitized assets, and would thus be disclosed to potential investors in a securitization offering covered by the SEC's Regulation AB. If the servicing is transferred from the creditor to another entity who acts as securitization servicer, the Agencies expect these commitments would nevertheless be carried forward to the servicing agreements for the securitizations and disclosed pursuant to Regulation AB, because the policies and procedures prescribed under the proposed rule require the creditor not to transfer QRM servicing unless the agreement requires the transferee to abide by the same kind of default mitigation commitments as are required of the creditor.

[164] Participating agencies in the effort include the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the Federal Housing Finance Agency, the Department of Housing and Urban Development (including the Government National Mortgage Association (Ginnie Mae)), the Consumer Financial Protection Bureau, and the Department of the Treasury.

procedures that provide for loss mitigation actions for QRMs (within 90 days after delinquency, unless the delinquency is cured) when the estimated net present value of the action would exceed the estimated net present value of recovery through foreclosure?

128(b). Should those policies and procedures be required to include specific actions, such as (i) restructuring the mortgage loan; (ii) reducing the borrower's payments through interest rate reduction, extension of loan maturity, or similar actions; (iii) making principal reductions, or (iv) taking other loss mitigation action in the event that the estimated net present value of that action would exceed the estimated net present value of recovery though loan foreclosure?

128(c). What would be the practical implications of such an approach?

129. The Agencies seek comment on whether other servicing standards should be included, consistent with the statute's authority.

130(a). What are the practical implications of the proposed QRM servicing standards?

130(b). Do commenters envision operational issues in implementing the standards?

130(c). If so, please describe.

130(d). Are the standards sufficiently clear?

130(e). If not, which should be clarified?

131. Would the proposed QRM servicing conditions restrict or impede the ability or willingness of certain classes of originators to originate QRMs?

132(a). Is the scope of the QRM servicing standards appropriate?

132(b). Are there alternatives to QRM servicing standards that would better address servicing issues?

133(a). Should the servicing requirements be part of the pooling and servicing agreement rather than part of the mortgage transaction documents?

133(b). Should they be included in both sets of documentation?

134(a). If a creditor or an affiliate has an ownership interest in a subordinate lien mortgage and the creditor services the first lien mortgage, should the creditor be required to implement pre-defined processes to address any potential conflicts of interest when the first lien loan becomes 90 days past due?

134(b). What types of processes should be required?

134(c). Would specification of a particular process unduly limit the ability of the creditor to address different circumstances that may arise?

135(a). Should the Agencies impose a standard requiring that a particular risk mitigation activity maximize the recovery based on net present value to avoid potential conflicts of interests between different classes of investors?

135(b). How would that be determined?

135(c). Would this approach improve the ability of servicers to best represent the interest of all investors?

135(d). What would be the practical implications under such an approach?

136(a). Are the proposed compensation requirements appropriate?

136(b). For example, should the compensation structure be more specific, depending on the type of risk mitigation action deemed appropriate?

136(c). If so, how?

137(a). Pursuant to servicers' obligations to investors under the terms of securitization transaction documents, servicers are generally required to advance scheduled payments of principal and interest to investors after a borrower has become past due for some period of time (with respect to private label securities, usually until foreclosure is started), to the extent that such monthly advances are expected to be reimbursed from future payments and collections or insurance payments or proceeds of liquidation of the related mortgage loan. These monthly advances are intended to maintain a regular flow of scheduled principal and interest payments on the certificates rather than to guarantee or insure against losses. Does funding of these delinquent payments create liquidity constraints for servicers that incent servicers to take action (e.g., start foreclosure) that may not be in the investors' best interest?

137(b). Should the Agencies put limits on servicers advancing delinquent mortgagors' payments of principal and interest to investors?

137(c). Would such a limitation harm investors' interests?

137(d). What are the practical implications of such an approach?

138(a). Should the Agencies require servicing standards for a broader class of securitized residential mortgages?

138(b). If so, how?

139. For commenters responding to any of the foregoing questions or with recommendations for different or additional approaches to servicing standards, are such approaches consistent with the statutory factors the Agencies are directed to take into account under the QRM exemption?

140. The Agencies are in the process of developing national mortgage servicing standards, which would cover all residential mortgage loans, including QRMs. In light of this, the Agencies seek comment on whether the establishment of national mortgage servicing standards is a more effective means to address the problems associated with servicing of all loans.

D. Repurchase of Loans Subsequently Determined To Be Non-Qualified After Closing

As required by section 15G and discussed in greater detail in Part IV.B of this Supplementary Information, the proposed rules require that the depositor of the asset-backed security certify that it has evaluated the effectiveness of its internal supervisory controls with respect to the process for ensuring that all assets that collateralize the asset-backed security are QRMs and has concluded that such internal supervisory controls are effective. Nevertheless, the Agencies recognize that, despite the use of robust processes and procedures, it is possible that one or more loans included in a QRM securitization transaction may later be determined to have not met the QRM definition due to inadvertent error. For example, an originator conducting post-origination file reviews for compliance or internal audit purposes may find that some aspects of the documentation required to verify the borrower's monthly gross income were not obtained. If the discovery of such an error after closing of the securitization terminated the securitization's QRM exemption, then sponsors and investors may well be unwilling to participate in the securitization of QRMs. On the other hand, unless sponsors or depositors face some penalty for the inclusion in a QRM securitization transaction of loans that do not meet the QRM standards, sponsors and depositors may not have the proper incentives to use all reasonable efforts to ensure that securitizations relying on the QRM exemption are collateralized only by loans that meet all of the QRM standards.

The proposal seeks to balance these interests by providing that a sponsor that has relied on the QRM exemption with respect to a securitization transaction would not lose the exemption, with respect to the transaction, if, after closing of the securitization transaction, it is determined that one or more of the mortgages collateralizing the ABS do not meet all of the criteria to be a QRM, provided that certain conditions are met. First, the depositor must have certified that it evaluated the effectiveness of its internal supervisory controls with respect to the process for ensuring that all of the loans that collateralize the ABS are QRMs and concluded that its internal supervisory

controls are effective, as required by § __.15(b)(4) of the proposed rules. Second, the sponsor must repurchase the loan(s) determined to not be QRMs from the issuing entity at a price at least equal to the remaining principal balance and accrued interest on the loan(s). The sponsor must complete this repurchase no later than ninety (90) days after the determination that the loan(s) does not satisfy the QRM requirements. Third, the sponsor must promptly notify (or cause to be notified) all investors of the ABS of any loan(s) that are required to be repurchased by the sponsor pursuant to this repurchase obligation, including the principal amount of the repurchased loan(s) and the cause for such repurchase.

These conditions are intended to provide a sponsor with the opportunity to correct inadvertent errors by promptly repurchasing any non-qualified loan(s) and removing such non-qualifying loan(s) from the pool, while protecting investors. Moreover, in light of this buy-back requirement, sponsors should continue to have a strong economic incentive to ensure that all loans backing a QRM securitization satisfy all of the conditions applicable to QRMs prior to closing of the transaction.

Request for Comment

141(a). Should the Agencies require, as a condition to qualify for the QRM exemption, that the sponsor repurchase the entire pool of loans collateralizing the ABS if the amount or percentage of the loans that are required to be repurchased due to the failure to meet the QRM standards reaches a certain threshold?

141(b). If so, what threshold would be appropriate?

142(a). Should the Agencies permit a sponsor, within the first four months after the closing of a QRM securitization, to substitute a comparable QRM loan for a residential mortgage loan that is determined, post-closing, to not be a QRM (in lieu of purchasing the loan for cash)?

142(b). If so, is four months an appropriate period or should the rule allow more or less time?

E. Request for Comment on Possible Alternative Approach

As discussed previously, the approach taken by the proposal to implementing the exemption for QRMs within the broader context of section 15G is to limit QRMs to mortgages of very high credit quality, while providing sponsors considerable flexibility in how they meet the risk retention requirements for loans that do not qualify as QRMs (or for another exemption). An alternative approach to implementing the exemption for QRMs within the context of section 15G would be to create a broader definition of a QRM that includes a wider range of mortgages of potentially lower credit quality, and make the risk retention requirements stricter for non-QRM mortgages, such as by, for example, providing sponsors with less flexibility in how they retain risk (e.g., requiring vertical risk retention or increasing the base risk retention requirement), in order to provide additional incentives to originate QRM loans. Under this type of alternative approach, the proposed QRM standards could be modified as follows—

(a) If the mortgage transaction is a purchase transaction or rate and term refinancing, the combined LTV ratio of the mortgage transaction could not exceed 90 percent (with no restriction on the existence of a subordinate lien at closing of a purchase transaction);

(b) If the mortgage transaction is a cash-out refinancing, the combined LTV ratio of the mortgage transaction could not exceed 75 percent;

(c) The borrower's required cash down payment on a purchase mortgage could be reduced to—

(1) 10 percent (rather than the proposed 20 percent) of the lesser of the property's market value or purchase price, plus

(2) The closing costs payable by the borrower in connection with the mortgage transaction; and

(d) A borrower's maximum front-end DTI ratio could be increased to—

(1) 33 percent, if payments under the mortgage could not increase by more than 20 percent over the life of the mortgage; or

(2) 28 percent, if payments under the mortgage could increase by more than 20 percent over the life of the mortgage;

(e) A borrower's maximum back-end DTI ratio would be increased to—

(1) 41 percent, if payments under the mortgage could not increase by more than 20 percent over the life of the mortgage; or

(2) 38 percent, if payments under the mortgage could increase by more than 20 percent over the life of the mortgage; and

(f) Mortgage guarantee insurance or other types of insurance or credit enhancements provided by third parties could be taken into account in determining whether the borrower met the applicable combined LTV requirement, but such insurance or enhancements would not alter the 90 percent maximum combined LTV for purchase transactions and rate and term refinancings and 75 percent maximum combined LTV for cash-out refinancings.

Request for Comment

143. The Agencies seek comment on the potential benefits and costs of the alternative approach, with a broader QRM exemption combined with a stricter set of risk retention requirements for non-QRM mortgages.

144(a). If such an alternative approach were to be adopted, what stricter risk retention requirements would be appropriate in order to provide additional incentives to underwrite a greater share of origination volume within the QRM definition?

144(b). Should such stricter requirements involve the form of risk retention or a higher amount of risk retention?

144(c). Are there other changes that would achieve the same objective?

145. How would this approach help to ensure high quality loan underwriting standards and align the interests of investors?

146(a). Would this approach have the practical effect of exempting the securitization of most residential loans from the risk retention requirement?

146(b). If so, how would this positively and/or negatively affect investors in such securitizations?

146(c). Would an offering of an ABS backed by loans complying with the lower standards in the alternative approach adequately promote the necessary alignment of incentives among originators, sponsors, and investors?

147. What impact might a broader QRM definition have on the pricing, liquidity, and availability of loans that might fall outside the broader QRM boundary?

148. Would the lower QRM standards under the alternative approach be consistent with the requirement that QRMs be fully exempted from section 15G's risk retention requirements?

149. How could this type of alternative approach be designed to limit the likelihood that loans with significant credit risk are included in the pool and thus not subject to risk retention?

V. Reduced Risk Retention Requirements for ABS Backed by Qualifying Commercial Real Estate, Commercial or Automobile Loans

Under Section 15G, the regulations issued by the Agencies must include underwriting standards for residential mortgages, commercial real estate (CRE) loans, commercial loans, and automobile loans, as well as any other asset class that the Federal banking

agencies and the Commission deem appropriate.[165] These underwriting standards, which are to be established by the Federal banking agencies, must specify terms, conditions, and characteristics of a loan within such asset class that indicate low credit risk with respect to the loan.[166] Section 15G provides that the Agencies must allow a securitizer to retain less than five percent of the credit risk of loans within an asset class that meet the underwriting standards set jointly by the Federal banking agencies if such loans are securitized through the issuance of an ABS.[167]

The following discussion addresses the underwriting standards established by the Federal banking agencies for CRE loans, commercial loans, and automobile loans.

A. Asset Classes

As directed by section 15G, § __.18 to § __.20 of the proposed rules include underwriting standards for CRE loans, commercial loans, and automobile loans that would allow ABS backed exclusively by loans that meet these underwriting standards to qualify for a less than five percent risk retention requirement. As discussed in further detail in Part IV of this Supplementary Information, the proposed rules provide a complete exemption from the risk retention requirements for securitization transactions that are collateralized solely by residential mortgages that qualify as QRMs. Accordingly, the proposed rules do establish separate rules for securitizations of residential mortgages that have terms, conditions and characteristics that indicate a low credit risk as required by section 15G(c)(2)(B). The Agencies do not propose to establish additional underwriting standards for residential mortgages that would be different from those set forth in the QRM standards. In determining not to propose additional standards, the Agencies considered, among other things, whether requiring risk retention greater than zero percent but less than five percent would provide an adequate incentive to sponsors and originators to underwrite assets meeting those standards.

Although the Agencies recognize that securitization markets include securitizations collateralized by various subcategories of assets with unique characteristics, the Agencies believe that the asset classes specified in section 15G (e.g., residential mortgages, commercial mortgages, commercial loans and automobile loans) capture a predominance of all ABS issuances by dollar volume where the underlying pool is comprised of relatively homogeneous assets. Moreover, general information for ABS issuances collateralized exclusively by CRE, commercial, and automobile loans is widely available and, due to the homogeneity of the underlying pool, lends itself to the establishment of uniform underwriting standards establishing low credit risk for all of the assets within the pool. These characteristics also should facilitate the ability of investors and supervisors to monitor a sponsor's compliance with the proposed standards and disclosure requirements in a timely and comprehensive manner.

In contrast, many of the other types of ABS issuances are collateralized by assets that exhibit significant heterogeneity, or assets that by their nature exhibit relatively high credit risk. Such factors make it difficult to develop underwriting standards establishing low credit risk that can be, as a practical matter, applicable to an entire class of underlying assets in the manner described under section 15G. Accordingly, for purposes of the proposed rules, the Federal banking agencies and the Commission do not propose to establish asset classes in addition to those set forth in section 15G.

Request for Comment

150(a). Should underwriting standards be developed for residential mortgage loans that are different from those proposed for the QRM definition and under which a sponsor would be required to retain more than zero but less than five percent of the credit risk?

150(b). If so, what should those underwriting standards be and how should they differ from those established under the QRM provisions?

150(c). For example, should such underwriting standards allow for a loan-to-value ratio of up to 90 percent for purchase mortgage loans if there is mortgage insurance that would provide investors similar amounts of loss protection upon default as would be provided by a mortgage with a loan-to-value ratio of 80 percent?

150(d). If additional underwriting standards were established for residential mortgages, what amount of risk retention less than five percent should be required for loans meeting such standards, and should it be required to be held in a particular form?

151. If any new underwriting standards for residential mortgages were to be established and permit the inclusion of mortgage guarantee insurance or other types of insurance or credit enhancements, what financial eligibility standards should be incorporated for mortgage insurance or financial product providers?

152. Should additional asset classes beyond those specified in section 15G be established and, if so, how should the associated underwriting standards for such additional asset classes be defined? Commenters are encouraged to provide supporting data regarding the prevalence of each asset class in the ABS market, as well as loan-level performance data that provides information on the characteristics, terms, and conditions of the underlying loans and that may be useful in developing standards that identify loans within such asset class that have low credit risk.

B. ABS Collateralized Exclusively by Qualifying CRE Loans, Commercial Loans, or Auto Loans

Section 15G(c)(1)(B)(ii) provides that a sponsor of an ABS issuance collateralized exclusively by loans that meet the underwriting standards prescribed by the Federal banking agencies under section 15G(c)(2)(B) shall be required to retain less than five percent of the credit risk of the securitized loans. The Agencies are proposing a zero percent risk retention requirement (that is, the sponsor would not be required to retain any portion of the credit risk) for ABS issuances collateralized exclusively by loans from one of the asset classes specified in the proposed rules, and which meet the proposed underwriting standards. In proposing a zero risk retention requirement for ABS backed by qualifying loans within these asset classes, the Agencies considered several factors. As discussed below, the underwriting standards the Agencies propose are, as is appropriate for a zero percent risk retention requirement, very conservative. In addition, the Agencies were concerned that establishing a risk retention requirement between zero and five percent for qualifying assets within these asset classes may not sufficiently incent securitizers to allocate the resources necessary to ensure that the collateral backing an ABS issuance satisfies the proposed underwriting standards, as there may be significant compliance costs to structure and maintain the retention piece of a securitization structure (irrespective of how it is calibrated) and provide required disclosures to investors.

Sections __.18 to __.20 of the proposed rules establish underwriting standards for CRE loans, commercial

[165] *See* 15 U.S.C. 78o–11(c)(2)(A).

[166] *See id.* at sec. 78o–11(c)(2)(B).

[167] *See id.* at sec. 78o–11(c)(1)(B)(ii).

loans, and automobile loans that are designed to ensure that loans in these asset classes, which qualify for a zero risk retention requirement, are of very low credit risk. The proposed underwriting standards are based on the Federal banking agencies' expertise and supervisory experience with respect to the credit risk of the loans in each of the prescribed asset classes. Commercial, CRE and automobile loans that meet the conservative underwriting standards included in the proposed rules are referred to as "qualifying" commercial, CRE and automobile loans.

The Federal banking agencies have sought to make the standards for qualifying commercial loans, CRE loans and automobile loans, transparent to, and verifiable by, originators, securitizers, investors and supervisors. To facilitate compliance with the rule, as well as the supervision and enforcement of the rule, the proposed standards are generally prescriptive, rather than principle-based.

The Agencies recognize that many prudently underwritten CRE, commercial and automobile loans will not meet the underwriting standards set forth in § __.18 to § __.20 of the proposed rules. For example, the Agencies note that the proposed standards are significantly more prudent and conservative than those required to attain a "pass" credit under the Federal banking agencies' supervisory practices. Sponsors of ABS backed by loans that do not meet the underwriting standards will be required to retain some of the credit risk of the securitized loans in accordance with the proposed regulation (unless another exemption is available). However, as noted previously, the proposed rules provide sponsors with several options for complying with the risk retention requirements of section 15G so as to reduce the potential for these requirements to disrupt securitization markets or materially affect the flow or pricing of credit to borrowers and businesses. Moreover, the national pool of commercial loans, CRE loans and automobile loans that do not meet the standards set forth in § __.18 to § __.20 of the proposed rules should be sufficiently large, and include enough prudently underwritten loans, so that ABS backed by such loans will be routinely issued and purchased by a wide variety of investors. As a result, the market for such securities should be relatively liquid.

Request for Comment

153. The Agencies request comment on the appropriateness of a total exemption for sponsors of ABS issuances collateralized exclusively by qualifying CRE, commercial, or automobile loans that meet the underwriting standards set forth in § __.18 to § __.20 of the proposed rules. Commenters who support a partial exemption are encouraged to provide information regarding the methodology the Agencies should use to calibrate the retention requirement, in a manner that considers the relative risk of the securitization transaction, both within and across the proposed asset classes.

C. Qualifying Commercial Loans

For an ABS issuance collateralized exclusively by commercial loans to qualify for a zero percent risk retention requirement, the commercial loans must satisfy the underwriting standards set forth in § __.18 of the proposed rules. The proposed rules define a commercial loan as any secured or unsecured loan to a company or an individual for business purposes, other than a loan to purchase or refinance a one-to-four family residential property, a loan for the purpose of financing agricultural production, or a loan for which the primary source (that is, 50 percent or more) of repayment is expected to be derived from rents collected from persons or entities that are not affiliates of the borrower. Commercial loans encompass a wide variety of credit types and terms. However, these loans generally are similar in that the primary source of repayment is revenue from the business operations of the borrower. The standards for a qualifying commercial loan use measures that are consistent with, but more prudent and conservative than, industry standards for evaluating the financial condition and repayment capacity of a borrower.

1. Ability To Repay

The historical performance of a borrower with respect to its outstanding loan obligations is, generally, a useful measure for evaluating whether the borrower will likely satisfy new debt obligations. However, even where a borrower has a consistent and documented record of satisfactory performance on prior debt obligations, the originator also must ensure that the borrower's financial condition has not changed in a way that could adversely affect its capacity to satisfy new loan obligations. Accordingly, under § __.18 of the proposed rules, the originator of a qualifying commercial loan must verify and document the financial condition of the borrower as of the end of the borrower's two most recently completed fiscal years. In addition, the originator must conduct an analysis of the borrower's ability to service its overall debt obligations during the next two years, based on reasonable projections. A commercial loan would meet the standards in the proposed rules only if the originator determines that, during the borrower's two most recently completed fiscal years and the two-year period after the closing of the commercial loan, the borrower had, or is expected to have: (1) A total liabilities ratio [168] of 50 percent or less; (2) a leverage ratio [169] of 3.0 or less; and (3) a debt service coverage (DSC) ratio [170] of 1.5 or greater.

Under the proposed rules, the loan payments under the commercial loan must be determined based on straight-line amortization of principal and interest that fully amortize the debt over a term that does not exceed five years from the closing date for the loan. In addition, the loan documentation must require payments no less frequently than quarterly over a term that does not exceed five years. The Federal banking agencies believe these proposed methods for assessing a borrower's financial condition and ability to repay are consistent with industry standards for evaluating the financial condition and repayment capacity of a borrower.

The proposal does not require that a commercial loan be secured by collateral in order to be a qualifying commercial loan. However, where the loan is made on a secured basis, the proposed rules include several conditions designed to ensure that the collateral is maintained and available to be used to satisfy the borrower's obligations under the loan, if necessary. For example, if the commercial loan is originated on a secured basis, the originator must obtain a first-lien security interest on the pledged property and include covenants in the loan agreement that require the borrower to maintain the condition of the collateral and permit the originator to inspect the collateral and the books and records of the borrower. The loan documentation for the commercial loan also must include covenants that require the borrower to: (a) Pay all applicable taxes, fees, charges and claims where

[168] Total liabilities ratio equals the borrower's total liabilities, determined in accordance with GAAP divided by the sum of the borrower's total liabilities and equity, less the borrower's intangible assets, with each component determined in accordance with GAAP.

[169] The leverage ratio equals the borrower's total debt divided by the borrower's annual income before expenses for interest, tax, depreciation, and amortization (EBITDA), as determined in accordance with GAAP.

[170] The DSC ratio equals the borrower's EBITDA, as of the most recently completed fiscal year divided by the sum of the borrower's annual payments for principal and interest on any debt obligation.

nonpayment could give rise to a lien against the collateral; (b) take any action necessary to perfect or defend the security interest (or priority of the security interest) of the originator (or any subsequent holder of the loan) in the collateral against claims adverse to the lender's interest; and (c) maintain insurance that protects against loss on the collateral at least up to the amount of the loan, and that names the originator (or any subsequent holder of the loan) as an additional insured or loss payee.

2. Risk Management and Monitoring Requirements

To mitigate default risk during periods of economic stress or when the financial condition of the borrower otherwise deteriorates, the proposed rules require the loan documentation to include covenants that restrict the borrower's ability to incur additional debt or transfer or pledge its assets. Specifically, the proposed rules require the loan documentation to provide certain covenants, including a covenant to provide to the originator (or any subsequent holder) and the servicer financial information and supporting schedules on an ongoing basis, but not less frequently than quarterly. The covenants must also prohibit the borrower from retaining or entering into a debt arrangement that permits payments-in-kind, and place limitations on the transfer of any of the borrower's assets, on the borrower's ability to create other security interests with respect to any of its assets, and on any change to the name, location, or organizational structure of the borrower (or any other party that pledges collateral for the loan). The loan documentation must also include covenants designed to protect the value of any collateral pledged to secure the loan that require the borrower (and any other party that pledges collateral for the loan) to: (a) Maintain insurance protecting against loss on any collateral at least up to the amount of the loan and names the originator (or any subsequent holder) as an additional insured, loss payee, or similar beneficiary; (b) pay any taxes, charges, claims and fees where nonpayment could give rise to a lien against any collateral securing the loan; (c) take any action necessary to perfect or defend the security interest of the originator or any subsequent holder of the loan in the collateral for the commercial loan or the priority thereof, and to defend the collateral against claims adverse to the lender's interest; (d) permit the originator or any subsequent holder of the loan, and the servicer of the loan, to inspect the collateral and the books and records of the borrower; and (e) maintain the physical condition of any collateral for the loan.

Request for Comment

154(a). Are the proposed standards appropriate for a qualifying commercial loan? 154(b) Are these standards sufficient and appropriate to ensure that qualifying commercial loans are of very low credit risk?

155. Are the metrics to measure a borrower's financial capacity, and the specified parameter for each metric, an appropriate standard?

D. Qualifying CRE Loans

Section __.19 of the proposed rules provides the underwriting standards for qualifying CRE loans. Such standards focus predominately on the following criteria: The borrower's ability to repay the loan; the value of, and the originator's security interest in, the collateral; the LTV ratio; and whether the loan documentation includes the appropriate covenants to protect the collateral.

For purposes of the proposed rules, a CRE loan is defined as a loan secured by a property with five or more single-family units, or by nonfarm non-residential real property, the primary source (50 percent or more) of repayment for which is expected to be derived from: (a) The proceeds of the sale, refinancing, or permanent financing of the property; or (b) rental income associated with the property other than rental income that is derived from any affiliate of the borrower. However, under the proposal, a CRE loan does *not* include a land development and construction loan (including one-to-four family residential or commercial construction loans), loans on raw or unimproved land, a loan to a real estate investment trust (REIT), or an unsecured loan.

1. Ability To Repay

The Federal banking agencies believe that prudent underwriting standards should require the originator to verify and document the capacity of the borrower, or income from the underlying collateral, to repay the loan. For qualifying CRE loans, the proposed underwriting standards focus on both the sufficiency of the CRE property's net operating income (NOI) [171] less replacement reserves to support the payment of principal and interest over the full term of the CRE loan, as well as the financial condition of the borrower (independent of the CRE property's NOI less replacement reserves) to repay other outstanding debt obligations. Specifically, the proposed rules generally require the borrower to have a DSC ratio [172] of 1.7 or greater. The proposed rules, however, would allow a CRE loan on properties with a demonstrated history of stable NOI to have a slightly lower (1.5) DSC ratio. To qualify for the lower DSC ratio requirement, the CRE loan must be secured by either (1) a residential property (other than a hotel, motel, inn, hospital, nursing home, or other similar facility where dwellings are not leased to residents) that consists of five or more dwelling units primarily for residential use, and where at least 75 percent of the CRE property's NOI is derived from residential rents and tenant amenities (such as a swimming pool, gym membership, or parking fees); or (2) commercial nonfarm real property (other than a multi-family property or a hotel, inn or similar property) that is occupied by, and derives at least 80 percent of its aggregate gross revenue from, one or more "qualified tenants." Under the proposed rules, a qualified tenant is defined as a tenant that (1) is subject to a triple net lease [173] that is current and performing with respect to the CRE property, or (2) was subject to a triple net lease that has expired, currently is leasing the property on a month-to-month basis, has occupied the property for at least three years prior to closing, and is current and performing with respect to all obligations associated with the CRE property. All outstanding triple net leases must have a remaining maturity of at least six months, unless the tenant leases the property on a month-to-month basis as described above.

Under the proposed rules, the originator of a qualifying CRE loan must also determine whether the borrower has the ability to service its other outstanding debt obligations, net of any income generated from the CRE (based on the NOI). This requirement is intended to ensure that the CRE remains a reliable source of repayment and

[171] Section __.16 of the proposed rules defines NOI as income generated by a CRE property, net of all expenses that have been deducted for federal income tax purposes (except depreciation, debt service expenses, and federal and state income taxes) and any unusual or nonrecurring income items.

[172] Under § __.16 of the proposed rules (definition of "Debt service coverage (DSC) ratio"), the DSC ratio for a CRE loan equals the CRE property's annual NOI less the annual replacement reserve of the CRE property at the time of origination divided by the sum of the borrower's annual payments for principal and interest on any debt obligation.

[173] For purposes of the proposed rules, a triple net lease means a lease pursuant to which the lessee is required to pay rent as well as taxes, insurance, and maintenance expenses associated with the property.

security for the CRE loan, and not other debts of the borrower, over the full loan term. Accordingly, under the proposed rules, the originator must conduct an analysis of the borrower's ability, and determine that the borrower has the ability, to service all outstanding debt obligations over the two years following the origination date for the loan, based on reasonable projections and including the new debt obligation. A borrower's historical performance in satisfying debt obligations is often an indicator of whether the borrower will satisfy a new debt obligation. Accordingly, as part of this analysis, the originator also must document and verify that the borrower has satisfied all debt obligations over a look-back period of at least two years.

The proposed rules generally require that a qualifying CRE loan have a fixed stated interest rate to reduce the potential for the borrower to experience payment shock. However, the proposed rules allow the interest rate to be adjustable if the borrower obtains, prior to or concurrently with the origination date for the CRE loan, a derivative product that effectively results in the borrower paying a fixed interest rate on the CRE loan. Commercial borrowers often purchase a derivative (such as an interest rate swap) that effectively "convert" an adjustable rate into a fixed rate. In addition, the proposed standards for qualifying CRE loans would prohibit terms that (1) permit the borrower to defer principal or interest payments; (2) allow the originator to establish an interest reserve to fund all or part of a payment on the loan; or, (3) provide a maturity date that is earlier than ten years following the closing date for the loan. Further, the loan payment amount must be based on straight-line amortization of the debt over the term of the loan not to exceed twenty (20) years, with payments made no less frequently than monthly over a term of at least ten (10) years.

2. Loan-to-Value Requirement

The Agencies believe that prudent underwriting standards should limit the amount an originator may advance relative to the market value of the CRE property. Therefore, the Federal banking agencies are proposing to require a combined loan-to-value (CLTV) ratio of less than or equal to 65 percent for qualifying CRE loans. However, the recent crisis has demonstrated that the use of very low capitalization rates generally results in significantly higher market values for some CRE properties. Where the capitalization rate used in the appraisal is less than the 10-year interest rate swap rate [174] plus 300 basis points, the maximum CLTV ratio requirement will be 60 percent to mitigate the effect of an artificially low capitalization rate.

3. Valuation of the Collateral

Because the credit risk of a CRE loan is closely linked with the commercial real estate collateralizing the loan, the proposed rules include several conditions relating to the collateral. For example, under § __.19(b) of the proposed rules, the originator of a qualifying CRE loan must determine whether the purchase price for the CRE property that secures the loan reflects the current market value of the property, so as to ensure that the collateral is sufficient to recover any unpaid principal in the event of default, and that the borrower has sufficient equity in the property to incent continued performance of all loan obligations during an economic downturn or when the CRE property's NOI may not be sufficient to cover loan payments. To determine the value of the CRE property, the proposed rules require the originator to obtain an appraisal prepared not more than six months before the origination date for the loan, in accordance with the Uniform Standards of Professional Appraisal Practice and the appraisal requirements of the Federal banking agencies for the CRE property securing the loan. The appraisal report must provide an "as is" opinion of the current market value of the CRE property, which includes an income approach that uses a discounted cash flow analysis based on the CRE property's actual NOI. These requirements are intended to help ensure that the appraisal is prepared by an independent third party with the experience, competence, and knowledge necessary to provide an accurate and objective valuation based on the CRE property's actual physical condition.

Environmental hazards, such as ground water contamination and the presence of lead or other harmful chemicals or substances, may potentially jeopardize the value of CRE property as well as the borrower's ability to repay the loan. Accordingly, under the proposed rules, the originator also must conduct an environmental risk assessment of the CRE property securing a qualifying CRE loan and, based on this assessment, take appropriate measures to mitigate any risk of loss to the value of the CRE property. Appropriate measures may include a reduction in the loan amount sufficient to reflect potential losses; however, where the assessment reveals significant environmental hazards, originators are encouraged to reconsider the primary loan decision. The originator can have a qualified third party perform the assessment, but remains responsible for ensuring that appropriate measures are taken to mitigate any risk of loss due to environmental risks.

4. Risk Management and Monitoring Requirements

Under § __.19(b) of the proposed rules, the CRE loan documentation must provide certain covenants that are generally designed to facilitate the ability of the originator to monitor and manage credit risk over the full term of the loan. In developing the proposed covenants, the Federal banking agencies reviewed the supporting loan documentation for several recent ABS issuances collateralized by CRE loans. The proposed covenants are generally consistent with those provided in such loan documentation and, therefore, should reflect current industry practice and impose minimal compliance burden.

As with the covenants required for commercial loans (as discussed in the previous section), the covenants for CRE loans require certain information be provided to the originator (or any subsequent holder) and the servicer financial on an ongoing basis. Additionally, with respect to CRE loans in particular, such information must include information on existing, maturing, and new leasing or rent-roll activity, as appropriate for the CRE property. This should assist the originator in monitoring volatility in the repayment capacity of the borrower, with respect to the CRE property's NOI and the borrower's financial condition.

The loan documentation for a qualifying CRE loan also must include covenants restricting the ability of the borrower to create additional security interests with respect to the CRE property and covenants designed to help maintain the value of, and protect the originator's (or any subsequent holder's) security interest in, the collateral. These covenants are substantially the same as the covenants required for commercial loans (as discussed above). Additionally, a covenant must be included that requires the borrower to comply with all legal or contractual obligations applicable to the collateral. Finally, the loan documentation must include a covenant that prohibits the borrower from pledging the CRE property as security

[174] The 10-year interest rate swap rate is as reported on the previous day's Federal Reserve Statistical Release H.15: Selected Interest Rates.

for another loan, even where doing so results in the creation of a subordinate lien. The Agencies note, however, that the proposed rules provide an exception for loans that finance the purchase of machinery and equipment that is pledged as additional collateral for the CRE loan. This restriction is intended to ensure that the CRE property remains a reliable source of repayment and security for the CRE loan and the borrower does not become overleveraged, which could threaten the borrower's ability to repay the CRE loan. The proposed covenants must be applicable to the borrower as well as any other party who provides collateral for the loan.

Request for Comment

156(a). Are the proposed requirements for a qualifying CRE loan appropriate?

156(b). Are these standards sufficient to ensure that qualifying CRE loans have very low credit risk?

157. Are the DSC metrics employed for measuring a borrower's financial capacity, and the specified parameter for each type of CRE property, an appropriate standard?

158. The Agencies are proposing the same DSC ratio (1.5) for qualifying leased CRE loans and qualifying multifamily CRE loans, where the DSC analysis is based on at least two years of actual performance. The Agencies request comment whether the risk of default for qualifying non-Enterprise multifamily CRE loans is demonstrably lower as to justify a lower DSC ratio (such as 1.3). For example, the Agencies acknowledge that several highly-publicized defaults on large multifamily CRE loans had a much weaker structure (*e.g.,* pro-forma underwritten DSC ratio or DSC ratio lower than 1.2) than what is contained in the proposed rules. Commenters should provide relevant criteria to be applied to qualify for a reduced DSC ratio and multifamily CRE loan performance data supporting the conclusion that multifamily loans meeting such criteria, as a class, have a correspondingly reduced risk of default to support a reduced DSC ratio for such loans.

D. Qualifying Automobile Loans

§__.20 of the proposed rules provides underwriting standards for qualifying automobile loans. Although automobile loans involve secured financing, the collateral represents a highly depreciable asset. Accordingly, in developing the proposed underwriting standards for qualifying automobile loans, the Federal banking agencies sought to establish conservative requirements that are consistent with underwriting standards commonly used by the industry for unsecured installment credits. The proposed rules define an automobile loan as a loan to an individual to finance the purchase of, and secured by a first lien on, a passenger car or other passenger vehicle, such as a minivan, van, sport-utility vehicle, pickup truck, or similar light truck for personal, family, or household use. Under the proposed rules, an automobile loan would not include: (a) Any loan to finance fleet sales; (b) a personal cash loan secured by a previously purchased automobile; (c) a loan to finance the purchase of a commercial vehicle or farm equipment that is not used for personal, family, or household purposes; (d) any lease financing; or (e) a loan to finance the purchase of a vehicle with a salvage title.[175] A qualifying automobile loan may be for a new [176] or used vehicle.[177]

1. Ability To Repay

A borrower's ability to repay an automobile loan primarily hinges on the amount of the borrower's monthly total debt obligations in relation to the borrower's monthly income. The Agencies have sought to establish standards for the verification and documentation of a borrower's ability to repay an automobile loan that will help ensure that the loan is of very low credit risk. At the same time, the proposed standards seek to reflect the nature of automobile loans and allow originators to make qualifying automobile loans without undue burden or disruption to existing methods for making automobile loans. For example, originators of automobile loans typically do not verify all of a borrower's income and debt obligations prior to making an automobile loan and requiring an originator to do so could significantly limit any incentive an originator might otherwise have to underwrite loans in accordance with the standards for a qualifying automobile loan. The Federal banking agencies have sought to balance these considerations in developing the proposed underwriting standards.

Under the proposed rules, the borrower under a qualifying automobile loan must have a monthly DTI ratio of less than or equal to 36 percent, consistent with the proposed DTI ratio requirement for QRM loans. The originator must make this determination, and document the underlying analysis, upon origination of the loan.

Originators typically consider a borrower's income and debts in the credit approval process; however, the income history requirements of and the type of information considered by the originator vary widely across the industry. The Agencies believe that the use of consistent underwriting standards, to the extent practical and consistent with industry practice, should reduce implementation burden and ensure that all ABS issuances that qualify for an exemption from the risk retention requirement of the proposed rules are collateralized by high-quality, low credit risk loans. Based on the Federal banking agencies' supervisory experience in overseeing automobile lending, and in an effort to address these inconsistencies, the Federal banking agencies propose to require that originators verify and document the borrower's income using payroll stubs, tax returns, profit and loss statements, or other similar documentation, and that originators verify that all outstanding debts reported in a borrower's credit report are incorporated into the calculation of the borrower's ratio of total debt to monthly income (DTI ratio). For the borrower's monthly debt obligations, the Agencies propose to require the originator to obtain information from the borrower about all monthly housing payments (rent- or mortgage-related, including any property taxes, insurance, and home owners association fees), plus any of the following that are dependent on the borrower's income for payment: (1) Monthly payments on all debt and lease obligations (such as installment loans or credit card loans), including the monthly amount due on the automobile loan; (2) estimated monthly amortizing payments for any term debt, debts with other than monthly payments, and debts not in repayment (for example, deferred student loans, interest-only loans); and (3) any required monthly alimony, child support, or court-ordered payments. These elements are generally consistent many of the elements taken into account for the DTI requirement for the QRM standards.

[175] Under the proposed rules, a new vehicle is one that is not a used vehicle and has not been previously sold to an end user. A used vehicle is any vehicle driven more than the limited use necessary in transporting or road testing the vehicle prior to the initial sale of the vehicle and does not include any vehicle sold only for scrap or parts (title documents surrendered to the State and a salvage certificate issued). Salvage title is a form of vehicle title branding by an insurance company paying a claim on the vehicle, where the vehicle title notes that the vehicle has been severely damaged and/or deemed a total loss and uneconomical to repair.

[176] A new vehicle is one that is not a used vehicle and has not been previously sold to an end user.

[177] A used vehicle is any vehicle driven more than the limited use necessary in transporting or road testing the vehicle prior to the initial sale of the vehicle and does not include any vehicle sold only for scrap or parts (title documents surrendered to the State and a salvage certificate issued).

2. Loan Terms

The Federal banking agencies have found that, in supervising credit risk for such highly depreciable assets as automobiles, a fixed payment amount helps ensure that a borrower will have the ability to repay a loan over the life of the credit. Therefore, the proposed rules require qualifying automobile loans to provide for a fixed interest rate. In addition, under the proposal, the monthly payment must be calculated using straight-line amortization for the term of the loan, not to exceed five years, with the first payment due within 45 days of the closing date. The proposed rules also prohibit loan terms that permit a borrower to defer repayment of principal or interest.

If the loan is for a new vehicle, the proposal would require the loan agreement provide a maturity date for the loan that does not exceed 5 years from the date of closing. If the loan is for a used vehicle, the loan agreement must provide that the term of the loan, plus the difference between the current model year and the vehicle's model year, cannot exceed 5 years. In addition, under the proposed rules, the transaction documents must require that the originator, subsequent holder of the loan, or any agent of the originator or subsequent holder maintain physical possession of the vehicle title until the loan is repaid in full and the borrower has satisfied all obligations under the loan agreement.

3. Reviewing Credit History

The supervisory experience of the Federal banking agencies has shown that the historical payment performance of a borrower often is indicative of the borrower's ability to manage debt and willingness to repay a new loan. Accordingly, the proposed rules require the originator to verify and document, within 30 days of the origination date for a qualifying automobile loan, that the borrower (1) is not currently 30 days or more past due, in whole or in part, on any debt obligation and (2) has not been 60 days or more past due on, in whole or in part, on any debt obligation within the past 24 months. Additionally, the originator must verify and document that, within the previous 36 months, the borrower was not a debtor in any bankruptcy proceeding, subject to a Federal or State judgment for collection of any unpaid debt or foreclosure, repossession, deed in lieu of foreclosure, or short sale, and has not had any personal property repossessed. These credit history standards are the same as those established for QRMs.

Similar to the safe harbor proposed in § __.15 of the proposed rules for the QRM requirements, the Federal banking agencies are proposing a safe harbor that would allow an originator to satisfy the documentation and verification requirements regarding a borrower's credit history. Under the proposal, an originator of a qualifying automobile loan will be deemed to have complied with the verification and documentation requirements related to the borrower's credit history (as described above) if, no more than 90 days before the automobile loan closing, the originator (1) obtains a credit report regarding the borrower from at least two consumer reporting agencies that compile and maintain files on consumers on a nationwide basis (within the meaning of 15 U.S.C. 1681a(p)); and (2) determines, based on the information in such credit reports, that the borrower meets the credit history requirements related described above. This safe harbor would not be available if the originator obtains a subsequent credit report before the closing of the automobile loan transaction that indicates that the borrower does not meet the credit history requirements.

4. Loan-to-Value

Limitations relative to the amount financed are critical for automobile lending because the collateral is subject to such rapid depreciation. Therefore, under the proposed rules, an originator must document that, at the time of the closing of the automobile loan, the borrower tendered a minimum down payment from the borrower's personal funds and trade-in allowance,[178] if any, that is sufficient to pay (1) the full cost of vehicle title, tax, and registration fees, as well as any dealer-imposed fees, and (2) 20 percent of the purchase price of the automobile. Under § __.16 of the proposed rules, the purchase price of a new automobile is the net amount the consumer paid for the vehicle after any manufacturer, dealer, or financing incentive payments or cash rebates are applied. However, for a used automobile, the purchase price is the lesser of either the actual purchase price or the value of the automobile, as determined by a nationally recognized automobile pricing agency (for example, N.A.D.A. or Kelley Blue Book) based on the manufacturer, year, model, features, and condition of the vehicle.

An illustration of how to determine the minimum down payment is provided below.

DOWN PAYMENT DETERMINATION

$30,000	Invoice Purchase Price.
$2,000	Manufacturer Cash Rebate.
$1,000	Dealer Incentive.
$27,000	Purchase Price.
$5,400	20% of Purchase Price.
$2,700	Tax, Title, and License.
$8,100	Down Payment Requirement.
$18,900	Maximum Loan Amount.

Request for Comment

159(a). Are the proposed requirements for a qualifying automobile loan appropriate?

159(b). Are these standards sufficient and appropriate to ensure that qualifying automobile loans have very low credit risk?

160. Are the DTI ratios employed for measuring a borrower's financial capacity an appropriate standard?

E. Buy-Back Requirements for ABS Issuances Collateralized Exclusively by Qualifying Commercial, CRE or Automobile Loans

Under the proposed rules, for a securitizer to qualify for a zero percent risk retention requirement under § __.18, § __.19 or § __.20, as applicable, the depositor must have (and certify that it has) effective internal supervisory controls with respect to its process for ensuring that all assets that collateralize the ABS meet the applicable underwriting standards set forth in § __.18, § __.19 or § __.20, as applicable, of the proposed rules. The Federal banking agencies recognize that, despite the use of reasonable processes and procedures by a depositor or sponsor, it is possible that one or more loans included in a securitization transaction may later be determined to have not met the underwriting standards set forth in § __.18, § __.19 or § __.20, as applicable, of the proposed rules due to inadvertent error. For example, an originator conducting post-origination file reviews for compliance or internal audit purposes may find that some aspects of the documentation required to verify the borrower's monthly income were not obtained. The Agencies are concerned that if an error that is discovered after closing of the securitization were to make the issuance ineligible for the proposed exemption, then sponsors and investors may well be less willing to participate in securitization transactions that are structured to meet the

[178] Under § __.16 of the proposed rules, a trade-in allowance is the amount a vehicle purchaser is given as a credit at the purchase of a vehicle for the fair exchange of the borrower's existing vehicle to compensate the dealer for some portion of the vehicle purchase price, except that such amount shall not exceed the trade-in value of the used vehicle, as determined by a nationally recognized automobile pricing agency and based on the manufacturer, year, model, features, and condition of the vehicle.

underwriting standards of § __.18, § __.19 or § __.20, as applicable, of the proposed rules. On the other hand, if there is no penalty for including in a securitization transaction a loan that does not meet such underwriting standards, sponsors and other participants in the securitization may not have the proper incentives to ensure that the issuance is collateralized exclusively by qualifying commercial, CRE, or automobile loans.

The proposal seeks to balance these interests by providing that a sponsor that has relied on an exemption from the retention requirement under § __.18, § __.19 or § __.20, as applicable, of the proposed rules would not lose the exemption, if, after closing of the securitization transaction, it is determined that one or more of the loans collateralizing the ABS do not meet all of the applicable criteria under § __.18, § __.19 or § __.20, as applicable, of the proposed rules provided that:

(a) The depositor certified the effectiveness of its internal supervisory controls for ensuring all of the loans backing the ABS are qualified loans under § __.18, § __.19 or § __.20, as applicable, of the proposed rules;

(b) The sponsor repurchases the loan(s) determined to not meet the underwriting standards set forth in § __.18, § __.19 or § __.20, as applicable, of the proposed rules from the issuing entity at a price at least equal to the remaining principal balance and accrued interest on the loan(s) no later than ninety (90) days after the determination that the loans do not satisfy the underwriting standards set forth in § __.18, § __.19 or § __.20, as applicable, of the proposed rules; and

(c) The sponsor discloses to the investors of the ABS any loan(s) that are repurchased by the sponsor, including the principal amount of such repurchased loan(s) and the cause for such repurchase.

These conditions, which are identical to those applicable to QRMs, are intended to provide the sponsor with the opportunity to correct inadvertent errors by repurchasing any non-qualified loan(s) and removing such non-qualifying loan(s) from the ABS, while protecting investors. Moreover, in light of the buy-back requirement, sponsors should continue to have a strong economic incentive to ensure that all loans backing a securitization subject to zero risk retention under § __.18, § __.19 or § __.20, as applicable, of the proposed rules satisfy all of the conditions applicable to such loans under § __.18, § __.19 or § __.20, as applicable, of the proposed rules.

Request for Comment

161(a). The Agencies seek comment on whether the sponsor should be required to repurchase the entire pool of loans collateralizing the ABS if the amount or percentage of the loans that are required to be repurchased due to the failure to meet the underwriting standards under § __.18, § __.19 or § __.20, as applicable, of the proposed rules reaches a certain threshold. 161(b). If so, what threshold would be appropriate?

VI. General Exemptions

Section 15G(c)(1)(G) and section 15G(e) of the Exchange Act require the Agencies to provide a total or partial exemption from the risk retention requirements for certain types of ABS or securitization transactions. In addition, section 15G(e)(1) permits the Federal banking agencies and the Commission jointly to adopt or issue additional exemptions, exceptions, or adjustments to the risk retention requirements of the rules, including exemptions, exceptions, or adjustments for classes of institutions or assets, if the exemption, exception, or adjustment would: (A) help ensure high quality underwriting standards for the securitizers and originators of assets that are securitized or available for securitization; and (B) encourage appropriate risk management practices by the securitizers and originators of assets, improve the access of consumers and businesses to credit on reasonable terms, or otherwise be in the public interest and for the protection of investors.[179]

Consistent with these provisions, section __.21 of the proposed rules exempts certain types of ABS or securitization transactions from the credit risk retention requirements of the rule. Certain of these exemptions would appear in the rules of all Agencies, and others would appear only in the rules of certain Agencies, reflecting the different scope of the Agencies' rulewriting authority.

A. Exemption for Federally Insured or Guaranteed Residential, Multifamily, and Health Care Mortgage Loan Assets

Proposed § __.21(a)(1) would implement section 15G(e)(3)(B) of the Exchange Act, which exempts from the risk retention requirements any residential, multifamily, or health care facility mortgage loan asset, or securitization based directly or indirectly on such an asset, that is insured or guaranteed by the United States or an agency of the United States.[180] Section 15G expressly clarifies that Fannie Mae, Freddie Mac, and the Federal Home Loan Banks are not agencies of the United States,[181] and the proposed rules include a specific provision making clear that the exemptions that apply to ABS that is issued, guaranteed or insured by a U.S. government agency or that is backed by loans insured or guaranteed by a U.S. government agency do not apply where the issuer, insurer or guarantor is Fannie Mae, Freddie Mac, or a Federal Home Loan Bank.[182]

Proposed § __.21(a)(1)(i) would exempt any securitization transaction that is collateralized solely (excluding cash and cash equivalents) by residential, multifamily, or health care facility mortgage loan assets if the assets are insured or guaranteed as to the payment of principal and interest by the United States or an agency of the United States. Currently, the federal government insures or guarantees residential, multifamily, and healthcare facility loans through a variety of programs. Some examples include FHA insurance on single family mortgage loans which insures the lender at approximately 100 percent of losses including advanced taxes, insurance and foreclosure costs. The Department of Veterans Administration also guarantees between 25 percent and 50 percent of lender losses in the event of residential borrower defaults. United States Department of Agriculture Rural Development also guarantees a sliding amount against loss of up to 90 percent of the original loan amount for single family loans. Each of the agencies sets underwriting and servicing standards, and in the case of some multifamily programs underwrites the mortgage itself. The agencies charge a fee or premium for the insurance/guaranty, and monitor the performance of participating lenders and borrowers.

Proposed § __.21(a)(1)(ii) would exempt any securitization transaction that involves the issuance of ABS if the ABS are insured or guaranteed as to the payment of principal and interest by the United States or an agency of the United States and that are collateralized solely (excluding cash and cash equivalents)

[179] *See* 15 U.S.C. 78o–11(e)(1) and (2).

[180] *See* 15 U.S.C. 78o–11(e)(3)(B).

[181] *See* 15 U.S.C. 78o–11(c)(1)(G)(ii), (e)(3)(B).

[182] *See* section 15 U.S.C. 78o–11(c)(1)(G) and (e)(3)(B) and the proposed rules at § __.21(c). At this time, the Federal Home Loan Banks do not, and are not authorized to, issue or guarantee asset-backed securities. Similarly, neither Fannie Mae, Freddie Mac, nor the Federal Home Loan Banks insure or guarantee individual loans, and none is authorized to do so. These references are included in § __.21(c) in order to conform the rule of construction to that which is required by section 15G(e)(3) of the Exchange Act.

by residential, multifamily, or health care facility mortgage loan assets, or interests in such assets. Thus, proposed § __.21(a)(1)(ii) would exempt ABS the payment of principal and interest on which is guaranteed by the United States or an agency of the United States and that is collateralized by ABS that itself is backed by residential, multifamily, or health care facility mortgage loan assets. Examples of securitization transactions that would be exempted under § __.21(a)(1)(ii) include securities guaranteed by the Government National Mortgage Association (Ginnie Mae). Ginnie Mae guarantees the issuance of securities by approved lender/issuers. These mortgage-backed securities (MBS) are collateralized solely by federally insured or guaranteed loans. The insurance or guarantee protects the lender from some or all of the credit loss on the loan in the event of a borrower default. Upon issuance of the security, the issuer is obligated to advance from its own funds principal and interest to the investors if the borrower fails to pay the mortgage. Ginnie Mae guarantees to the investors that, in the event the issuer defaults on this obligation, Ginnie Mae will ensure the investors are paid. Ginnie Mae provides a similar guarantee for Real Estate Mortgage Investment Conduits (REMICs) and Platinum Securities, which are collateralized by Ginnie Mae MBS.

Although, historically, federally insured/guaranteed loans have been securitized largely through Ginnie Mae, and Ginnie Mae is statutorily restricted to guaranteeing only securities collateralized by federally insured/guaranteed loans, this regulation would exempt a private securitization from risk retention to the extent it is collateralized solely by loans with federal insurance or guarantees. In addition, in cases where private securitization may be used the proposed rules do not limit the exemption based on the federal housing program involved or the nature of the government's insurance or guaranty coverage.

Request for Comments

162(a). Have the Agencies appropriately implemented the exemption in section 15G(e)(3)(B) of the Exchange Act? 162(b). Why or why not?

163. Are we correct in believing the federal department or agency issuing, insuring, or guaranteeing the ABS or collateral will monitor the quality of the assets securitized?

164(a). While it appears that Congress may have intended to exempt all existing federal insurance or guarantee programs for residential, multifamily, or health care facility mortgage loans, comments are requested on the proposed rules where private securitization may be used in the following areas. Are there risks in exempting assets or ABS that are not significantly insured or guaranteed by a federal agency? 164(b). If so, what level of federal guarantee or insurance should be required? 164(c). Would inclusion of additional requirements be appropriate in the public interest and for the protection of investors? 164(d). Why or why not? 164(e). Would inclusion of additional requirements be disruptive to any federal guarantee or insurance programs established or authorized by Congress? 164(f). If so, how and to what extent?

B. Other Exemptions

Section 15G(c)(1)(G)(ii) of the Exchange Act separately requires the rules of the Agencies to provide for a total or partial exemption from risk retention requirements for securitizations of assets that are issued or guaranteed by the United States or an agency of the United States as the Federal banking agencies and the Commission jointly determine appropriate in the public interest and the protection of investors.[183] This exemptive authority is broader than the statutory exemption in section 15G(e)(3)(B) because it permits the exemption of any securitization of assets that are issued or guaranteed by the United States or any agency of the United States (and not just those based on residential, multifamily, or health care facility mortgage loan assets). Proposed § __.21(b)(1) fully exempts any securitization transaction if the asset-backed securities issued in the transaction are (i) collateralized solely (excluding cash and cash equivalents) by obligations issued by the United States or an agency of the United States; (ii) collateralized solely (excluding cash and cash equivalents) by assets that are fully insured or guaranteed as to the payment of principal and interest by the United States or an agency of the United States (other than those referred to in paragraph (a)(1)(i) of this section);[184] or (iii) fully guaranteed as to the timely payment of principal and interest by the United States or any agency of the United States. This exemption is being proposed because payments of principal and interest on the ABS, or on the collateral backing the ABS, would be backed by the United States or an agency of the United States and, thus, the exemption should be appropriate in the public interest and for the protection of investors. The federal department or agency issuing, insuring or guaranteeing the ABS or collateral would monitor the quality of the assets securitized, consistent with the relevant statutory authority.[185]

Proposed § __.21(a)(2) provides an exemption from the risk retention requirements of the rules for any securitization transaction that is collateralized solely (excluding cash and cash equivalents) by loans or other assets made, insured, guaranteed, or purchased by any institution that is subject to the supervision of the Farm Credit Administration, including the Federal Agricultural Mortgage Corporation. This provision implements the exemption for these types of assets included in section 15G(e)(3)(A) of the Exchange Act.[186]

Section 15G(c)(1)(G)(iii) requires that the rules of the Agencies provide a total or partial exemption for an ABS if the security is (i) issued or guaranteed by any State of the United States, or by any political subdivision of a State or territory, or by any public instrumentality of a State or territory that is exempt from the registration requirements of the Securities Act by reason of section 3(a)(2) of the Securities Act[187] or (ii) defined as a qualified scholarship funding bond in section 150(d)(2) of the Internal Revenue Code of 1986.[188] In light of the special treatment afforded such securities by Congress, the directive in section 15G(c)(1)(G)(iii), and the role of the State or municipal entity in issuing, insuring, or guaranteeing the ABS or collateral, the Agencies are proposing to exempt such ABS from the risk retention requirements of the rule as an exemption that is appropriate in the public interest and for the protection of investors.[189]

Request for Comments

165(a). Have the Agencies appropriately implemented the exemption in section 15G(e)(3)(A) of the Exchange Act and the exemptive

[183] *See* 15 U.S.C. 78o–11(c)(1)(G).

[184] To avoid confusion, the proposed rules provide that these assets do not include the types of federally insured or guaranteed residential, mortgage, and health care mortgage loan assets that are covered by the exemption in proposed § __.21(a).

[185] *See* 12 U.S.C. 78o–11(e)(2).

[186] *See* 15 U.S.C. 78o–11(e)(3)(A).

[187] 15 U.S.C. 77c(a)(2).

[188] *See* 26 U.S.C. 150(d)(2). Such bonds are those issued by a not-for-profit corporation established and operated exclusively for the purpose of acquiring student loans incurred under the Higher Education Act of 1965, and organized at the request of a State or a political subdivision of a State. *See* 10 U.S.C. chapter 28.

[189] *See* §§ __.21(a)(3) and (4) of the proposed rules.

authority in section 15G(c)(1)(G)(ii) and (iii)? 165(b). Why or why not?

166(a). Is the proposed exemption for ABS issued or guaranteed by a State or municipal entity appropriate? 166(b). Is it under or over-inclusive? 166(c). There may be some ABS in which the sponsor is a municipal entity (*i.e.,* a State or Territory of the United States, the District of Columbia, any political subdivision of any State, Territory or the District of Columbia, or any public instrumentality of one or more States, Territories or the District of Columbia), however, the ABS are issued by a special purpose entity, that is created at the direction of the municipal entity, but are not issued or guaranteed by the municipal entity. Should the rules also exempt from the risk retention requirements asset-backed securities where the sponsor is a municipal entity? 166(d). There are some municipal ABS that are issued by a municipal entity and exempt by reason of Section 3(a)(2) of the Securities Act but may include assets originated using the same underwriting criteria as private label securitizations. Should the rules, as proposed, exempt them?

167(a). Are there any ABS that are collateralized solely by obligations issued by the United States or an agency of the United States where the process of packaging and securitizing those obligations may raise issues that the risk retention requirement was designed to address? 167(b). For example, would a securitization by a non-governmental securitizer of debt issued by the Tennessee Valley Authority raise any issues such that the Agencies should provide only a partial exemption? 167(c). If so, what type of transactions and how should the Agencies determine the amount and form of risk retention to be required?

C. Exemption for Certain Resecuritization Transactions

Section __.21(a)(5) of the proposed rules would exempt from the credit risk retention requirements certain resecuritization transactions that meet two conditions.[190] First, the transaction must be collateralized solely by existing ABS issued in a securitization transaction for which credit risk was retained as required under the rule or which was exempted from the credit risk retention requirements of the rule (hereinafter 15G-compliant ABS). Second, the transaction must be structured so that it involves the issuance of only a single class of ABS interests and provides for the pass-through of all principal and interest payments received on the underlying ABS (net of expenses of the issuing entity) to the holders of such class. The holder of a resecuritization ABS structured as a single-class pass-through has a fractional undivided interest in the pool of underlying ABS and in the distributions of principal and interest (including prepayments) from these underlying ABS. Accordingly, the principal and interest payments allocated to each holder are identical (less any fees associated with the resecuritization) to those that would occur if that holder were to hold individual securities representing the same fractional interest in each of the underlying ABS.[191] Thus, a resecuritization ABS structured as a single-class pass-through would not alter the level or allocation of credit risk and interest rate risk on the underlying ABS.

The Agencies propose to adopt this exemption under the general exemption provisions of section 15G(e)(1) of the Exchange Act. Under that provision, the Agencies may jointly adopt or issue exemptions, exceptions, or adjustments to the risk retention rules, if such exemption, exception, or adjustment would: (A) help ensure high quality underwriting standards for the securitizers and originators of assets that are securitized or available for securitization; and (B) encourage appropriate risk management practices by the securitizers and originators of assets, improve the access of consumers and businesses to credit on reasonable terms, or otherwise be in the public interest and for the protection of investors.[192] As noted above, all of the ABS underlying a resecuritization that would be exempted under proposed § __.21(a)(5) would already have been issued in a securitization transaction in which the sponsor has retained credit risk in accordance with the rule, or for which an exemption from the rule was available. Accordingly, the resecuritization of a single-class pass-through would neither increase nor reallocate the credit risk inherent in that underlying 15G-compliant ABS. Furthermore, because this type of resecuritization may be used to combine 15G-compliant ABS backed by smaller asset pools, the exemption for this type of resecuritization could improve the access of consumers and businesses to credit on reasonable terms by allowing for the creation of an additional investment vehicle for these smaller pools. The exemption would allow the creation of ABS that may be backed by more geographically diverse pools than those that can be achieved by the pooling of individual assets as part of the issuance of the underlying 15G-compliant ABS, which could also improve access to credit on reasonable terms.

Under the proposed rules, sponsors of resecuritizations that are not structured purely as single-class pass-through transactions would be required to meet the credit risk retention requirements with respect to such resecuritizations unless another exemption for the resecuritization is available, regardless of whether the sponsor of the initial securitization transaction retained credit risk under the rule or whether an exemption applied to the initial securitization transaction. Thus, resecuritizations that re-tranche the credit risk of the underlying ABS would be subject to separate risk retention requirements under the proposed rules.[193] Similarly, under the proposed rules, resecuritizations that re-tranche the prepayment risk of the underlying ABS, or that are structured to achieve a sequential paydown of tranches, would not be exempted. In these resecuritizations, although losses on the underlying ABS would be allocated to holders in the resecuritization on a *pro rata* basis, holders of longer duration classes in the resecuritization could be

[190] In a resecuritization transaction, the asset pool underlying the ABS issued in the transaction comprises one or more asset-backed securities. In this section, we refer to the securities issued in a resecuritization transaction as "resecuritization ABS."

[191] According to the staff of the FHFA, Fannie Mae Mega Certificates are an example of a single-class pass-through resecuritization. FHFA staff have indicated that these certificates represent a fractional undivided beneficial ownership interest in the pool of underlying ABS (typically MBS, REMICs and other Mega Certificates) and in the principal and interest distributions from those underlying ABS. The proposed exemption in § __.21(a)(5) of the proposed rules would be available to any sponsor of a securitization transaction that is structured in accordance with the rule's requirements.

[192] 15 U.S.C. 78o–11(e)(1).

[193] For example, under the proposed rules, the sponsor of a collateralized debt obligation (CDO) would not meet the proposed conditions of the exemption and therefore would be required to retain risk in accordance with the rule with respect to the CDO, regardless of whether the underlying ABS have been drawn exclusively from 15G-compliant ABS. *See* 15 U.S.C. 78o–11(c)(1)(F). In a typical CDO transaction, a securitizer pools interests in the mezzanine tranches from many existing ABS and uses that pool to collateralize the CDO. Repayments of principal on the underlying ABS interests are allocated so as to create a senior tranche, as well as supporting mezzanine and equity tranches of increasing credit risk. Specifically, as periodic principal payments on the underlying ABS are received, they are distributed first to the senior tranche of the CDO and then to the mezzanine and equity tranches in order of increasing credit risk, with any shortfalls being borne by the most subordinate tranche then outstanding.

exposed to a higher level of credit risk than holders of shorter duration classes.

Section 15G does not apply to ABS issued before the effective date of the Agencies' final rules.[194] As a practical matter, private-label ABS issued before the effective date of the final rules will typically not be 15G-compliant ABS, because such ABS will not have been structured to meet the rule's risk retention requirements. ABS issued before the effective date that meets the terms of an exemption of the type proposed under __.21 (General exemptions) or __.11 (Fannie Mae and Freddie Mac ABS) could serve as 15G-compliant ABS.

Request for Comment

168(a). Are there other types of resecuritization transactions backed solely by 15G-compliant ABS that should be exempt from the risk retention requirements? 168(b). If so, what principles and factors should the Agencies use in considering whether other types of resecuritizations backed by 15G-compliant ABS should be exempted from the risk retention requirements of section 15G? 168(c). Should the Agencies consider granting an exemption only if it is clear that the resecuritization transaction does not expose investors in the resecuritization to different levels or types of credit risk in the securitized assets than the underlying 15G-compliant ABS?

169(a). Should the rule provide an exemption for a sequential-pay resecuritization that is collateralized only by 15G-compliant ABS? In this type of resecuritization, the rights to principal repayment of the holders of the different classes differ solely with respect to the timing of such repayments. Longer duration classes receive no payments of principal until shorter duration classes have been paid off in full and principal shortfalls are allocated on a pro-rata basis based upon the unpaid principal balance of each class. As the shorter duration classes are paid off, the unpaid principal balances of the longer duration classes begin to represent a larger portion of the total unpaid principal balances of the underlying ABS and, therefore, the longer duration classes are allocated an ever-increasing percentage of credit losses as the ABS matures. 169(b). If an exemption for sequential-pay resecuritizations backed by 15G-compliant ABS is appropriate, how could such an exemption be written to ensure the exemption is limited to this particular structure?

170(a). Should the Agencies provide an exemption for prepayment-tranched resecuritizations that are backed solely by 15G-compliant ABS? This form of resecuritization involves the sponsor of the resecuritization creating tranches based on the prepayments of the underlying ABS (i.e., prepayments received by the ABS in the first-level ABS securitization). One type of prepayment-tranched resecuritization is a planned amortization class (PAC) resecuritization. PAC bonds receive principal payments based on the level of prepayments and will have their expected duration if the actual speed of prepayments on the underlying ABS falls within a designated range. In order to create a PAC bond with greater certainty of cash flow than the underlying ABS, one or more support (SUP) classes that are highly sensitive to varying levels of prepayment are created as part of the same transaction. If the rate of prepayments is faster than that assumed in the creation of the PAC, the SUPs receive more principal in order to prevent an overpayment of principal on the PAC. If the rate of prepayment is slower, principal is redirected from the SUPs in order to achieve the specified repayment schedule on the PAC. In either case, credit losses are allocated on a pro rata basis based on the unpaid principal balance attributable to each class. Accordingly, the effect of faster-than-expected rates of prepayment will tend to expose holders of the PAC bonds to relatively greater losses than the holders of the SUPs, while slower-than-expected rates of prepayment will tend to have the opposite effect. Moreover, in transactions where more than one PAC bond is created, the distribution of principal repayments to the PACs are based on priority and, therefore, the holders of the PACs are exposed to levels of credit risk that differ from that of the underlying ABS. 170(b). If an exemption of prepayment-tranched resecuritizations or certain types of such resecuritizations (such as PAC structures) is appropriate, how could an exemption be written to ensure that the exemption does not extend to other resecuritizations?

171. As noted above, the proposed exemptions require the underlying ABS be 15G-compliant ABS. In practice, initially this may mean that only resecuritizations based on ABS guaranteed by Fannie Mae and Freddie Mac will qualify for this exemption. Does this raise any competitive or other issues and if so, how can they be mitigated without eliminating the requirement there be risk retention on the underlying ABS?

172(a). Is the proposed language for this exemption appropriate? 172(b). Does any portion of the exemption cause an ambiguity that should be addressed?

D. Additional Exemptions

Consistent with section15G of the Exchange Act, § __.23(b) of the proposed rules provides that the Federal banking agencies and the Commission, in consultation with FHFA and HUD, may jointly adopt or issue additional exemptions, exceptions or adjustments to the credit risk retention requirements, including exemptions, exceptions or adjustments for classes of institutions or assets in accordance with section 15G(e).[195] In addition, § __.23(a) of the proposed rules recognizes that the Agencies with rulewriting authority under section 15G(b)[196] with respect to the type of assets involved may jointly provide a total or partial exemption of any individual securitization transaction, as such Agencies determine may be appropriate in the public interest and for the protection of investors, as permitted by section 15G(c)(1)(G)(i).[197] The Agencies expect to coordinate with each other to facilitate the processing, review and action on requests for such written interpretations or guidance, or additional exemptions, exceptions or adjustments.

Request for Comments

173(a). Are there securitization transactions that would not be covered by the exemptions in the proposed rules that should be exempted from risk retention requirements pursuant to section 15G(e)(3) of the Exchange Act? 173(b). If so, what are the features and characteristics of such securitization transactions that would properly exempt them from risk retention requirements pursuant to section 15G(e)(3)?

E. Safe Harbor for Certain Foreign-Related Transactions

The proposed rules include a safe harbor provision for certain predominantly foreign transactions based on the limited nature of the transactions' connections with the United States and U.S. investors. The proposed safe harbor is intended solely to provide clarity that the Agencies would not apply the requirements of the proposed rules to transactions that meet

[194] *See* 15 U.S.C. 78o–11(i) (regulations become effective with respect to residential mortgage-backed ABS 1 year after publication of the final rules in the **Federal Register**, and 2 years for all other ABS).

[195] 15 U.S.C. 78o–11(e).

[196] 15 U.S.C. 78o–11(b).

[197] 15 U.S.C. 78o–11(c)(1)(G)(i).

all of the conditions of the safe harbor. The proposed safe harbor should not be interpreted as reflecting the views of any Agency as to the potential scope of transactions or persons subject to section 15G or the proposed rules.

As set forth in section __.23 of the proposed rules, the safe harbor provides that the rule's risk retention requirements would not apply to a securitization transaction if certain conditions are met, including: (i) The securitization transaction is not required to be and is not registered under the Securities Act; (ii) no more than 10 percent of the dollar value by proceeds (or equivalent if sold in a foreign currency) of all classes of ABS interests sold in the securitization transaction are sold to U.S. persons or for the account or benefit of U.S. persons; [198] (iii) neither the sponsor of the securitization transaction nor the issuing entity is (A) chartered, incorporated, or organized under the laws of the U.S., or a U.S. State or Territory or (B) the unincorporated branch or office located in the U.S. of an entity not chartered, incorporated, or organized under the laws of the U.S., or a U.S. State or Territory (collectively, a U.S.-located entity); (iv) no more than 25 percent of the assets collateralizing the ABS sold in the securitization transaction were acquired by the sponsor, directly or indirectly, from a consolidated affiliate of the sponsor or issuing entity that is a U.S.-located entity.[199]

The safe harbor is intended to exclude from the proposed risk retention requirements transactions in which the effects on U.S. interests are sufficiently remote so as not to significantly impact underwriting standards and risk management practices in the United States or the interests of U.S. investors. Accordingly, the conditions for use of the safe harbor limit involvement by persons in the U.S. with respect to both assets being securitized in a transaction and the ABS sold in connection with the transaction. The safe harbor would not be available for any transaction or series of transactions that, although in technical compliance with the conditions of the safe harbor, is part of a plan or scheme to evade the requirements of section 15G and the proposed rules.

Request for Comment

174(a). Are there any extra or special considerations relating to these circumstances that we should take into account? 174(b). Should the more than 10 percent proceeds trigger be higher or lower (*e.g.,* 0 percent, 5 percent, 15 percent, or 20 percent)?

Appendix A to the Supplementary Information

The tables below show the estimated effects of the proposed QRM standards based on data for all residential mortgage loans purchased or securitized by the Enterprises between 1997 and 2009. The first set of results shows rates of serious delinquency (SDQ), that is, loans that are 90 days or more delinquent, or are in the process of foreclosure. The second set of results shows volume, in dollars of unpaid principal balance (UPB).

Because the data that FHFA routinely receives from the Enterprises does not include all the factors needed to identify QRM eligible loans, the universe of loans within the data set that would qualify as a QRM under the proposed standards was estimated based on four of the most significant QRM elements: (i) Product type (i.e. excluding non-owner occupied loans, low or no documentation loans, interest-only or negative amortization loans, loans with balloon payments, and ARM loans that permit payment shocks in excess of the range permitted by the proposed QRM standards); (ii) front-end and back-end DTI ratios; (iii) LTV ratios; and (iv) credit history.

Because of data limitations, proxies were used for certain of these QRM standards. FHFA does not have individual credit items in the data set used for analysis, such as previous bankruptcies or foreclosures involving the borrower, or current or recent borrower delinquencies on other debt obligations. However, borrowers with such credit issues would tend to have much lower credit scores than other borrowers (all else being equal). To proxy the credit history restrictions in the proposed QRM definition, borrowers with FICO scores below 690 were deemed to not satisfy the proposed QRM credit history standards for purposes of the analysis.

In addition, the analysis uses first-lien LTV ratios as a proxy for combined LTV when relevant. The Agencies do not believe that this proxy would produce a large discrepancy for analysis of loans originated before 2002 or after 2007, but it may understate the proposed QRM definition's effects, both on volume and on rates of SDQ, for originations from 2002 to 2007, as second liens were increasingly used during this period. (That is, the proposed QRM definition would likely cause a greater decrease in SDQ rates and loan volumes than estimated through the use of this proxy.)

Other proposed QRM factors may differ somewhat for this analysis. The QRM proposal is based on current FHA definitions of income, and standards for full documentation of income and full appraisals. The data used in this analysis for purposes of estimating whether a loan would meet the DTI and LTV ratios in the proposed QRM standards, however, is based on Enterprise definitions of income, and Enterprise documentation and appraisal requirements that prevailed at the time the loans were originated. While there may be some circumstances in which the different standards and definitions would have led to a different QRM eligibility estimate, the Agencies do not believe that these differences would have a material impact on the analysis. For example, the Enterprises did not always require an interior appraisal in cases where the default risk was judged to be low and the down payment was substantial. While loans originated to these standards would not be QRM eligible under this proposal, it is likely that the QRM standard would induce originators to require full appraisals going forward, and thus cause these loans to be QRM eligible.

For the first set of results concerning SDQ rates, the first column shows the "QRM qualifying" population. This is the SDQ rate for all loans that are estimated as meeting the proposed QRM standards. The last column in the first set of results shows the SDQ rate for all loans purchased or securitized by the Enterprises in that year. Thus, the difference between the first and last column show the cumulative estimated effect of the set of proposed QRM standards on SDQ for that cohort of loans. The intermediate columns show the SDQ rate for the population of loans in the relevant year that are estimated to meet every QRM standard other than the standard(s) indicated at the top of the column. For example, the second column, headed Product Type, shows the estimated effect of allowing low or no documentation loans, interest-only or negative amortization loans, loans with balloon payments, or ARM loans that permit payment shocks in excess of the range permitted by the proposed QRM standards, while still prohibiting loans with credit history (as proxied

[198] The proposed rules include a definition of "U.S. person" that is substantially the same as the definition of "U.S. person" in the Commission's Regulation S, although Regulation S relates solely to the application of section 5 of the Securities Act (12 U.S.C. 77e). *See* proposed rules at § __.23 and 17 CFR 203.902(k). Additionally, the 10 percent threshold is consistent with other Commission exemptive rules relating to cross-border offerings under which the Commission has provided accommodations for not applying its rules even though there is a limited offering of securities in the United States. *See* Securities Act Rules 801 and 802 (17 CFR 230.801 and 802).

[199] *See* proposed rules at § __.23.

through the use of credit scores), an LTV ratio, or debt-to-income ratios that would disqualify them for QRM status. These columns show the differences between the base QRM SDQ rate and the higher risk population within each column. The analysis is shown separately for all loans, for purchases, for rate and term refinances, and for cash out refinances.

The second set of results shows the volume of Enterprise mortgages purchased or securitized that are estimated to have met the proposed QRM standards. The last column shows total dollar originations purchased or securitized by the Enterprises for each year. The first column shows the percent of that volume estimated to be QRM eligible. The intermediate columns show the estimated effect on that volume for the population of loans that are estimated to meet the proposed QRM standards other than the one identified at the top of the column. For example, the second column, headed Product Type, shows the estimated effect on the percentage of Enterprise volume that would be QRM eligible by allowing loans that do not conform to the Product Type standards for QRMs,[200] while still prohibiting loans with a credit history (as proxied by credit scores), an LTV ratio, or debt-to-income ratios that would disqualify the loan for QRM status. These columns show the differences between the base QRM qualifying percentage and the higher risk population.

ALL LOANS

Year	QRM	Product type	PTI/DTI	LTV	FICO	All loans
Ever-to-Date Serious Delinquency Rates for QRMs and the Difference in Rates for Mortgages That Do Not Meet One of the Qualification Requirements						
1997	0.42%	+0.05%	+0.39%	+0.61%	+3.08%	+2.30%
1998	0.39%	+0.10%	+0.31%	+0.52%	+2.34%	+1.68%
1999	0.44%	+0.13%	+0.34%	+0.78%	+3.12%	+2.31%
2000	0.32%	+0.43%	+0.20%	+0.83%	+2.94%	+2.77%
2001	0.31%	+0.35%	+0.27%	+0.59%	+2.52%	+2.27%
2002	0.33%	+0.41%	+0.32%	+0.73%	+2.34%	+2.09%
2003	0.55%	+0.64%	+0.66%	+1.06%	+2.95%	+2.40%
2004	0.95%	+1.72%	+1.16%	+1.58%	+4.27%	+4.33%
2005	1.86%	+5.30%	+2.36%	+2.31%	+6.46%	+8.13%
2006	2.72%	+7.49%	+3.35%	+3.73%	+7.90%	+13.93%
2007	2.37%	+6.34%	+3.59%	+4.39%	+8.66%	+17.12%
2008	0.68%	+1.48%	+1.64%	+1.68%	+5.15%	+5.94%
2009	0.04%	+0.06%	+0.11%	+0.09%	+0.50%	+0.24%
Total	0.69%	+2.99%	+1.38%	+0.99%	+3.73%	+5.27%
Percent of Total Dollar Volume for QRMs and Mortgages That Do Not Meet One of the Qualification Requirements						
1997	20.44%	+3.75%	+13.04%	+13.74%	+5.81%	$286,497,878,371
1998	23.29%	+2.17%	+13.30%	+17.10%	+6.24%	691,033,994,509
1999	19.48%	+3.16%	+14.83%	+12.95%	+5.37%	481,450,519,442
2000	16.44%	+3.70%	+17.00%	+8.40%	+4.53%	356,779,731,420
2001	19.37%	+3.01%	+14.33%	+13.11%	+4.62%	1,039,412,013,403
2002	22.37%	+4.28%	+15.35%	+10.72%	+4.62%	1,385,056,256,240
2003	24.57%	+4.55%	+16.68%	+10.02%	+4.98%	1,924,265,340,603
2004	17.03%	+6.35%	+17.68%	+6.25%	+4.34%	937,643,914,289
2005	14.41%	+6.74%	+18.78%	+5.45%	+3.36%	939,069,358,457
2006	11.52%	+7.11%	+17.59%	+3.91%	+2.73%	887,443,942,464
2007	10.72%	+5.44%	+16.14%	+4.95%	+2.24%	1,027,460,511,244
2008	17.39%	+4.64%	+22.01%	+9.22%	+2.12%	793,136,249,487
2009	30.52%	+3.38%	+24.47%	+15.26%	+1.74%	1,176,445,135,548
Total	19.79%	+4.62%	+17.36%	+9.86%	+3.91%	11,925,694,845,477

PURCHASE LOANS

Year	QRM	Product type	PTI/DTI	LTV	FICO	All loans
Ever-to-Date Serious Delinquency Rates for QRMs and the Difference in Rates for Mortgages That Do Not Meet One of the Qualification Requirements						
1997	0.42%	+0.03%	+0.36%	+0.80%	+3.13%	+2.44%
1998	0.46%	+0.04%	+0.30%	+0.90%	+2.70%	+2.13%
1999	0.40%	+0.12%	+0.30%	+0.98%	+3.05%	+2.23%
2000	0.29%	+0.38%	+0.17%	+0.83%	+2.51%	+2.29%
2001	0.38%	+0.35%	+0.28%	+0.97%	+2.72%	+2.59%
2002	0.48%	+0.50%	+0.32%	+1.28%	+2.61%	+2.70%
2003	0.93%	+0.72%	+0.78%	+1.84%	+3.29%	+3.50%
2004	1.16%	+1.97%	+1.24%	+2.53%	+3.93%	+4.71%
2005	2.13%	+6.18%	+2.49%	+2.87%	+5.94%	+8.61%

[200] That is, low or no documentation loans, interest-only or negative amortization loans, loans with a balloon payment, or ARM loans that permit payment shocks in excess of the range permitted by the proposed QRM standards.

PURCHASE LOANS—Continued

Year	QRM	Product type	PTI/DTI	LTV	FICO	All loans
2006	2.76%	+8.69%	+3.28%	+3.29%	+6.78%	+13.63%
2007	2.33%	+6.76%	+3.31%	+4.33%	+6.79%	+16.51%
2008	0.64%	+1.36%	+1.42%	+2.10%	+4.73%	+5.62%
2009	0.07%	+0.09%	+0.09%	+0.07%	+0.63%	+0.23%
Total	1.01%	+3.84%	+1.56%	+1.28%	+3.69%	+6.39%
Percent of Total Dollar Volume for QRMs and Mortgages That Do Not Meet One of the Qualification Requirements						
1997	20.74%	+4.40%	+14.02%	+12.11%	+5.55%	$171,316,168,314
1998	22.08%	+2.99%	+15.33%	+13.09%	+6.23%	243,827,154,269
1999	19.86%	+4.02%	+17.29%	+10.39%	+4.93%	252,736,885,540
2000	18.17%	+4.21%	+19.37%	+7.56%	+4.45%	259,462,348,244
2001	19.57%	+4.20%	+18.76%	+7.94%	+4.92%	334,671,388,428
2002	18.43%	+5.80%	+18.86%	+6.12%	+4.51%	378,648,800,742
2003	18.03%	+6.81%	+19.38%	+5.32%	+4.42%	428,404,858,343
2004	16.71%	+9.21%	+20.88%	+3.25%	+3.78%	397,943,548,815
2005	15.67%	+10.22%	+22.25%	+2.51%	+2.92%	433,917,427,310
2006	13.57%	+9.37%	+21.75%	+2.02%	+2.48%	459,040,004,449
2007	12.39%	+6.88%	+19.94%	+3.27%	+1.95%	504,879,485,500
2008	17.33%	+6.08%	+26.06%	+6.40%	+1.86%	321,485,446,505
2009	27.06%	+7.02%	+33.83%	+8.18%	+1.89%	225,983,942,704
Total	17.57%	+6.69%	+20.69%	+5.89%	+3.63%	4,412,317,459,162

NO CASH-OUT REFINANCINGS

Year	QRM	Product type	PTI/DTI	LTV	FICO	All loans
Ever-to-Date Serious Delinquency Rates for QRMs and the Difference in Rates for Mortgages That Do Not Meet One of the Qualification Requirements						
1997	0.37%	+0.06%	+0.43%	+0.32%	+2.94%	+2.00%
1998	0.33%	+0.11%	+0.27%	+0.36%	+2.15%	+1.41%
1999	0.46%	+0.17%	+0.43%	+0.66%	+3.26%	+2.47%
2000	0.40%	+0.66%	+0.31%	+0.70%	+3.69%	+4.11%
2001	0.27%	+0.32%	+0.24%	+0.50%	+2.21%	+1.97%
2002	0.28%	+0.27%	+0.28%	+0.65%	+2.01%	+1.63%
2003	0.46%	+0.42%	+0.54%	+0.88%	+2.69%	+1.71%
2004	0.77%	+1.01%	+0.97%	+1.25%	+4.09%	+3.36%
2005	1.43%	+3.09%	+1.92%	+1.96%	+6.46%	+6.54%
2006	2.74%	+6.44%	+3.70%	+3.72%	+8.57%	+13.99%
2007	2.86%	+7.94%	+5.20%	+5.39%	+10.27%	+19.45%
2008	0.70%	+1.80%	+1.94%	+1.55%	+5.25%	+5.78%
2009	0.04%	+0.03%	+0.11%	+0.10%	+0.48%	+0.24%
Total	0.44%	+1.65%	+0.90%	+0.82%	+3.11%	+3.47%
Percent of Total Dollar Volume for QRMs and Mortgages That Do Not Meet One of the Qualification Requirements						
1997	21.04%	+3.12%	+11.92%	+15.76%	+6.12%	$72,883,400,278
1998	25.24%	+1.92%	+12.34%	+18.72%	+6.40%	302,723,323,315
1999	20.34%	+2.44%	+12.42%	+14.98%	+6.23%	140,480,199,806
2000	13.66%	+2.31%	+11.72%	+10.37%	+5.06%	48,878,241,470
2001	22.56%	+2.89%	+13.21%	+15.14%	+4.72%	390,566,245,690
2002	28.69%	+4.46%	+15.27%	+11.65%	+4.90%	584,998,514,202
2003	31.06%	+4.48%	+16.76%	+11.22%	+5.22%	920,098,549,172
2004	22.37%	+5.15%	+16.81%	+8.76%	+5.07%	269,562,391,201
2005	16.42%	+4.93%	+16.06%	+8.46%	+3.82%	169,162,254,192
2006	10.24%	+6.22%	+13.03%	+6.20%	+2.73%	131,792,837,483
2007	9.41%	+5.15%	+12.27%	+6.36%	+2.16%	196,852,210,903
2008	20.16%	+4.61%	+20.18%	+10.87%	+2.06%	231,714,054,542
2009	32.80%	+3.01%	+22.10%	+16.44%	+1.63%	637,544,819,174
Total	25.50%	+3.95%	+16.25%	+12.53%	+4.23%	4,097,257,041,427

CASH-OUT REFINANCINGS

Year	QRM	Product type	PTI/DTI	LTV	FICO	All loans
Ever-to-Date Serious Delinquency Rates for QRMs and the Difference in Rates for Mortgages That Do Not Meet One of the Qualification Requirements						
1997	0.51%	+0.18%	+0.48%	+0.54%	+3.12%	+2.20%
1998	0.39%	+0.20%	+0.37%	+0.42%	+2.09%	+1.44%
1999	0.52%	+0.23%	+0.42%	+0.56%	+3.05%	+2.27%
2000	0.51%	+0.70%	+0.41%	+0.81%	+4.26%	+3.88%
2001	0.31%	+0.33%	+0.23%	+0.52%	+2.67%	+2.30%
2002	0.31%	+0.40%	+0.28%	+0.61%	+2.57%	+2.15%
2003	0.51%	+0.64%	+0.60%	+1.12%	+3.11%	+2.57%
2004	0.89%	+1.29%	+1.08%	+1.51%	+4.92%	+4.71%
2005	1.70%	+2.71%	+2.22%	+2.55%	+7.11%	+8.34%
2006	2.61%	+3.77%	+3.34%	+4.05%	+9.06%	+14.42%
2007	2.14%	+3.46%	+3.37%	+3.84%	+9.99%	+16.66%
2008	0.72%	+1.39%	+1.73%	+1.44%	+5.47%	+6.52%
2009	0.03%	+0.05%	+0.10%	+0.07%	+0.44%	+0.24%
Total	0.70%	+2.01%	+1.40%	+1.12%	+4.50%	+5.85%
Percent of Total Dollar Volume for QRMs and Mortgages That Do Not Meet One of the Qualification Requirements						
1997	18.17%	+2.23%	+10.98%	+16.86%	+6.32%	$42,298,309,778
1998	21.25%	+1.30%	+11.88%	+20.45%	+5.91%	144,483,516,925
1999	17.05%	+1.84%	+11.63%	+17.04%	+5.28%	88,233,434,096
2000	10.03%	+2.40%	+9.66%	+10.90%	+4.46%	48,439,141,706
2001	15.19%	+1.90%	+11.01%	+16.10%	+4.18%	314,174,379,286
2002	17.13%	+2.67%	+12.30%	+13.58%	+4.33%	421,408,941,296
2003	19.05%	+2.99%	+14.53%	+11.60%	+5.00%	575,761,933,088
2004	12.16%	+3.34%	+13.83%	+8.15%	+4.43%	270,137,974,274
2005	11.77%	+3.14%	+15.67%	+7.74%	+3.71%	335,989,676,955
2006	8.93%	+4.00%	+13.17%	+5.81%	+3.12%	296,611,100,532
2007	8.93%	+3.39%	+12.61%	+6.70%	+2.75%	325,728,814,842
2008	14.78%	+2.75%	+18.34%	+11.41%	+2.52%	239,936,748,440
2009	28.36%	+1.52%	+22.56%	+17.99%	+1.87%	312,916,373,670
Total	15.81%	+2.75%	+14.39%	+11.78%	+3.89%	3,416,120,344,887

VII. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106–102, sec. 722, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Federal banking agencies invite your comments on how to make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposed regulation clearly stated? If not, how could the regulation be more clearly stated?
- Does the proposed regulation contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

VIII. Administrative Law Matters

A. Regulatory Flexibility Act

OCC: The Regulatory Flexibility Act (RFA) generally requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small entities.[201] However, the regulatory flexibility analysis otherwise required under the RFA is not required if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (defined in regulations promulgated by the Small Business Administration to include banking organizations with total assets of less than or equal to $175 million) and publishes its certification and a short, explanatory statement in the **Federal Register** together with the rule.

As of September 30, 2010, there were approximately 590 small national banks. For the reasons provided below, the OCC certifies that the proposed rule, if adopted in final form, would not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

As discussed in the "Supplementary Information" above, section 941 of the Dodd-Frank Act[202] generally requires the Federal banking agencies and the Commission, and, in the case of the securitization of any residential mortgage asset, together with HUD and FHFA, to jointly prescribe regulations, that (i) require a securitizer to retain not less than 5 percent of the credit risk of any asset that the securitizer, through the issuance of an asset-backed security (ABS), transfers, sells, or conveys to a third party; and (ii) prohibit a securitizer from directly or indirectly hedging or otherwise transferring the credit risk that the securitizer is required to retain under section 15G. Although the proposed rule would apply directly only to securitizers,

[201] *See* 5 U.S.C. 601 *et seq.*

[202] *Codified at* section 15G of the Exchange Act, 17 U.S.C. 78o–11.

subject to certain considerations, section 15G authorizes the Agencies to permit securitizers to allocate at least a portion of the risk retention requirement to the originator(s) of the securitized assets.

Section 15G provides a total exemption from the risk retention requirements for securitizers of certain securitization transactions, such as an ABS issuance collateralized exclusively by "qualified residential mortgage" (QRM) loans, and further authorizes the Agencies to establish a lower risk retention requirement for securitizers of ABS issuances collateralized by other asset types, such as commercial, commercial real estate (CRE), and automobile loans, which satisfy underwriting standards established by the Federal banking agencies.

The risk retention requirements of section 15G apply generally to a "securitizer" of ABS, where securitizer is defined to mean (i) an issuer of an ABS; or (ii) a person who organizes and initiates an asset-backed transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer. Section 15G also defines an "originator" as a person who (i) through the extension of credit or otherwise, creates a financial asset that collateralizes an asset-backed security; and (ii) sells an asset directly or indirectly to a securitizer.

The proposed rule implements the credit risk retention requirements of section 15G. Section 15G requires the Agencies to establish risk retention requirements for "securitizers". The proposal would, as a general matter, require that a "sponsor" of a securitization transaction retain the credit risk of the securitized assets in the form and amount required by the proposed rule. The Agencies believe that imposing the risk retention requirement on the sponsor of the ABS—as permitted by section 15G—is appropriate in light of the active and direct role that a sponsor typically has in arranging a securitization transaction and selecting the assets to be securitized. The OCC is aware of only six small banking organizations that currently sponsor securitizations (one of which is a national bank, two are state member banks, and three are state nonmember banks based on September 30, 2010 information) and, therefore, the risk retention requirements of the proposed rule, as generally applicable to sponsors, would not have a significant economic impact on a substantial number of small national banks.

Under the proposed rule a sponsor may offset the risk retention requirement by the amount of any vertical risk retention ABS interests or eligible horizontal residual interest acquired by an originator of one or more securitized assets if certain requirements are satisfied, including, the originator must originate at least 20 percent of the securitized assets, as measured by the aggregate unpaid principal balance of the asset pool. In determining whether the allocation provisions of the proposal would have a significant economic impact on a substantial number of small banking organizations, the Federal banking agencies reviewed September 30, 2010 Call Report data to evaluate the securitization activity and approximate the number of small banking organizations that potentially could retain credit risk under allocation provisions of the proposal.[203]

The Call Report data indicates that approximately 329 small banking organizations, 54 of which are national banks, originate loans for securitization, namely ABS issuances collateralized by one-to-four family residential mortgages. The majority of these originators sell their loans either to Fannie Mae or Freddie Mac, which retain credit risk through agency guarantees and would not be able to allocate credit risk to originators under this proposed rule. Additionally, based on publicly-available market data, it appears that most residential mortgage-backed securities offerings are collateralized by a pool of mortgages with an unpaid aggregate principal balance of at least $500 million.[204] Accordingly, under the proposed rule a sponsor could potentially allocate a portion of the risk retention requirement to a small banking organization only if such organization originated at least 20 percent ($100 million) of the securitized mortgages. As of September 30, 2010, only one small banking organization reported an outstanding principal balance of assets sold and securitized of $100 million or more.[205]

The OCC seeks comments on whether the proposed rule, if adopted in final form, would impose undue burdens, or have unintended consequences for, small national banks and whether there are ways such potential burdens or consequences could be minimized in a manner consistent with section 15G of the Exchange Act.

Board: The Regulatory Flexibility Act (5 U.S.C. 603(b)) generally requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small entities.[206] Under regulations promulgated by the Small Business Administration, a small entity includes a commercial bank or bank holding company with assets of $175 million or less (each, a small banking organization).[207] The Board has considered the potential impact of the proposed rules on small banking organizations supervised by the Board in accordance with the Regulatory Flexibility Act.

For the reasons discussed in Part II of this Supplementary Information, the proposed rules define a securitizer as a "sponsor" in a manner consistent with the definition of that term in the Commission's Regulation AB and provide that the sponsor of a securitization transaction is generally responsible for complying with the risk retention requirements established under section 15G. The Board is unaware of any small banking organization under the supervision of the Board that has acted as a sponsor of an ABS transaction[208] (based on September 30, 2010 data).[209] As of September 30, 2010, there were approximately 2861 small banking organizations supervised by the Board, which includes 2412 bank holding companies, 398 state member banks, 9 Edge and agreement corporations and 42

[203] Call Report Schedule RC–S provides information on the servicing, securitization, and asset sale activities of banking organizations. For purposes of the RFA analysis, the Agencies gathered and evaluated data regarding (1) net securitization income, (2) the outstanding principal balance of assets sold and securitized by the reporting entity with servicing retained or with recourse or other seller-provided credit enhancements, and (3) assets sold with recourse or other seller-provided credit enhancements and not securitized by the reporting bank.

[204] Based on the data provided in Table 1, page 29 of the Board's "Report to the Congress on Risk Retention", it appears that the average MBS issuance is collateralized by a pool of approximately $620 million in mortgage loans (for prime MBS issuances) or approximately $690 million in mortgage loans (for subprime MBS issuances). For purposes of the RFA analysis, the agencies used an average asset pool size $500 million to account for reductions in mortgage securitization activity following 2007, and to add an element of conservatism to the analysis.

[205] The OCC notes that this finding assumes that no portion of the assets originated by small banking organizations were sold to securitizations that qualify for an exemption from the risk retention requirements under the proposed rule.

[206] *See* 5 U.S.C. 601 *et seq.*

[207] 13 CFR 121.201.

[208] For purposes of the proposed rules, this would include a small bank holding company; state member bank; Edge corporation; agreement corporation; foreign banking organization; and any subsidiary of the foregoing.

[209] Call Report Schedule RC–S; Data based on the Reporting Form FR 2866b; Structure Data for the U.S. Offices of Foreign Banking Organizations; and Aggregate Data on Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks based on the quarterly form FFIEC 002.

U.S. offices of foreign banking organizations.

The proposed rules permit, but do not require, a sponsor to allocate a portion of its risk retention requirement to one or more originators of the securitized assets, subject to certain conditions being met. In particular, a sponsor may offset the risk retention requirement by the amount of any vertical risk retention ABS interests or eligible horizontal residual interest acquired by an originator of one or more securitized assets if certain requirements are satisfied, including, the originator must originate at least 20 percent of the securitized assets, as measured by the aggregate unpaid principal balance of the asset pool. A sponsor using this risk retention option remains responsible for ensuring that the originator has satisfied the risk retention requirements. In light of this option, the Board has considered the impact of the proposed rules on originators that are small banking organizations.

The September 30, 2010 regulatory report data [210] indicates that approximately 329 small banking organizations, 37 of which are small banking organizations that are supervised by the Board, originate loans for securitization, namely ABS issuances collateralized by one-to-four family residential mortgages. The majority of these originators sell their loans either to Fannie Mae or Freddie Mac, which retain credit risk through agency guarantees and would not be able to allocate credit risk to originators under this proposed rule. Additionally, based on publicly-available market data, it appears that most residential mortgage-backed securities offerings are collateralized by a pool of mortgages with an unpaid aggregate principal balance of at least $500 million.[211] Accordingly, under the proposed rule a sponsor could potentially allocate a portion of the risk retention requirement to a small banking organization only if such organization originated at least 20 percent ($100 million) of the securitized mortgages. As of September 30, 2010, only one small banking organization supervised by the Board reported an outstanding principal balance of assets sold and securitized of $100 million or more.[212]

In light of the foregoing, the proposed rules would not appear to have a significant economic impact on sponsors or originators supervised by the Board. The Board seeks comment on whether the proposed rules would impose undue burdens on, or have unintended consequences for, small banking organizations, and whether there are ways such potential burdens or consequences could be minimized in a manner consistent with section 15G of the Exchange Act.

FDIC: The Regulatory Flexibility Act (RFA) generally requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small entities.[213] However, a regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (defined in regulations promulgated by the Small Business Administration to include banking organizations with total assets of less than or equal to $175 million) and publishes its certification and a short, explanatory statement in the **Federal Register** together with the rule.

As of September 30, 2010, there were approximately 2,768 small FDIC-supervised institutions, which includes 2,639 state nonmember banks and 129 state chartered savings banks. For the reasons provided below, the FDIC certifies that the proposed rule, if adopted in final form, would not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

As discussed in the **SUPPLEMENTARY INFORMATION** above, section 941 of the Dodd-Frank Act [214] generally requires the Federal banking agencies and the Commission, and, in the case of the securitization of any residential mortgage asset, together with HUD and FHFA, to jointly prescribe regulations, that (i) require a securitizer to retain not less than 5 percent of the credit risk of any asset that the securitizer, through the issuance of an asset-backed security (ABS), transfers, sells, or conveys to a third party; and (ii) prohibit a securitizer from directly or indirectly hedging or otherwise transferring the credit risk that the securitizer is required to retain under section 15G. Although the proposed rule would apply directly only to securitizers, subject to certain considerations, section 15G authorizes the Agencies to permit securitizers to allocate at least a portion of the risk retention requirement to the originator(s) of the securitized assets.

Section 15G provides a total exemption from the risk retention requirements for securitizers of certain securitization transactions, such as an ABS issuance collateralized exclusively by "qualified residential mortgage" (QRM) loans, and further authorizes the Agencies to establish a lower risk retention requirement for securitizers of ABS issuances collateralized by other asset types, such as commercial, commercial real estate (CRE), and automobile loans, which satisfy underwriting standards established by the Federal banking agencies.

The risk retention requirements of section 15G apply generally to a "securitizer" of ABS, where securitizer is defined to mean (i) an issuer of an ABS; or (ii) a person who organizes and initiates an asset-backed transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer. Section 15G also defines an "originator" as a person who (i) through the extension of credit or otherwise, creates a financial asset that collateralizes an asset-backed security; and (ii) sells an asset directly or indirectly to a securitizer.

The proposed rule implements the credit risk retention requirements of section 15G. The proposal would, as a general matter, require that a "sponsor" of a securitization transaction retain the credit risk of the securitized assets in the form and amount required by the proposed rule. The Agencies believe that imposing the risk retention requirement on the sponsor of the ABS—as permitted by section 15G—is appropriate in view of the active and direct role that a sponsor typically has in arranging a securitization transaction and selecting the assets to be securitized. The FDIC is aware of only six small banking organizations that currently sponsor securitizations (one of which is a national bank, two are state

[210] Call Report Schedule RC–S provides information on the servicing, securitization, and asset sale activities of banking organizations. For purposes of the RFA analysis, the Agencies gathered and evaluated data regarding (1) net securitization income, (2) the outstanding principal balance of assets sold and securitized by the reporting entity with servicing retained or with recourse or other seller-provided credit enhancements, and (3) assets sold with recourse or other seller-provided credit enhancements and not securitized by the reporting bank.

[211] Based on the data provided in Table 1, page 29 of the Board's "Report to the Congress on Risk Retention", it appears that the average MBS issuance is collateralized by a pool of approximately $620 million in mortgage loans (for prime MBS issuances) or approximately $690 million in mortgage loans (for subprime MBS issuances). For purposes of the RFA analysis, the agencies used an average asset pool size $500 million to account for reductions in mortgage securitization activity following 2007, and to add an element of conservatism to the analysis.

[212] The FDIC notes that this finding assumes that no portion of the assets originated by small banking organizations were sold to securitizations that qualify for an exemption from the risk retention requirements under the proposed rule.

[213] *See* 5 U.S.C. 601 *et seq.*

[214] *Codified at* section 15G of the Exchange Act, 17 U.S.C. 78o–11.

member banks, and three are state nonmember banks based on September 30, 2010 information) and, therefore, the risk retention requirements of the proposed rule, as generally applicable to sponsors, would not have a significant economic impact on a substantial number of small state nonmember banks.

Under the proposed rule a sponsor may offset the risk retention requirement by the amount of any vertical risk retention ABS interests or eligible horizontal residual interest acquired by an originator of one or more securitized assets if certain requirements are satisfied, including, the originator must originate at least 20 percent of the securitized assets, as measured by the aggregate unpaid principal balance of the asset pool. In determining whether the allocation provisions of the proposal would have a significant economic impact on a substantial number of small banking organizations, the Federal banking agencies reviewed September 30, 2010 Call Report data to evaluate the securitization activity and approximate the number of small banking organizations that potentially could retain credit risk under allocation provisions of the proposal.[215]

The Call Report data indicates that approximately 329 small banking organizations, 241 of which are state nonmember banks, originate loans for securitization, namely ABS issuances collateralized by one-to-four family residential mortgages. The majority of these originators sell their loans either to Fannie Mae or Freddie Mac, which retain credit risk through agency guarantees, and therefore would not be allocated credit risk under the proposed rule. Additionally, based on publicly-available market data, it appears that most residential mortgage-backed securities offerings are collateralized by a pool of mortgages with an unpaid aggregate principal balance of at least $500 million.[216] Accordingly, under the proposed rule a sponsor could potentially allocate a portion of the risk retention requirement to a small banking organization only if such organization originated at least 20 percent ($100 million) of the securitized mortgages. As of September 30, 2010, only one small banking organization reported an outstanding principal balance of assets sold and securitized of $100 million or more.[217]

The FDIC seeks comment on whether the proposed rule, if adopted in final form, would impose undue burdens, or have unintended consequences for, small state nonmember banks and whether there are ways such potential burdens or consequences could be minimized in a manner consistent with section 15G of the Exchange Act.

SEC: The Commission hereby certifies, pursuant to 5 U.S.C. 605(b), that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed rule implements the risk retention requirements of section 15G of the Exchange Act, which, in general, requires the securitizer of a asset-backed securities (ABS) to retain not less than five percent of the credit risk of the assets collateralizing the ABS.[218] Under the proposed rule, the risk retention requirements would apply to "sponsors", as defined in the proposed rule. Based on our data, we found only one sponsor that would meet the definition of a small broker-dealer for purposes of the Regulatory Flexibility Act.[219] Accordingly, the Commission does not believe that the proposed rule, if adopted, would have a significant economic impact on a substantial number of small entities.

FHFA: Pursuant to section 605(b) of the Regulatory Flexibility Act, FHFA hereby certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

1. Request for Comment on Proposed Information Collection

Certain provisions of the proposed rule contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA"), 44 U.S.C. 3501–3521. In accordance with the requirements of the PRA, the Agencies may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The information collection requirements contained in this joint notice of proposed rulemaking have been submitted by the FDIC, OCC, and the Commission to OMB for approval under section 3506 of the PRA and section 1320.11 of OMB's implementing regulations (5 CFR part 1320). The Board reviewed the proposed rule under the authority delegated to the Board by OMB.

Comments are invited on:

(a) Whether the collections of information are necessary for the proper performance of the agencies' functions, including whether the information has practical utility;

(b) The accuracy of the estimates of the burden of the information collections, 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 information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start up costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Commenters may submit comments on aspects of this notice that may affect disclosure requirements and burden estimates at the addresses listed in the **ADDRESSES** section of this Supplementary Information. A copy of the comments may also be submitted to the OMB desk officer for the agencies: By mail to U.S. Office of Management and Budget, 725 17th Street, NW., #10235, Washington, DC 20503 or by facsimile to 202–395–6974, Attention, Commission and Federal Banking Agency Desk Officer.

2. Proposed Information Collection

Title of Information Collection: Credit Risk Retention.

Frequency of response: Event generated.

Affected Public:[220]

[215] Call Report Schedule RC–S provides information on the servicing, securitization, and asset sale activities of banking organizations. For purposes of the RFA analysis, the Agencies gathered and evaluated data regarding (1) net securitization income, (2) the outstanding principal balance of assets sold and securitized by the reporting entity with servicing retained or with recourse or other seller-provided credit enhancements, and (3) assets sold with recourse or other seller-provided credit enhancements and not securitized by the reporting bank.

[216] Based on the data provided in Table 1, page 29 of the Board's "Report to the Congress on Risk Retention", it appears that the average MBS issuance is collateralized by a pool of approximately $620 million in mortgage loans (for prime MBS issuances) or approximately $690 million in mortgage loans (for subprime MBS issuances). For purposes of the RFA analysis, the agencies used an average asset pool size $500 million to account for reductions in mortgage securitization activity following 2007, and to add an element of conservatism to the analysis.

[217] The FDIC notes that this finding assumes that no portion of the assets originated by small banking organizations were sold to securitizations that qualify for an exemption from the risk retention requirements under the proposed rule.

[218] *See* 17 U.S.C. 78o–11.

[219] 5 U.S.C. 601 *et seq.*

[220] The affected public of the FDIC, OCC, and Board is assigned generally in accordance with the entities covered by the scope and authority section of their respective proposed rule. The affected

FDIC: Insured state non-member banks, insured state branches of foreign banks, and certain subsidiaries of these entities.

OCC: National banks, Federal savings associations, Federal branches or agencies of foreign banks, or any operating subsidiary thereof.

Board: FDIC-insured state member banks. For § __.15(d)(13) the Board's respondents also include bank holding companies, foreign banking organizations, Edge or agreement corporations, any nonbank financial company (as defined in § __.1(c)(5)), savings and loan holding companies, (as defined in 12 U.S.C. 1467a, on and after the transfer date established under section 311 of the Dodd-Frank Act (12 U.S.C. 5411)), or any subsidiary of the foregoing.

SEC: All entities other than those assigned to the FDIC, OCC, or Board.

Abstract: The notice sets forth permissible forms of risk retention for securitizations that involve issuance of asset-backed securities. The information requirements in joint regulations proposed by the three Federal banking agencies and the Commission are found in §§ __.4, __.5, __.6, __.7, __.8, __.9, __.10, __.12, __.13, __.15, __.18, __.19, and __.20. The Agencies believe that the disclosure and recordkeeping requirements associated with the various forms of risk retention will enhance market discipline, help ensure the quality of the assets underlying a securitization transaction, and assist investors in evaluating transactions. Compliance with the information collections would be mandatory. Responses to the information collections would not be kept confidential and, except as provided below, there would be no mandatory retention period for proposed collections of information.

Section-by-Section Analysis

Section __.4 sets forth the conditions that must be met by sponsors electing to use the vertical risk retention option. Section __.4(b)(1) requires disclosure of the amount of each class of ABS interests retained and required to be retained by the sponsor and § __.4(b)(2) requires disclosure of material assumptions used to determine the aggregate dollar amount of ABS interests issued in the transaction.

Section __.5 specifies the conditions that must be met by sponsors using the horizontal risk retention option, including disclosure of the amount of the eligible horizontal residual interest retained by the sponsor and the amount required to be retained (§ __.5(c)(1)(i)); disclosure of the material terms of the eligible horizontal residual interest (§ __.5(c)(1)(ii)); disclosure of the dollar amount to be placed in a cash reserve account and the amount required to be placed in the account (§ __.5(c)(2)(i)), if applicable; disclosure of the material terms governing the cash reserve account (§ __.5(c)(2)(ii)), if applicable; and disclosure of material assumptions and methodology used in determining the aggregate dollar amount of ABS interests issued in the transaction (§ __.5(c)(3)).

Section __.6 identifies the requirements for sponsors opting to use the hybrid L-shaped risk retention method, including disclosures in compliance with those set forth for the vertical and horizontal risk retention methods (§ __.6(b)).

Section __.7 requires sponsors using a revolving master trust structure for securitizations to disclose the amount of seller's interest retained by the sponsor and the amount the sponsor is required to retain (§ __.7(b)(1)); the material terms of the seller's interest retained by the sponsor (§ __.7(b)(2)); and the material assumptions and methodology used in determining the aggregate dollar amount of ABS issued in the transaction (§ __.7(b)(3)).

Section __.8 discusses the representative sample method of risk retention and requires that the sponsor adopt and adhere to policies and procedures to, among other things, document the material characteristics used to identify the designated pool and randomly select assets using a process that does not take account of any asset characteristic other than the unpaid balance (§ __.8(c)); maintaining, until all ABS interests are paid in full, documentation that clearly identifies the assets included in the representative sample (§ __.8(c)); obtaining an agreed upon procedures report from an independent public accounting firm (§ __.8(d)(1)); disclose the amount of assets included in the representative sample and retained by the sponsor and the amount of assets required to be retained by the sponsor (§ __.8(g)(1)(i)); disclose prior to sale a description of the material characteristics of the designated pool (§ __.8(g)(1)(ii)); disclose prior to sale a description of the policies and procedures used by the sponsor to ensure compliance with random selection and equivalent risk determination requirements (§ __.8(g)(1)(iii)); confirm prior to sale that the required agreed upon procedures report was obtained (§ __.8(g)(1)(iv)); disclose the material assumptions and methodology used in determining the aggregate dollar amount of ABS interests issued in the transaction (§ __.8(g)(1)(v)); and disclose after sale the performance of the pool of assets in the securitization transaction as compared to performance of assets in the representative sample (§ __.8(g)(2)); and disclose to holders of the asset-backed securities information concerning the assets in the representative sample (§ __.8(g)(3)).

Section __.9 addresses the requirements for sponsors utilizing the ABCP conduit risk retention approach. The requirements for the ABCP conduit risk retention approach include disclosure of each originator-seller with a retained eligible horizontal residual interest and the form, amount, and nature of the interest (§ __.9(b)(1)); disclosure of each regulated liquidity provider providing liquidity support to the ABCP conduit and the form, amount, and nature of the support (§ __.9(b)(2)); maintenance of policies and procedures that are reasonably designed to monitor regulatory compliance by each originator-seller of the eligible ABCP conduit (§ __.9(c)(2)(i)); and notice to holders of the ABS interests issued in the transaction in the event of originator-seller regulatory non-compliance (§ __.9(c)(2)(ii)).

Section __.10 sets forth the requirements for sponsors utilizing the commercial mortgage-backed securities risk retention option, and includes disclosures of the name and form of organization of the third-party purchaser (§ __.10(a)(5)(i)), the third-party purchaser's experience (§ __.10(a)(5)(ii)), other material information (§ __.10(a)(5)(iii)), the amount and purchase price of eligible horizontal residual interest retained by the third-party purchaser and the amount that the sponsor would have been required to retain (§ __.10(a)(5)(iv) and (v)), a description of the material terms of the eligible residual horizontal interest retained by the third-party purchaser (§ __.10(a)(5)(vi)), the material assumptions and methodology used to determine the aggregate amount of ABS interests issued by the issuing entity (§ __.10(a)(5)(vii)), representations and warranties concerning the securitized assets and factors used to determine the assets should be included in the pool (§ __.10(a)(5)(viii)); sponsor maintenance of policies and procedures to monitor third-party compliance with regulatory requirements (§ __.10(b)(2)(A)); and sponsor notice to holders of ABS interests in the event of third-party non-compliance with

public of the Commission is based on those entities not already accounted for by the FDIC, OCC, and Board.

regulatory requirements (§ __.10(b)(2)(B)).

Section __.12 requires the establishment of a premium cash reserve account, in addition to the sponsor's base risk retention requirement, in instances where the sponsor structures a securitization to monetize excess spread on the underlying assets. The premium cash reserve account would be used to "capture" the premium received on sale of such tranches for purposes of covering losses on the underlying assets and would require the sponsor to make disclosures regarding the dollar amount required by regulation to be placed in the account and any other amounts placed in the account by the sponsor (§ __.12(d)(1)) and the material assumptions and methodology used in determining fair value of any ABS interest that does not have a par value and that was used in calculating the amount required for the premium capture cash reserve account (§ __.12(d)(2)).

Section __.13 sets forth the conditions that apply when the sponsor of a securitization allocates to originators of securitized assets a portion of the credit risk it is required to retain, including disclosure of the name and form of organization of any originator with an acquired and retained interest (§ __.13(a)(2)); maintenance of policies and procedures that are reasonably designed to monitor originator compliance with retention amount and hedging, transferring and pledging requirements (§ __.13(b)(2)(A)); and notice to holders of ABS interests in the transaction in the event of originator non-compliance with regulatory requirements (§ __.13(b)(2)(B)).

Section __.15 provides an exemption from the risk retention requirements for qualified residential mortgages that meet certain specified criteria including certification by the depositor of the asset-backed security that it has evaluated the effectiveness of its internal supervisory controls and concluded that the controls are effective (§ __.15(b)(4)(i)), and sponsor disclosure prior to sale of asset-backed securities in the issuing entity of a copy of the certification to potential investors (§ __.15(b)(4)(iii)). In addition § __.15(e)(3) provides that a sponsor that has relied upon the exemption shall not lose the exemption if it complies with certain specified requirements, including prompt notice to the holders of the asset-backed securities of any loan repurchased by the sponsor. Section __.15 also contains additional information collection requirements on the mortgage originator to include terms in the mortgage transaction documents under which the creditor commits to having servicing policies and procedures (§ __.15(d)(13)(i)) and to provide disclosure of the foregoing default mitigation commitments to the borrower at or prior to the closing of the mortgage transaction (§ __.15(d)(13)(ii)).

Sections __.18, __.19, and __.20 provide exemptions from the risk retention requirements for qualifying commercial real estate loans, commercial mortgages, and auto loans that meet specified criteria. Each section requires that the depositor of the asset-backed security certify that it has evaluated the effectiveness of its internal supervisory controls and concluded that its controls are effective (§§ __.18(b)(7)(i), __.19(b)(10)(i), and __.20(b)(9)(i)); that the sponsor provide a copy of the certification to potential investors prior to the sale of asset-backed securities (§§ __.18(b)(7)(iii), __.19(b)(10)(iii), and __.20(b)(9)(iii)); and that the sponsor promptly notify the holders of the securities of any loan included in the transaction that is required to be repurchased by the sponsor (§§ __.18(c)(3), __.19(c)(3), and __.20(c)(3)).

Estimated Paperwork Burden

Estimated Burden per Response:

§ __.4—Vertical risk retention: disclosures—2 hours.

§ __.5—Horizontal risk retention: disclosures—2.5 hours.

§ __.6—L-Shaped risk retention: disclosures—3 hours.

§ __.7—Revolving master trusts: disclosures—2.5 hours.

§ __.8—Representative sample: recordkeeping—120 hours; disclosures—23.25 hours.

§ __.9—Eligible ABCP conduits: recordkeeping—20 hours; disclosures—3 hours.

§ __.10—Commercial mortgage-backed securities: recordkeeping—20 hours; disclosures—19.75 hours.

§ __.12—Premium capture cash reserve account: disclosures—1.75 hours.

§ __.13—Allocation of risk retention: recordkeeping—20 hours; disclosures—2.5 hours.

§ __.15—Exemption for qualified residential mortgages: recordkeeping—40 hours; disclosures—9.25 hours.

§ __.18—Exemption for qualifying CRE loans: recordkeeping—40 hours; disclosures—1.25 hours.

§ __.19—Exemption for qualifying commercial mortgages: recordkeeping—40 hours; disclosures—1.25 hours.

§ __.20—Exemption for qualifying auto loans: recordkeeping—40 hours; disclosures—1.25 hours.

FDIC

Number of Respondents: 90 sponsors and 4,715 creditors.

Total Estimated Annual Burden: 59,463 hours.

OCC

Number of Respondents: 30 sponsors and 1,650 creditors.

Total Estimated Annual Burden: 20,483 hours.

Board

Number of Respondents: 20 sponsors and 7,636 creditors.

Total Estimated Annual Burden: 70,430 hours.

Commission

Number of Respondents: 104 sponsors and 1,500 creditors.

Total Estimated Annual Burden: 37,166 hours.

Commission's explanation of the calculation:

To determine the total paperwork burden for the requirements contained in this proposed rule the Agencies first estimated the universe of sponsors that would be required to comply with the proposed disclosure and recordkeeping requirements. The Agencies estimate that approximately 243 unique sponsors conduct ABS offerings per year. This estimate was based on 2010 data reported on the commercial bank Call Report (FFIEC 031 and 041) and from the ABS database AB Alert. Of the 243 sponsors, the Agencies have assigned 8 percent of these sponsors to the Board, 12 percent to the OCC, 37 percent to the FDIC, and 43 percent to the Commission.

Next, the Agencies estimated the burden per response that would be associated with each disclosure and recordkeeping requirement. In some cases, the proposed rule is estimated to incur only an incremental burden on respondents. For example, in the representative sample option, the proposed rule requires that the sponsor cause to be disclosed information regarding the securitized assets, but the Agencies believe similar information regarding the securitized assets are already being made to investors, and therefore the proposed rule would only incur an incremental burden on sponsors.

Next, the Agencies estimated how frequent the entities would make the required disclosure by estimating the proportionate amount of offerings per year for each agency. In making this determination, the estimate was based on the average number of ABS offerings from 2004 through 2009, and therefore, we estimate the total number of annual

offerings per year to be 1,700.[221] We also made the following additional estimates:

- 12 offerings per year will be subject to disclosure and recordkeeping requirements under sections § __.12 and § __.13, which are divided equally among the four agencies (i.e., 3 offering per year per agency);
- 100 offerings per year will be subject to disclosure and recordkeeping requirements under section § __.15, which are divided proportionately among the agencies based on the entity percentages described above (i.e., 8 offerings per year subject to § __.15 for the Board; 12 offerings per year subject to § __.15 for the OCC; 37 offerings per year subject to § __.15 for the FDIC; and 43 offerings per year subject to § __.15 for the Commission); and
- 40 offerings per year will be subject to disclosure and recordkeeping requirements under § __.18, § __.19, and § __.20, respectively, which are divided proportionately among the agencies based on the entity percentages described above (i.e., 3 offerings per year subject to each section for the Board, 5 offerings per year subject to each section for the OCC; 15 offerings per year subject to each section for the FDIC, and 17 offerings per year subject to each section for the Commission).

To obtain the estimated number of responses (equal to the number of offerings) for each option in Part B of the proposed rule, the Agencies multiplied the number of offerings estimated to be subject to the base risk retention requirements (i.e., 1,480) [222] by the sponsor percentages described above. The result was the number of base risk retention offerings per year per agency. For the Commission, this was calculated by multiplying 1,480 offerings per year by 43 percent, which equals 636 offerings per year. This number was then divided by the number of base risk retention options (7) to arrive at the estimate of the number of offerings per year per agency per base risk retention option. For the Commission, this was calculated by dividing 636 offerings per year by 7 options, resulting in 91 offerings per year per base risk retention option.

The total estimated annual burden for each Agency was then calculated by multiplying the number of offerings per year per section for such Agency (except with respect to the recordkeeping burden hours under § __.8 and § __.15(d)(13) as described below) by the number of burden hours estimated for the respective section, then adding these subtotals together. For example, under § __.4, the Commission multiplied the estimated number of offerings per year per § __.4 (i.e., 91 offerings per year) by the disclosure burden hour estimate for § __.4 of 2.0 hours. Thus, the estimated annual burden hours for respondents to which the Commission accounts for the burden hours under § __.4 is 182 hours (91 * 2.0 hours = 182 hours). For the recordkeeping burden estimate under §§ __.8(c) and __.8(d)(2), instead of using the number of offerings per year per base risk retention option, the Agencies multiplied the number of recordkeeping burden hours by the number of unique sponsors assigned to such Agency per year (i.e., 104 in the case of the Commission).[223] The reason for this is that the Agencies considered it possible that sponsors may establish these policies and procedures during the year independent on whether an offering was conducted, with a corresponding agreed upon procedures report obtained from a public accounting firm each time such policies and procedures are established.

To obtain an estimate for the number of burden hours required by § __.15(d)(13), the Agencies multiplied the estimate of the number of creditors assigned to such Agency for purposes of this risk retention rule by an estimate of the number of hours that it will take creditors to perform a one-time update to their systems to account for the requirements of this section, which we estimate to be 8 hours.[224] This estimate was added to the other disclosure and recordkeeping burden estimates as described above to achieve a total estimated annual burden for respondents assigned to the Commission.

For disclosures made at the time of the securitization transaction,[225] the Commission allocates 25 percent of these hours (1,009 hours) to internal burden for all sponsors. For the remaining 75 percent of these hours, (3,028 hours), the Commission uses an estimate of $400 per hour for external costs for retaining outside professionals totaling $1,211,200. For disclosures made after the time of sale in a securitization transaction,[226] the Commission allocated 75 percent of the total estimated burden hours (892 hours) to internal burden for all sponsors. For the remaining 25 percent of these hours (297 hours), the Commission uses an estimate of $400 per hour for external costs for retaining outside professionals totaling $118,800. With respect to the agreed upon procedures report by an independent public accounting firm under the representative sample option, the Commission allocated 100 percent of the total estimated burden hours (4,160 hours [227]) to retaining outside professionals at an estimate of $400 per hour, for a total cost of $1,664,000.

FHFA: The proposed regulation does not contain any FHFA information collection requirement that requires the approval of OMB under the Paperwork Reduction Act.

HUD: The proposed regulation does not contain any HUD information collection requirement that requires the approval of OMB under the Paperwork Reduction Act.

C. Commission Economic Analysis

1. Introduction

As discussed above, Section 15G of the Exchange Act, as added by section 941(b) of the Dodd-Frank Act, generally requires the Agencies to jointly prescribe regulations, that (i) require a sponsor to retain not less than five percent of the credit risk of any asset that the sponsor, through the issuance of an ABS, transfers, sells, or conveys to a third party, and (ii) prohibit a sponsor from directly or indirectly hedging or otherwise transferring the credit risk that the sponsor is required to retain under section 15G and the Agencies' implementing rules.[228]

Section 15G of the Exchange Act exempts certain types of securitization transactions from these risk retention requirements and authorizes the Agencies to exempt or establish a lower risk retention requirement for other types of securitization transactions. For example, section 15G specifically provides that a sponsor shall not be required to retain any part of the credit risk for an asset that is transferred, sold, or conveyed through the issuance of

[221] We use the ABS issuance data from Asset-Backed Alert on the initial terms of offerings, and we supplement that data with information from Securities Data Corporation (SDC). This estimate includes registered offerings and offerings made under Securities Act Rule 144A. We also note that this estimate is for offerings that are not exempted under §§ __.21 and __.22 of the proposed rule.

[222] Estimate of 1,700 offerings per year minus the estimate of the number of offerings qualifying for an exemption under § __.15, § __.18, § __.19, and § __.20 (220 total).

[223] 243 * 43% = 104.

[224] 1,500 creditors * 8 hours = 12,000 hours

[225] These are the disclosures required by §§ __.4(b)(1)–(2); __.5(c)(1)(i)–(ii), (2)(i)–(ii), and (3); __.6(b); __.7(b)(1)–(3); __.8(g)(1)(i)–(iv) and (g)(3); __.9(b)(1)–(2); __.10(a)(5)(i)–(viii); __.12(d)(1)–(3); __.13(a)(2); __.15(b)(4)(iii); __.18(b)(7)(iii); __.19(b)(10)(iii); and __.20(b)(9)(iii).

[226] These are the disclosures required by §§ __.8(g)(2); __.9(c)(2)(ii); __.10(b)(2)(B); __.13(b)(2)(B); __15(e)(3); __.18(c)(3); __19(c)(3); and __.20(c)(3).

[227] 40 * 104 = 4,160 hours.

[228] *See* 15 U.S.C. 78o–11(b), (c)(1)(A) and (c)(1)(B)(ii).

ABS by the sponsor, if all of the assets that collateralize the ABS are qualified residential mortgages (QRMs), as that term is jointly defined by the Agencies.[229] In addition, section 15G states that the Agencies must permit a sponsor to retain less than five percent of the credit risk of commercial mortgages, commercial loans, and automobile loans that are transferred, sold, or conveyed through the issuance of ABS by the sponsor if the loans meet underwriting standards established by the Federal banking agencies.[230]

Section 15G requires the Agencies to prescribe risk retention requirements for "securitizers," which the Agencies interpret are depositors or sponsors of ABS. The proposal would require that a "sponsor" of a securitization transaction to retain the credit risk of the securitized assets in the form and amount required by the proposed rule. The Agencies believe that imposing the risk retention requirement on the sponsor of the ABS is appropriate in light of the active and direct role that a sponsor typically has in arranging a securitization transaction and selecting the assets to be securitized.

In developing the proposed rules, the Agencies have taken into account the diversity of assets that are securitized, the structures historically used in securitizations, and the manner in which sponsors may have retained exposure to the credit risk of the assets they securitize. The proposed rules provide several options sponsors may choose from in meeting the risk retention requirements of section 15G, including, but not limited to, retention of a five percent "vertical" slice of each class of interests issued in the securitization or retention of a five percent "horizontal" first-loss interest in the securitization, as well as other risk retention options that take into account the manners in which risk retention often has occurred in credit card receivable and automobile loan and lease securitizations and in connection with the issuance of asset-backed commercial paper. The proposed rules also include a special "premium capture" mechanism designed to prevent a sponsor from structuring an ABS transaction in a manner that would allow the sponsor to effectively negate or reduce its retained economic exposure to the securitized assets by immediately monetizing the excess spread created by the securitization transaction. In designing these options and the proposed rules in general, the Agencies have sought to ensure that the amount of credit risk retained is meaningful—consistent with the purposes of section 15G—while reducing the potential for the proposed rules to negatively affect the availability and costs of credit to consumers and businesses.

As required by section 15G, the proposed rules provide a complete exemption from the risk retention requirements for ABS that is collateralized solely by QRMs and establish the terms and conditions under which a residential mortgage would qualify as a QRM. In developing the proposed definition of a QRM, the Agencies carefully considered the terms and purposes of section 15G, public input, and the potential impact of a broad or narrow definition of QRMs on the housing and housing finance markets.

As discussed in greater detail in Part IV of this Supplementary Information, the proposed rule would generally prohibit QRMs from having product features that contributed significantly to the high levels of delinquencies and foreclosures since 2007—such as terms permitting negative amortization, interest-only payments, or significant interest rate increases—and also would establish underwriting standards designed to ensure that QRMs are of very high credit quality consistent with their exemption from risk retention requirements. These underwriting standards include, among other things, maximum front-end and back-end debt-to-income ratios of 28 percent and 36 percent, respectively; a maximum loan-to-value ratio of 80 percent in the case of a purchase transaction (with a lesser combined LTV permitted for refinance transactions); a 20 percent down payment requirement in the case of a purchase transaction; and credit history restrictions.

The proposed rules also would not require a sponsor to retain any portion of the credit risk associated with a securitization transaction if the ABS issued are exclusively collateralized by qualified assets (QAs)—commercial loans, commercial mortgages, or automobile loans that meet underwriting standards included in the proposed rule for the individual asset class.

The Commission is sensitive to the costs and benefits imposed by its rules. The discussion below focuses on the costs and benefits of the decisions made by the Commission, together with the other Agencies, to fulfill the mandates of the Dodd-Frank Act within its permitted discretion, rather than the costs and benefits of the mandates of the Dodd-Frank Act itself. For instance, the analysis below assumes as a baseline that a standard for QRM is in place, since such a standard is mandated by statute. Rather than assessing the economic costs and benefits of implementing such a standard, the analysis below focuses on the relative costs and benefits of alternative QRM standards. Similarly, the analysis assumes the following: A risk retention requirement of at least 5 percent for non-qualified mortgages and non-qualified assets, 0% for QRMs and less than 5 percent for qualified assets. Thus, our analysis below examines the costs and benefits of alternative implementations of a risk retention requirement meeting the mandates of the Dodd-Frank Act, rather than the existence of a risk retention requirement. Although our intent is to limit the economic analysis of this rule to decisions made by the Commission, to the extent that the Commission's discretion is exercised to further the benefits intended by the Dodd-Frank Act, the two types of benefits might not be entirely separable.

Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact on competition that the rules would have, and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the Exchange Act.[231] Further, Section 2(b) of the Securities Act of 1933[81] and Section 3(f) of the Exchange Act requires the Commission,[232] when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. The Commission has considered and discussed below the effects of the proposed rules on efficiency, competition, and capital formation, as well as the benefits and costs associated with the Commission's decisions in the proposed rulemaking.

2. Risk Retention Methods for Non-QRMs and Non-Qualifying Assets ("QAs")

The proposed rules require not less than 5 percent risk retention for all non-QRMs and non-QAs. The form of the retention is to be chosen from a menu of options, which should provide flexibility to sponsors in meeting the

[229] *See* 15 U.S.C. 78o–11(c)(1)(C)(iii), (4)(A) and (B).

[230] *See id.* at § 78o–11(c)(1)(B)(ii) and (2).

[231] 15 U.S.C. 78w(a).

[232] 17 U.S.C. 78c(f).

risk retention requirement mandated by Section 15G, as added by the Dodd-Frank Act. Section 15G directs the Agencies to set appropriate risk retention rules, which will require the retention of no less than 5 percent of the credit risk in the securitized assets for all ABS classes not exempt from the requirement. Section 15G provides for a risk retention exemption for sponsors of ABS backed solely by QRMs and for certain other sponsors or ABS asset classes as discussed below and a less than five percent risk retention requirement for QAs.

Empirical evidence points to a significant heterogeneity of securitization structures, practices and risk characteristics across ABS asset classes.[233] Accordingly, allowing sponsors to choose a form of risk retention from a menu of options provides them with the flexibility of choosing the form that best suits their operational and financing preferences. By including most of the risk retention forms currently observed in the marketplace, the Agencies' proposal benefits sponsors, originators, and investors alike by limiting disruption to current securitization practices to the extent possible. Historically, most sponsors have been exposed to some level of credit risk by retaining an economic interest in the pools they securitize in the form of first-loss or pro-rata positions.[234] Thus, the proposed rule allows sponsors that have existing risk retention programs to minimize their compliance costs resultant from the statute's mandate. Without the flexibility allowed by a broad menu-of-options approach, there likely would be an increase in borrowing costs to sponsors and to the borrowers whose loans are in the securitized pools. In some cases, this increase could be large enough to make certain types of securitizations economically unfeasible.

It is possible that the flexibility allowed by the proposed approach to implementing the risk retention mandate of Section 15G might result in some sponsors choosing risk retention methods that do not align fully their incentives with those of investors. In such cases, underwriting standards and pool selection procedures may not improve. If investors are reluctant to invest in ABS where a sponsor has selected such a suboptimal risk retention method, risk retention might not have the effect of facilitating capital formation. To the extent that such reluctance on part of investors provides sponsors with the incentive to choose risk retention methods that investors demand, this effect on capital formation is mitigated.

An integral part of the proposed rules are new risk retention disclosure requirements specifically tailored to each of the permissible forms of risk retention. The required disclosure would provide investors with information on the sponsor's retained interest in an ABS transaction, such as the amount and form of the interest retained and the assumptions used in determining the aggregate value of ABS to be issued. This information would benefit investors by providing them with an efficient mechanism to monitor compliance with the proposed rules and make informed investment decisions. However, compliance costs to sponsors would increase, since sponsors would now have to prepare and provide these disclosures to investors.

Therefore, the Commission believes that the proposed menu-of-options approach and the accompanying disclosures will have no competitive effects, and will implement the mandates of Section 15G without causing economic inefficiencies or hindering capital formation.[235]

Vertical Risk Retention Method

By requiring the retention of five percent of each interest backed by the securitized asset pool, regardless of whether the interest is certificated or not, the vertical risk retention method is the most straightforward method to implement. The transparency and ease of verification of this method will likely benefit investors to the extent that they view their ability to discern a sponsor's risk retention important. This provides the sponsor an interest in the entire structure of the securitization transaction. However, the vertical risk retention method requires a sponsor to bear only a small fraction of the losses incurred by the pool, thus possibly failing to align sufficiently originators' and sponsors' interests with those of investors when it comes to the origination and underwriting of riskier asset classes. Since 5 percent is a lower bound on the risk required to be retained, it is possible some sponsors may hold more if it were economically optimal.

Horizontal Risk Retention Method

This method exposes a sponsor to the first 5 percent of all pool-asset losses and thus results in the sponsor retaining substantially more than five percent of the credit risk in a securitization. That is, a sponsor will be exposed to 100 percent of all losses as long as those losses are up to 5 percent. Therefore, this method imposes a significant disincentive on sponsors of poorly underwritten assets. As a result, the horizontal method of risk retention should benefit investors by aligning their incentives with those of originators and sponsors when originating and underwriting riskier asset classes.

Since the retention of a horizontal first-loss position in securitizations leaves the sponsor holding a significant amount of risk, it is possible that for less risky asset classes a 5 percent risk retention might be unnecessarily high. For such asset classes, a sponsor might be constrained to raising external financing for only 95 percent of the asset pool, while the market might have allowed for a smaller equity interest. As a result, the sponsor might have to incur additional financing costs which would have the effect of impeding capital formation.

The retention of a first-loss position has been a common market practice for many asset classes, so this method should not be unnecessarily disruptive and should therefore impose limited additional costs on sponsors. The effect would be that of no decrease in efficiency and no new impediment to capital formation.

Premium Capture Cash Reserve Account

Securitization transactions often contain pools of assets that are expected to earn substantially higher returns compared to the financing rates on the ABS issued in the securitization. This is generally referred to as excess spread. In situations where there is substantial excess spread, the sponsor can obtain significant economic income by selling an interest based on the excess spread. If the sponsor is able to recover more than 5 percent of the balance of the pool in a short period of time, then the sponsor would be left with limited economic interest in the securitization. This is particularly true if defaults occur later in the life of pool assets. For this reason, the proposed rules prohibit the cash flows from the excess spread (or cash proceeds from selling it) to be distributed to the sponsor. This benefits investors by helping to ensure that the incentive-alignment objectives of the

[233] *See* Board of Governors of the Federal Reserve System, Report to the Congress on Risk Retention, October 2010 available at *http://federalreserve.gov/boarddocs/rptcongress/securitization/riskretention.pdf.*

[234] For example, Chen, Liu, and Ryan (2008) show that banks retain more risk when loans have higher or less externally verifiable credit risk. *See Characteristics of Securitizations that Determine Issuers' Retention of the Risks of the Securitized,* Weitzu Chen, Chi-Chun Liu, and Stephen Ryan (2008), The Accounting Review, 2008.83.5.1181.

[235] As discussed in the introduction, this statement refers to the choice made by the Commission and other agencies by having proposed a menu of options rather than the statutory mandate to require risk retention.

proposed rules are achieved. However, this may reduce the flexibility of sponsors in structuring their deals, thus imposing a cost.

L-Shaped Method

Another risk retention option in the proposed rules would allow a sponsor, subject to certain conditions, to use an equal combination of a vertical risk retention and horizontal risk retention as a means of retaining the required five percent exposure to the credit risk of the securitized assets. This form of risk retention is referred to as an "L-Shaped" form of risk retention because it combines both vertical and horizontal forms. Overall, this has the benefits and costs associated with the two approaches as described above. Also, the proposed requirement that the sponsor retain 50 percent vertical and 50 percent horizontal facilitates the monitoring of the risk retention compliance by investors, Agencies and other market participants.

Representative Sample Method

The representative sample method requires risk retention of a randomly selected loan pool that is "similar" in risk attributes to the securitized loans *prior to* a securitization. Since it may be costly to ensure the true "randomness" of the selection or "representativeness" of the sample, and since sponsors' prior knowledge of the sample selection bias might alter their incentives to put well-underwritten assets into the pool, this method may not fulfill its incentive-alignment benefits without mechanisms in place to ensure there is no selection bias. Thus, the proposed rules require that sponsors have plans and procedures in place, maintain documentation, and have the sampling procedures agreed upon by an independent auditing firm. In addition, the proposed rules would require ongoing disclosures about the performance of the assets in the representative sample in the same form, level, and manner as is provided concerning the securitized assets. Although this will increase sponsors' compliance costs, the Commission believes that it will also further the incentive-alignment benefits contemplated in Section 15G of the Exchange Act.

For some asset classes, such as automobile loans, retaining a portion of the loans that would ordinarily be securitized has been used as a method of risk retention. Therefore, permitting a representative sample risk retention option with the appropriate safeguards will likely benefit sponsors of such asset classes, whose compliance costs—other than reporting costs—will not increase as a result of the proposed rules. Furthermore, the borrowers whose loans back such securitizations will also likely experience no increase in their borrowing costs.

Seller's Interest Method

Securitizations of revolving lines of credit, such as credit card accounts or dealer floorplan loans, are typically structured using a revolving master trust, which issues more than one series of ABS backed by a single pool of revolving assets. The proposed rule would allow a sponsor of a revolving asset master trust that is collateralized by revolving loans or other extensions of revolving credit to meet its risk retention requirement by retaining a seller's interest in an amount not less than 5 percent of the unpaid principal balance of the pool assets held by the issuer. The definitions of a seller's interest and a revolving asset master trust are intended to be consistent with market practices and, with respect to seller's interest, designed to help ensure that any seller's interest retained by a sponsor under the proposal would expose the sponsor to the credit risk of the underlying assets. This should benefit all parties to the securitization by balancing implementation costs for sponsors utilizing the master trust structure with incentive-alignment benefits for investors.

3. Definition of Qualified Residential Mortgages

Section 15G requires the Commission, along with the other Agencies, to jointly specify underwriting standards for QRMs that take into consideration underwriting and product features that historical loan performance data indicate result in lower risk of default. Section 15G exempts ABS entirely backed by QRMs from the risk retention mandated by Section 15G. In defining QRMs, the Agencies examined data on mortgage performance supplied by Lender Processing Services' ("LPS") Applied Analytics division (formerly McDash Analytics). To minimize performance differences arising from unobservable changes across products, and to focus on loan performance through stressful environments, the analysis generally used prime fixed-rate loans originated from 2005 to 2008. Since the LPS data do not include detailed borrower information, the Agencies also analyzed data from the triennial Survey of Consumer Finances ("SCF") for the 1992–2007 period. To isolate the borrower characteristics closest in time to the mortgage origination, the analysis was limited to the approximately 1,500 families, who purchased their homes in the year prior to or of the survey. The Agencies also examined a combined data set of loans purchased or securitized by the Enterprises from 1997 to 2009. This data set consisted of more than 78 million mortgages, and included data on loan products and terms, borrower characteristics (e.g., income and credit score), and performance data through the third quarter of 2010.

The analysis of the data described above and the conclusions of numerous academic studies support a definition of QRM that takes into account the following underwriting and product features: the borrower's ability to repay the mortgage (as captured the borrower's debt-to-income ratio); the borrower's credit history; the borrower's down payment amount and sources; the loan-to-value ratio for the loan; the form of valuation used in underwriting the loan; the type of mortgage involved; and the owner-occupancy status of the property securing the mortgage.[236] The Commission believes that selecting this subset of features will be beneficial to loan originators, because these are the features typically considered in the mortgage underwriting process. Although there might be factors among those listed above that loan originators had not previously used in their lending decisions, the Commission believes that this is unlikely. Thus, the Commission expects that loan originators would not have to incur significant new or additional costs to collect information on these specific underwriting and product features, which should have the effect of not unnecessarily disrupting existing lending practices. As a result,

[236] *See* Demyanyk, Yuliya, and Otto Van Hemert, "Understanding the Subprime Crisis," Working paper. St. Louis, Missouri: Federal Reserve Bank of St. Louis (2008); Quercia, Roberto, Michael Stegman, and Walter R. Davis, "Residential Mortgage Default: A Review of the Literature," *Journal of Housing Research* 3(2): 341–379 (2005); Ambrose, Brent W., Michael LaCour-Little, and Zsuzsa Huszar, "A Note on Hybrid Mortgages," *Real Estate Economics* 33(4): 765–782 (2005); Anderson, Dennis Capozza and Robert Van Order, "Deconstructing the Mortgage Meltdown: A Methodology for Decomposing Underwriting Quality," Social Science Research Network. *http://ssrn.com/abstract=1411782* (2009); Gerardi, Kristopher, Andreas Lehnert, Shane Sherlund, and Paul Willen "Making Sense of the Subprime Crisis," Brookings Papers on Economic Activity (Fall 2008), 59–145; Austin Kelly, "Skin in the Game: Zero Down Payment Mortgage Default," Federal Housing Finance Agency, *Journal of Housing Re*search, Vol. 19, No. 2 (2008); Neil Bhutta, Jane Dokko and Hui Shan, "The Depth of Negative Equity and Mortgage Default Decisions," Finance and Economics Discussion Series, Federal Reserve Board, 2010–35 (2010); Deng, Yongheng, John M. Quigley and Robert van Order (2000), "Mortgage Terminations, Heterogeneity and the Exercise of Mortgage Options," *Econometrica,* Vol. 68, No. 2 (2000), pp. 275–307.

the Commission expects that mortgage rates would not be adversely impacted by the Agencies' choice of the features used to define QRMs and therefore this choice would not have a negative effect on efficiency and capital formation.

The Agencies also have sought to make the standards applicable to QRMs transparent to, and verifiable by, originators, securitizers, investors and supervisors. The Commission believes that investors will also benefit from the proposed approach to defining QRMs using the above subset of mortgage features, since these include the factors most commonly considered by the market as determinants of loan quality and expected mortgage default. Therefore, investors will likely be familiar with them, which will have the effect of facilitating investors' interpretation and understanding of the QRM standard as proposed.

When considering the underwriting and product features to be used in the QRM definition, the Agencies selected features that are transparent or verifiable. The Commission believes that this will benefit all entities involved in the securitization process. Loan originators will be able to easily discern whether a mortgage is a QRM during the underwriting process. Sponsors will be able to unambiguously determine whether an ABS is backed by QRMs alone and therefore qualifies for the risk retention exemption. And finally, investors will be able to assess without difficulty whether they are investing in a QRM ABS or not. Thus, the Commission expects that as a result of the transparency and verifiability of the mortgage features used to define QRMs, there will be no reduction in efficiency or impediment to capital formation.

Some of the QRM standards proposed by the Agencies rely on definitions and calculations which may be defined in multiple ways. To provide clarity, the Agencies are proposing the use of definitions of key terms as established in the U.S. Department of Housing and Urban Development (HUD) Handbook 4155.1 (New Version), Mortgage Credit Analysis for Mortgage Insurance, as in effect on December 31, 2010. Since the HUD definitions have been time-tested and are well understood by the market, the Commission believes this approach will be efficient and beneficial to both investors and sponsors. On the other hand, loan originators and sponsors who have been using alternative definitions might incur adjustment costs, if they have to modify their loan origination systems and processes. These new lending costs might be passed onto borrowers in the form of higher mortgage rates or fees, thus impeding capital formation.

The QRM standards that the Agencies are proposing prescribe fixed thresholds for several borrower and loan features. For instance, a QRM cannot have a front-end debt-to-income ratio higher than 28 percent or a loan-to-value ratio higher than 80 percent. The thresholds chosen in the proposed rule reflect a balance between setting standards that are over- or under-conservative with regard to mortgage default risk. If the Agencies had been more conservative in their choices of thresholds such that fewer mortgages were QRMs, more sponsors would have incurred compliance costs for risk retention for non-QRMs. These additional costs would likely be passed on to borrowers whose loans comprise the securitized pool, which would have the effect of increasing mortgage rates for a larger proportion of home buyers. On the other hand, QRM standards that are more restrictive and that result in more non-QRMs would likely create a larger and therefore more liquid secondary market for non-QRMs, and thus reduce the liquidity premium for non-QRM ABS. The reduced liquidity premium, which would decrease non-QRM rates, might counteract the possible increase in non-QRM rates resulting from risk retention compliance costs.

The opposite would also have been true. If the Agencies had been less conservative in their choices of thresholds such that a larger fraction of mortgages would have qualified as QRMs, then non-QRMs might face illiquidity in the secondary market. However, fewer borrowers would have had to face increased mortgage rates resulting from compliance costs for risk retention.

4. Risk Retention Allocation for Non-QRMs and Non-QAs

Many securitization transactions are brought to the market by aggregators who purchase assets from one or many originators, combine these assets in a pool, and then issue securities backed by the assets to investors. This securitization chain allows for the possibility of implementing risk retention at either the originator or the sponsor level. Risk retention imposed directly on originators may be more effective in improving underwriting standards than if imposed on sponsors. On the other hand, many of the risk retention forms discussed earlier would be unfeasible to implement due to the complexity introduced by the two-stage nature of a securitization by an aggregator. Nonetheless, the Agencies believe that the imposition of risk retention on sponsors should still have the effect of improving underwriting standards. Sponsors would have strong incentives to monitor the lending practices of originators and consider these practices when acquiring pool assets. This likely will align originators' interests with those of sponsors, whose interests would now be aligned with those of investors through risk retention.

The proposed rules allow sponsors to allocate some of their risk retention responsibilities to originators, which would provide additional flexibility in complying with the requirements. However, the proposed rules do not allow the allocation of risk to an originator contributing a small share of assets to the securitized pool. Thus, the proposed allocation of risk retention is likely to benefit small loan originators by not allowing sponsors to pass onto them their own risk retention costs.

The Agencies are also proposing to allow risk retention allocation to a third-party purchaser in the securitization of commercial real estate loans. It has been a common market practice for a third-party purchaser to retain the first-loss position in commercial mortgage-backed transactions. This third-party buyer, also known as "B-piece buyer," is typically involved in the securitization early on and thus can significantly affect pool asset selection. The B-piece buyer reviews the loans and corresponding mortgage properties, and may ask for loans to be removed from the pool if underwriting issues are uncovered. Thus, the Agencies' decision to allow a B-piece buyer to meet a sponsor's risk retention obligations under Section 15G of the Exchange Act, will likely benefit both sponsors and investors. It accommodates existing market practices, thus minimizing sponsors' compliance costs while aligning the interests of investors with those of parties performing due diligence on the pool assets. In this way, the proposal should provide incentives for good underwriting and origination practices. Since a sponsor's risk retention obligation can be met by a B-piece buyer only under certain conditions described earlier, these conditions may increase B-piece buyers' cost of participating in CMBS transactions. B-piece buyers may be able to pass these costs to borrowers with an adverse effect on capital formation. However, the Commission preliminary believes that the conditions help ensure that the B-piece buyer's risk retention is consistent with the intent of Section 15G and would benefit investors, and ultimately facilitating capital formation.

As noted earlier, the B-piece buyer in CMBS transactions often acts in the

capacity of a special servicer, which can create conflicts of interest between the B-piece buyer and senior tranche holders. To mitigate these conflicts of interest, the Agencies are proposing to have an operating adviser oversee the servicing activities of the B-piece buyer when the B-piece buyer acts in a capacity of a special servicer. While such a requirement would increase compliance costs, it should have the benefit of minimizing B-piece buyers' ability to manipulate cash flows through special servicing and by limiting B-piece buyers' ability to offset the consequences of poor underwriting through special servicing. In addition, it should incentivize B-piece buyers to avoid adding into the pool poorly underwritten or originated assets. This would be consistent with the purpose of Section 15G and would benefit investors, thus facilitating capital formation.

The Agencies are proposing yet another option for risk retention allocation, which is specifically designed for asset-backed commercial paper ("ABCP") conduits. This option takes into account the special structures through which this type of ABS is typically issued, as well as the manner in which exposure to the credit risk of the underlying assets is typically retained.

Although the proposal would allow the originator-sellers (rather than the sponsor) to retain the required eligible horizontal residual interest, the proposal also imposes certain obligations directly on the sponsor in recognition of the key role the sponsor plays in organizing and operating an eligible ABCP conduit. Most importantly, the proposal provides that the sponsor of an eligible ABCP conduit that issues ABCP in reliance on this option would be the securitization party ultimately responsible for compliance with the risk retention requirements of Section 15G of the Exchange Act. The proposal allows for an ABCP sponsor to be in compliance if each originator-seller retains a five-percent horizontal residual interest in each intermediate SPV established by or on behalf of that originator-seller for purposes of issuing interests to an eligible ABCP conduit. Since eligible ABCP conduits also provide full liquidity guarantees to commercial-paper investors by regulated liquidity providers, the flexibility allowed by the proposed rule benefits ABCP sponsors by allowing them to avoid costly duplicative risk retention and should have the effect of promoting capital formation in this important segment of the securitization market.

Further, the proposed rule avoids an outcome in which one originator-seller would have to be exposed to risks underwritten by other originator-sellers. Each originator-seller would be required to retain credit exposure only to its own receivables, thus properly aligning its incentives with those of ABCP investors.

5. Hedging Prohibitions

Hedging helps sponsors manage and mitigate their exposure to unwanted risks. For example, a securitizer may want to mitigate the interest rate risk of its ABS portfolio. Hedging is also a beneficial activity from a systemic risk perspective because it helps market participants redistribute risk. Given the benefits from hedging, the proposed rule aims to implement the risk retention mandate of Section 15G without unduly limiting a sponsor's risk management activities. This is accomplished by prohibiting hedging only to the extent that hedging would result in a sponsor no longer being exposed to the risk required to be retained by Section 15G of the Exchange Act.

The ability to hedge interest rate risk and similar risks increases economic efficiency and facilitates capital formation, because it allows securitizers to direct their capital and efforts towards activities of comparative advantage. For instance, a securitizer might have a superior ability of assessing the credit risk of residential mortgages, but be less skilled in forecasting interest-rate changes. Such a securitizer might find it more efficient to hedge the interest-rate risk of the residential mortgages collateralizing an RMBS rather than invest resources in improving its ability to understand and price this interest-rate risk. Furthermore, since interest-rate fluctuations are unrelated to underwriting deficiencies in the loan origination process, allowing a securitizer to hedge interest-rate risk will not compromise the incentive alignment contemplated by the Act. The ability to hedge also may help competition, because by hedging less diversified companies may be able to compete with more diversified companies that have weaker hedging incentives. Therefore, the proposed rules are designed to promote efficiency, competition and capital formation.

6. Treatment of Government-Sponsored Enterprises

The proposed rules, which allows the guarantees of Fannie Mae and Freddie Mac to satisfy the risk retention requirements while they are operating under the conservatorship or receivership of FHFA with capital support from the United States, as well as for any limited-life regulated entity succeeding to the charter and also operating with such capital support, avoid unnecessary costs to be incurred by sponsors until the statutory and regulatory framework for the Enterprises becomes clearer. The Commission believes that the capital support provided by the United States government makes additional risk retention unnecessary because as a result of the support investors in GSE ABS are not exposed to any credit losses. Thus, there would be no incremental benefit to be gained by requiring GSEs to retain risk.

7. Resecuritization Transactions

The Agencies have identified certain resecuritizations where duplicative risk retention requirements would provide no added benefit. Resecuritizations collateralized only by existing 15G-compliant ABS and financed through the issuance of a single class of securities so that all principal and interest payments received are evenly distributed to all security holders, are a unique category of resecuritizations. For them, the resecuritization process would neither increase nor reallocate the credit risk of the underlying ABS. Therefore, there would be no cost to investors from incentive misalignment with the securitizing sponsor. Furthermore, because this type of resecuritization may be used to aggregate 15G-compliant ABS backed by small asset pools, the exemption for this type of resecuritization could improve access to credit at reasonable terms to consumers and businesses by allowing for the creation of an additional investment vehicle for these smaller asset pools. The exemption would allow the creation of ABS that may be backed by more geographically diverse pools than those that can be achieved by the pooling of individual assets as part of the issuance of the underlying 15G-compliant ABS. Again, this will likely improve access to credit on reasonable terms.

Under the proposed rule, sponsors of resecuritizations that do not have the structure described above would not be exempted from risk retention. Resecuritization transactions, which re-tranche the credit risk of the underlying ABS, would be subject to risk retention requirements in addition to the risk retention requirement imposed on the underlying ABS. In such transactions, there is the possibility of incentive misalignment between investors and sponsors just as when structuring the underlying ABS. For such

resecuritizations, the proposed rule seeks to ensure that this misalignment is addressed by not granting these resecuritizations with an exemption from risk retention. However, the proposed rules may have an adverse impact on capital formation and efficiency if they make some types of resecuritization transactions costlier or infeasible to conduct as a result of risk retention costs.

D. Executive Order 12866 Determination

The Office of Management and Budget (OMB) reviewed this proposed rule as it relates to programs and activities of the Department of Housing and Urban Development (HUD) under Executive Order 12866 (entitled "Regulatory Planning and Review"), and determined the rule as it relates to HUD to be an economically significant regulatory action, as provided in section 3(f)(1) of the Order. The docket file is available for public inspection in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276 Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at 202–402–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Information Relay Service at 800–877–8339.

E. OCC Unfunded Mandates Reform Act of 1995 Determination

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million (adjusted for inflation) or more in any one year. The current inflation-adjusted expenditure threshold is $126.4 million. If a budgetary impact statement is required, section 205 of the UMRA also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.

Based on current and historical supervisory data on national bank securitization activity, the OCC estimates that, pursuant to the proposed rule, national banks would be required to retain approximately $2.8 billion of credit risk, after taking into consideration the proposed exemptions for qualified residential mortgages and other qualified assets. The cost of retaining this risk amount has two components. The first is the loss of origination and servicing fees on the reduced amount of origination activity necessitated by the need to hold the $2.8 billion retention amount on the bank's balance sheet. Typical origination fees are 1 percent and typical servicing fees are another half of a percentage point. To capture any additional lost fees, the OCC conservatively estimated that the total cost of lost fees to be two percent of the retained amount, or approximately $56 million. The second component of the retention cost is the opportunity cost of earning the return on these retained assets versus the return that the bank would earn if these funds were put to other use. Because of the variety of assets and returns on the securitized assets, the OCC assumes that this interest opportunity cost nets to zero. In addition to the cost of retaining the assets under the proposed rule, the overall cost of the proposed rule includes the administrative costs associated with implementing the rule and providing required disclosures. The OCC estimates that implementation and disclosure will require approximately 480 hours per institution, or at $100 per hour, approximately $48,000 per institution. The OCC estimates that the rule will apply to approximately 25 national banking organizations. Thus, the estimate of the total administrative cost of the proposed rule is approximately $1.2 million. Thus, the estimated total cost of the proposed rule applied to ABS is $57.2 million.

The OCC has determined that its portion of the final rules will not result in expenditures by State, local, and tribal governments, or by the private sector, of $126.4 million or more. Accordingly, the OCC has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

F. Commission: Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA,"[237] the Commission solicits data to determine whether the proposal constitutes a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

We request comment on the potential impact of the proposal on the U.S. economy on an annual basis, any potential increase in costs or prices for consumers or individual industries, and any potential effect on competition, investment or innovation. Commenters are requested to provide empirical data and other factual support for their views if possible.

G. FHFA: Considerations of Differences Between the Federal Home Loan Banks and the Enterprises

Section 1313 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 requires the Director of FHFA, when promulgating regulations relating to the Federal Home Loan Banks (Banks), to consider the following differences between the Banks and the Enterprises (Fannie Mae and Freddie Mac): cooperative ownership structure; mission of providing liquidity to members; affordable housing and community development mission; capital structure; and joint and several liability.[238] The Director also may consider any other differences that are deemed appropriate. In preparing the portions of this proposed rule over which FHFA has joint rulemaking authority, the Director considered the differences between the Banks and the Enterprises as they relate to the above factors. FHFA requests comments from the public about whether differences related to these factors should result in any revisions to the proposal.

Text of the Proposed Common Rules (All Agencies)

The text of the proposed common rules appears below:

Part ____—Credit Risk Retention

Subpart A—Authority, Purpose, Scope and Definitions

Sec.

____.1 [Reserved]
____.2 Definitions.

Subpart B—Credit Risk Retention

____.3 Base risk retention requirement.
____.4 Vertical risk retention.
____.5 Horizontal risk retention.
____.6 L-Shaped risk retention.
____.7 Revolving asset master trusts.
____.8 Representative sample.
____.9 Eligible ABCP conduits.
____.10 Commercial mortgage-backed securities.

[237] 5 U.S.C. 603.

[238] *See* 12 U.S.C. 4513.

____.11 Federal National Mortgage Association and Federal Home Loan Mortgage Corporation ABS.
____.12 Premium capture cash reserve account.

Subpart C—Transfer of Risk Retention

____.13 Allocation of risk retention to an originator.
____.14 Hedging, transfer and financing prohibitions.

Subpart D—Exceptions and Exemptions

____.15 Exemption for qualified residential mortgages.
____.16 Definitions applicable to qualifying commercial loans, commercial mortgages, and auto loans.
____.17 Exceptions for qualifying commercial loans, commercial mortgages, and auto loans.
____.18 Underwriting standards for qualifying commercial loans.
____.19 Underwriting standards for qualifying CRE loans.
____.20 Underwriting standards for qualifying auto loans.
____.21 General exemptions.
____.22 Safe harbor for certain foreign-related transactions.
____.23 Additional exemptions.
Appendix A to Part ___— Additional QRM Standards; Standards for Determining Acceptable Sources of Borrower Funds, Borrower's Monthly Gross Income, Monthly Housing Debt, and Total Monthly Debt

Subpart A—Authority, Purpose, Scope and Definitions

§ ____.1 [Reserved]

§ ____.2 Definitions.

For purposes of this part, the following definitions apply:

ABCP means asset-backed commercial paper that has a maturity at the time of issuance not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

ABS interest:

(1) Includes any type of interest or obligation issued by an issuing entity, whether or not in certificated form, including a security, obligation, beneficial interest or residual interest, payments on which are primarily dependent on the cash flows of the collateral owned or held by the issuing entity; and

(2) Does not include common or preferred stock, limited liability interests, partnership interests, trust certificates, or similar interests that:

(i) Are issued primarily to evidence ownership of the issuing entity; and

(ii) The payments, if any, on which are not primarily dependent on the cash flows of the collateral held by the issuing entity.

Affiliate. An *affiliate* of, or a person *affiliated* with, a specified person means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

Appropriate Federal banking agency has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

Asset means a self-liquidating financial asset (including but not limited to a loan, lease, mortgage, or receivable).

Asset-backed security has the same meaning as in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)).

Collateral with respect to any issuance of ABS interests means the assets or other property that provide the cash flow (including cash flow from the foreclosure or sale of the assets or property) for the ABS interests irrespective of the legal structure of issuance, including security interests in assets or other property of the issuing entity, fractional undivided property interests in the assets or other property of the issuing entity, or any other property interest in such assets or other property.

Collateralize. Assets or other property *collateralize* an issuance of ABS interests if the assets or property serve as collateral for such issuance.

Commercial real estate loan has the same meaning as in § _.16 of this part.

Commission means the Securities and Exchange Commission.

Consolidated affiliate means, with respect to a sponsor, an entity (other than the issuing entity) the financial statements of which are consolidated with those of:

(1) The sponsor under applicable accounting standards; or

(2) Another entity the financial statements of which are consolidated with those of the sponsor under applicable accounting standards.

Control including the terms "controlling," "controlled by" and "under common control with"

(1) Means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

(2) Without limiting the foregoing, a person shall be considered to control a company if the person:

(i) Owns, controls or holds with power to vote 25 percent or more of any class of voting securities of the company; or

(ii) Controls in any manner the election of a majority of the directors, trustees or persons performing similar functions of the company.

Credit risk means:

(1) The risk of loss that could result from the failure of the borrower in the case of a securitized asset, or the issuing entity in the case of an ABS interest in the issuing entity, to make required payments of principal or interest on the asset or ABS interest on a timely basis;

(2) The risk of loss that could result from bankruptcy, insolvency, or a similar proceeding with respect to the borrower or issuing entity, as appropriate; or

(3) The effect that significant changes in the underlying credit quality of the asset or ABS interest may have on the market value of the asset or ABS interest.

Depositor means:

(1) The person that receives or purchases and transfers or sells the securitized assets to the issuing entity;

(2) The sponsor, in the case of a securitization transaction where there is not an intermediate transfer of the assets from the sponsor to the issuing entity; or

(3) The person that receives or purchases and transfers or sells the securitized assets to the issuing entity in the case of a securitization transaction where the person transferring or selling the securitized assets directly to the issuing entity is itself a trust.

Eligible ABCP conduit means an issuing entity that issues ABCP *provided that:*

(1) The issuing entity is bankruptcy remote or otherwise isolated for insolvency purposes from the sponsor of the issuing entity and from any intermediate SPV;

(2) The interests issued by an intermediate SPV to the issuing entity are collateralized solely by the assets originated by a single originator-seller;

(3) All of the interests issued by an intermediate SPV are transferred to one or more ABCP conduits or retained by the originator-seller; and

(4) A regulated liquidity provider has entered into a legally binding commitment to provide 100 percent liquidity coverage (in the form of a lending facility, an asset purchase agreement, a repurchase agreement, or other similar arrangement) to all the ABCP issued by the issuing entity by lending to, or purchasing assets from, the issuing entity in the event that funds are required to repay maturing ABCP issued by the issuing entity.

Eligible horizontal residual interest means, with respect to any securitization transaction, an ABS interest in the issuing entity that:

(1) Is allocated all losses on the securitized assets (other than losses that are first absorbed through the release of funds from a premium capture cash reserve account, if such an account is required to be established under § __.12 of this part) until the par value of such ABS interest is reduced to zero;

(2) Has the most subordinated claim to payments of both principal and interest by the issuing entity; and

(3) Until all other ABS interests in the issuing entity are paid in full, is not entitled to receive any payments of principal made on a securitized asset, *provided, however,* an eligible horizontal residual interest may receive its current proportionate share of scheduled payments of principal received on the securitized assets in accordance with the transaction documents.

Federal banking agencies means the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation.

Intermediate SPV means, with respect to an originator-seller, a special purpose vehicle that:

(1) Is bankruptcy remote or otherwise isolated for insolvency purposes from the originator-seller;

(2) Purchases assets from the originator-seller; and

(3) Issues interests collateralized by such assets to one or more ABCP conduits.

Issuing entity means, with respect to a securitization transaction, the trust or other entity:

(1) That is created at the direction of the sponsor;

(2) That owns or holds the pool of assets to be securitized; and

(3) In whose name the asset-backed securities are issued.

Originator means a person who:

(1) Through an extension of credit or otherwise, creates an asset that collateralizes an asset-backed security; and

(2) Sells the asset directly or indirectly to a securitizer.

Originator-seller means an entity that creates assets through one or more extensions of credit and sells those assets (and no other assets) to an intermediate SPV, which in turn sells interests collateralized by those assets to one or more ABCP conduits.

Regulated liquidity provider means:

(1) A depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813));

(2) A bank holding company (as defined in 12 U.S.C. 1841), or a subsidiary thereof;

(3) A savings and loan holding company (as defined in 12 U.S.C. 1467a), provided all or substantially all of the holding company's activities are permissible for a financial holding company under 12 U.S.C. 1843(k), or a subsidiary thereof; or

(4) A foreign bank whose home country supervisor (as defined in § 211.21 of the Federal Reserve Board's Regulation K (12 CFR 211.21)) has adopted capital standards consistent with the Capital Accord of the Basel Committee on Banking Supervision, as amended, and that is subject to such standards, or a subsidiary thereof.

Retaining sponsor means, with respect to a securitization transaction, the sponsor that has retained or caused to be retained an economic interest in the credit risk of the securitized assets pursuant to subpart B of this part.

Revolving asset master trust means an issuing entity that is:

(1) A master trust; and

(2) Established to issue more than one series of asset-backed securities all of which are collateralized by a single pool of revolving securitized assets that are expected to change in composition over time.

Securitization transaction means a transaction involving the offer and sale of asset-backed securities by an issuing entity.

Securitized asset means an asset that:

(1) Is transferred, sold, or conveyed to an issuing entity; and

(2) Collateralizes the ABS interests issued by the issuing entity.

Securitizer with respect to a securitization transaction shall mean either:

(1) The depositor of the asset-backed securities; or

(2) A sponsor of the asset-backed securities.

Seller's interest means an ABS interest:

(1) In all of the assets that:

(i) Are owned or held by the issuing entity; and

(ii) Do not collateralize any other ABS interests issued by the issuing entity;

(2) That is pari passu with all other ABS interests issued by the issuing entity with respect to the allocation of all payments and losses prior to an early amortization event (as defined in the transaction documents); and

(3) That adjusts for fluctuations in the outstanding principal balances of the securitized assets.

Servicer means any person responsible for the management or collection of the securitized assets or making allocations or distributions to holders of the ABS interests, but does not include a trustee for the issuing entity or the asset-backed securities that makes allocations or distributions to holders of the ABS interests if the trustee receives such allocations or distributions from a servicer and the trustee does not otherwise perform the functions of a servicer.

Sponsor means a person who organizes and initiates a securitization transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity.

U.S. person:

(1) Means—

(i) Any natural person resident in the United States;

(ii) Any partnership, corporation, limited liability company, or other organization or entity organized or incorporated under the laws of the United States;

(iii) Any estate of which any executor or administrator is a U.S. person;

(iv) Any trust of which any trustee is a U.S. person;

(v) Any agency or branch of a foreign entity located in the United States;

(vi) Any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a U.S. person;

(vii) Any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated, or (if an individual) resident in the United States; and

(viii) Any partnership, corporation, limited liability company, or other organization or entity if:

(A) Organized or incorporated under the laws of any foreign jurisdiction; and

(B) Formed by a U.S. person principally for the purpose of investing in securities not registered under the Act.

(2) Does not include—

(i) Any discretionary account or similar account (other than an estate or trust) held for the benefit or account of a non-U.S. person by a dealer or other professional fiduciary organized, incorporated, or (if an individual) resident in the United States;

(ii) Any estate of which any professional fiduciary acting as executor or administrator is a U.S. person if:

(A) An executor or administrator of the estate who is not a U.S. person has sole or shared investment discretion with respect to the assets of the estate; and

(B) The estate is governed by foreign law;

(iii) Any trust of which any professional fiduciary acting as trustee is a U.S. person, if a trustee who is not a U.S. person has sole or shared investment discretion with respect to

the trust assets, and no beneficiary of the trust (and no settlor if the trust is revocable) is a U.S. person;

(iv) An employee benefit plan established and administered in accordance with the law of a country other than the United States and customary practices and documentation of such country;

(v) Any agency or branch of a U.S. person located outside the United States if:

(A) The agency or branch operates for valid business reasons; and

(B) The agency or branch is engaged in the business of insurance or banking and is subject to substantive insurance or banking regulation, respectively, in the jurisdiction where located;

(vi) The International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies, affiliates and pension plans, and any other similar international organizations, their agencies, affiliates and pension plans.

(3) For purposes of the definition of a U.S. person, the term *United States* means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

Subpart B—Credit Risk Retention

§ __.3 Base risk retention requirement.

(a) *Base risk retention requirement.* Except as otherwise provided in this part, the sponsor of a securitization transaction shall retain an economic interest in the credit risk of the securitized assets in accordance with any one of § __.4 through § __.11 of this part.

(b) *Multiple sponsors.* If there is more than one sponsor of a securitization transaction, it shall be the responsibility of each sponsor to ensure that at least one of the sponsors of the securitization transaction retains an economic interest in the credit risk of the securitized assets in accordance with any one of § __.4 through § __.11 of this part.

§ __.4 Vertical risk retention.

(a) *In general.* At the closing of the securitization transaction, the sponsor retains not less than five percent of each class of ABS interests in the issuing entity issued as part of the securitization transaction.

(b) *Disclosures.* A sponsor utilizing this section shall provide, or cause to be provided, to potential investors a reasonable period of time prior to the sale of the asset-backed securities in the securitization transaction and, upon request, to the Commission and to its appropriate Federal banking agency, if any, the following disclosure in written form under the caption "Credit Risk Retention":

(1) The amount (expressed as a percentage and dollar amount) of each class of ABS interests in the issuing entity that the sponsor will retain (or did retain) at the closing of the securitization transaction and the amount (expressed as a percentage and dollar amount) of each class of ABS interests in the issuing entity that the sponsor is required to retain under this section; and

(2) The material assumptions and methodology used in determining the aggregate dollar amount of ABS interests issued by the issuing entity in the securitization transaction, including those pertaining to any estimated cash flows and the discount rate used.

§ __.5 Horizontal risk retention.

(a) *General requirement.* At the closing of the securitization transaction, the sponsor retains an eligible horizontal residual interest in an amount that is equal to at least five percent of the par value of all ABS interests in the issuing entity issued as part of the securitization transaction.

(b) *Option to hold base amount in horizontal cash reserve account.* In lieu of retaining an eligible horizontal residual interest in the amount required by paragraph (a) of this section, the sponsor may, at closing of the securitization transaction, cause to be established and funded, in cash, a horizontal cash reserve account in the amount specified in paragraph (a), *provided that* the account meets all of the following conditions:

(1) The account is held by the trustee (or person performing similar functions) in the name and for the benefit of the issuing entity;

(2) Amounts in the account are invested only in:

(i) United States Treasury securities with maturities of 1 year or less; or

(ii) Deposits in one or more insured depository institutions (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)) that are fully insured by federal deposit insurance; and

(3) Until all ABS interests in the issuing entity are paid in full or the issuing entity is dissolved:

(i) Amounts in the account shall be released to satisfy payments on ABS interests in the issuing entity on any payment date on which the issuing entity has insufficient funds from any source (including any premium capture cash reserve account established pursuant to § __.12 of this part) to satisfy an amount due on any ABS interest; and

(ii) No other amounts may be withdrawn or distributed from the account except that:

(A) Amounts in the account may be released to the sponsor or any other person due to the receipt by the issuing entity of scheduled payments of principal on the securitized assets, *provided that,* the issuing entity distributes such payments of principal in accordance with the transaction documents and the amount released from the account on any date does not exceed the product of:

(*1*) The amount of scheduled payments of principal received by the issuing entity and for which the release is being made; and

(*2*) The ratio of the current balance in the horizontal cash reserve account to the aggregate remaining principal balance of all ABS interests in the issuing entity; and

(B) Interest on investments made in accordance with paragraph (b)(2) may be released once received by the account.

(c) *Disclosures.* A sponsor utilizing this section shall provide, or cause to be provided, to potential investors a reasonable period of time prior to the sale of the asset-backed securities in the securitization transaction and, upon request, to the Commission and its appropriate Federal banking agency, if any, the following disclosure in written form under the caption "Credit Risk Retention":

(1) If the sponsor retains risk through an eligible horizontal residual interest:

(i) The amount (expressed as a percentage and dollar amount) of the eligible horizontal residual interest the sponsor will retain (or did retain) at the closing of the securitization transaction, and the amount (expressed as a percentage and dollar amount) of the eligible horizontal residual interest that the sponsor is required to retain under this section; and

(ii) A description of the material terms of the eligible horizontal residual interest to be retained by the sponsor;

(2) If the sponsor retains risk through the funding of a horizontal cash reserve account:

(i) The dollar amount to be placed (or placed) by the sponsor in the horizontal cash reserve account and the dollar amount the sponsor is required to place in such an account pursuant to this section; and

(ii) A description of the material terms of the horizontal cash reserve account; and

(3) The material assumptions and methodology used in determining the aggregate dollar amount of ABS interests issued by the issuing entity in the securitization transaction, including those pertaining to any estimated cash flows and the discount rate used.

§ __.6 L-Shaped risk retention.

(a) *General requirement.* At the closing of the securitization transaction, the sponsor:

(1) Retains not less than 2.5 percent of each class of ABS interests in the issuing entity issued as part of the securitization transaction; and

(2) Retains an eligible horizontal residual interest in the issuing entity, or establishes and funds in cash a horizontal cash reserve account that meets all of the requirements of § __.5(b) of this part, in an amount that in either case is equal to at least 2.564 percent of the par value of all ABS interests in the issuing entity issued as part of the securitization transaction other than any portion of such ABS interests that the sponsor is required to retain pursuant to paragraph (a)(1) of this section.

(b) *Disclosure requirements.* A sponsor utilizing this section shall comply with all of the disclosure requirements set forth in § __.4(b) and § __.5(c) of this part.

§ __.7 Revolving asset master trusts.

(a) *General requirement.* At the closing of the securitization transaction and until all ABS interests in the issuing entity are paid in full, the sponsor retains a seller's interest of not less than five percent of the unpaid principal balance of all the assets owned or held by the issuing entity *provided that:*

(1) The issuing entity is a revolving asset master trust; and

(2) All of the securitized assets are loans or other extensions of credit that arise under revolving accounts.

(b) *Disclosures.* A sponsor utilizing this section shall provide, or cause to be provided, to potential investors a reasonable period of time prior to the sale of the asset-backed securities in the securitization transaction and, upon request, to the Commission and its appropriate Federal banking agency, if any, the following disclosure in written form under the caption "Credit Risk Retention":

(1) The amount (expressed as a percentage and dollar amount) of the seller's interest that the sponsor will retain (or did retain) at the closing of the securitization transaction and the amount (expressed as a percentage and dollar amount) that the sponsor is required to retain pursuant to this section;

(2) A description of the material terms of the seller's interest; and

(3) The material assumptions and methodology used in determining the aggregate dollar amount of ABS interests issued by the issuing entity in the securitization transaction, including those pertaining to any estimated cash flows and the discount rate used.

§ __.8 Representative sample.

(a) *In general.* At the closing of the securitization transaction, the sponsor retains ownership of a representative sample of the pool of assets that are designated for securitization in the securitization transaction and draws from such pool all of the securitized assets for the securitization transaction, *provided that:*

(1) At the time of issuance of asset-backed securities by the issuing entity, the unpaid principal balance of the assets comprising the representative sample retained by the sponsor is equal to at least 5.264 percent of the unpaid principal balance of all the securitized assets in the securitization transaction; and

(2) The sponsor complies with paragraphs (b) through (g) of this section.

(b) *Construction of representative sample*—(1) *Designated pool.* Prior to the sale of the asset-backed securities as part of the securitization transaction, the sponsor identifies a designated pool (the "designated pool") of assets:

(i) That consists of a minimum of 1000 separate assets;

(ii) From which the securitized assets and the assets comprising the representative sample are exclusively drawn; and

(iii) That contains no assets other than those described in paragraph (b)(1)(ii) of this section.

(2) *Random selection from designated pool.* (i) Prior to the sale of the asset-backed securities as part of the securitization transaction, the sponsor selects from the assets that comprise the designated pool a sample of such assets using a random selection process that does not take account of any characteristic of the assets other than the unpaid principal balance of the assets.

(ii) The unpaid principal balance of the assets selected through the random selection process described in paragraph (b)(2)(i) of this section must represent at least 5 percent of the aggregate unpaid principal balance of all the assets that comprise the designated pool.

(3) *Equivalent risk determination.* Prior to the sale of the asset-backed securities as part of the securitization transaction, the sponsor determines, using a statistically valid methodology, that for each material characteristic of the assets in the designated pool, including the average unpaid principal balance of all the assets, that the mean of any quantitative characteristic, and the proportion of any characteristic that is categorical in nature, of the sample of assets randomly selected from the designated pool pursuant to paragraph (b)(2) of this section is within a 95 percent two-tailed confidence interval of the mean or proportion, respectively, of the same characteristic of the assets in the designated pool.

(c) *Sponsor policies, procedures and documentation.* (1) The sponsor has in place, and adheres to, policies and procedures for:

(i) Identifying and documenting the material characteristics of assets included in the designated pool;

(ii) Selecting assets randomly in accordance with paragraph (b)(2) of this section;

(iii) Testing the randomly-selected sample of assets for compliance with paragraph (b)(3) of this section;

(iv) Maintaining, until all ABS interests are paid in full, documentation that clearly identifies the assets included in the representative sample established under paragraphs (b)(2) and (3) of this section; and

(v) Prohibiting, until all ABS interests are paid in full, assets in the representative sample from being included in the designated pool of any other securitization transaction.

(2) The sponsor maintains documentation that clearly identifies the assets in the representative sample established under paragraphs (b)(2) and (3) of this section.

(d) *Agreed upon procedures report.* (1) Prior to the sale of the asset-backed securities as part of the securitization transaction, the sponsor has obtained an agreed upon procedures report that satisfies the requirements of paragraph (d)(2) of this section from an independent public accounting firm.

(2) The independent public accounting firm providing the agreed upon procedures report required by paragraph (d)(1) of this section must at a minimum report on whether the sponsor has:

(i) Policies and procedures that require the sponsor to identify and document the material characteristics of assets included in a designated pool of assets that meets the requirements of paragraph (b)(1) of this section;

(ii) Policies and procedures that require the sponsor to select assets randomly in accordance with paragraph (b)(2) of this section;

(iii) Policies and procedures that require the sponsor to test the randomly-selected sample of assets in accordance with paragraph (b)(3) of this section;

(iv) Policies and procedures that require the sponsor to maintain, until all ABS interests are paid in full, documentation that identifies the assets in the representative sample established under paragraphs (b)(2) and (3) of this section; and

(v) Policies and procedures that require the sponsor to prohibit, until all ABS interests are paid in full, assets in the representative sample from being included in the designated pool of any other securitization transaction.

(e) *Servicing.* Until such time as all ABS interests in the issuing entity have been fully paid or the issuing entity has been dissolved:

(1) Servicing of the assets included in the representative sample must be conducted by the same entity and under the same contractual standards as the servicing of the securitized assets; and

(2) The individuals responsible for servicing the assets included in the representative sample or the securitized assets must not be able to determine whether an asset is owned or held by the sponsor or owned or held by the issuing entity.

(f) *Sale, hedging or pledging prohibited.* Until such time as all ABS interests in the issuing entity have been fully paid or the issuing entity has been dissolved, the sponsor:

(1) Shall comply with the restrictions in § __.14 of this part with respect to the assets in the representative sample;

(2) Shall not remove any assets from the representative sample; and

(3) Shall not cause or permit any assets in the representative sample to be included in any designated pool or representative sample established in connection with any other issuance of asset-backed securities.

(g) *Disclosures*—(1) *Disclosure prior to sale.* A sponsor utilizing this section shall provide, or cause to be provided, to potential investors a reasonable period of time prior to the sale of the asset-backed securities as part of the securitization transaction and, upon request, to the Commission and its appropriate Federal banking agency, if any, the following disclosure with respect to the securitization transaction in written form under the caption "Credit Risk Retention":

(i) The amount (expressed as a percentage of the designated pool and dollar amount) of assets included in the representative sample and to be retained (or retained) by the sponsor, and the amount (expressed as a percentage of the designated pool and dollar amount) of assets required to be included in the representative sample and retained by the sponsor pursuant to this section;

(ii) A description of the material characteristics of the designated pool, including, but not limited to, the average unpaid principal balance of all the assets, the means of the quantitative characteristics and the proportions of categorical characteristics of the assets, appropriate introductory and explanatory information to introduce the characteristics, the methodology used in determining or calculating the characteristics, and any terms or abbreviations used;

(iii) A description of the policies and procedures that the sponsor used for ensuring that the process for identifying the representative sample complies with paragraph (b)(2) of this section and that the representative sample has equivalent material characteristics as required by paragraph (b)(3) of this section;

(iv) Confirmation that an agreed upon procedures report was obtained pursuant to paragraph (d) of this section; and

(v) The material assumptions and methodology used in determining the aggregate dollar amount of ABS interests issued by the issuing entity in the securitization transaction, including those pertaining to any estimated cash flows and the discount rate used.

(2) *Disclosure after sale.* A sponsor utilizing this section shall provide, or cause to be provided, to the holders of the asset-backed securities issued as part of the securitization transaction and, upon request, provide, or cause to be provided, to the Commission and its appropriate Federal banking agency, if any, at the end of each distribution period, as specified in the governing documents for such asset-backed securities, a comparison of the performance of the pool of securitized assets included in the securitization transaction for the related distribution period with the performance of the assets in the representative sample for the related distribution period.

(3) *Conforming disclosure of representative sample.* A sponsor utilizing this section shall provide, or cause to be provided, to holders of the asset-backed securities issued as part of the securitization transaction and, upon request, provide to the Commission and its appropriate Federal banking agency, if any, disclosure concerning the assets in the representative sample in the same form, level, and manner as it provides, pursuant to rule or otherwise, concerning the securitized assets.

§ __.9 Eligible ABCP conduits.

(a) *In general.* A sponsor satisfies the risk retention requirement of § __.3 of this part with respect to the issuance of ABCP by an eligible ABCP conduit in a securitization transaction if:

(1) Each originator-seller of the ABCP conduit:

(i) Retains an eligible horizontal residual interest in each intermediate SPV established by or on behalf of that originator-seller for purposes of issuing interests collateralized by assets of such intermediate SPV to the eligible ABCP conduit in the same form, amount, and manner as would be required under § __.5(a) of this part if the originator-seller was the only sponsor of the intermediate SPV; and

(ii) Complies with the provisions of § __.14 of this part with respect to the eligible horizontal residual interest retained pursuant to paragraph (a)(1)(i) of this section as if it were a retaining sponsor with respect to such interest;

(2) The sponsor:

(i) Establishes the eligible ABCP conduit;

(ii) Approves each originator-seller permitted to sell or transfer assets, indirectly through an intermediate SPV, to the eligible ABCP conduit;

(iii) Establishes criteria governing the assets that the originator-sellers referred to in paragraph (a)(2)(ii) of this section are permitted to sell or transfer to an intermediate SPV;

(iv) Approves all interests in an intermediate SPV to be purchased by the eligible ABCP conduit;

(v) Administers the eligible ABCP conduit by monitoring the interests in any intermediate SPV acquired by the conduit and the assets collateralizing those interests, arranging for debt placement, compiling monthly reports, and ensuring compliance with the conduit documents and with the conduit's credit and investment policy; and

(vi) Maintains and adheres to policies and procedures for ensuring that the conditions in this paragraph (a) have been met.

(b) *Disclosures.* A sponsor utilizing this section shall provide, or cause to be provided, to potential investors a reasonable period of time prior to the sale of any ABCP by the eligible ABCP conduit as part of the securitization transaction and, upon request, to the Commission and its appropriate Federal banking agency, if any, in written form under the caption "Credit Risk Retention", the name and form of organization of:

(1) Each originator-seller that will retain (or has retained) an eligible

horizontal residual interest in the securitization transaction pursuant to this section, including a description of the form, amount (expressed as a percentage and as a dollar amount), and nature of such interest; and

(2) Each regulated liquidity provider that provides liquidity support to the eligible ABCP conduit, including a description of the form, amount, and nature of such liquidity coverage.

(c) *Duty to comply.*

(1) The retaining sponsor shall be responsible for compliance with this section.

(2) A retaining sponsor relying on this section:

(i) Shall maintain and adhere to policies and procedures that are reasonably designed to monitor compliance by each originator-seller of the eligible ABCP conduit with the requirements of paragraph (a)(1) of this section; and

(ii) In the event that the sponsor determines that an originator-seller no longer complies with the requirements of paragraph (a)(1) of this section, shall promptly notify the holders of the ABS interests issued in the securitization transaction of such noncompliance by such originator-seller.

§ __.10 Commercial mortgage-backed securities.

(a) *Third-Party Purchaser.* A sponsor satisfies the risk retention requirements of § __.3 of this part with respect to a securitization transaction if a third party purchases an eligible horizontal residual interest in the issuing entity in the same form, amount, and manner as would be required of the sponsor under § __.5(a) of this part and all of the following conditions are met:

(1) *Composition of collateral.* At the closing of the securitization transaction, at least 95 percent of the total unpaid principal balance of the securitized assets in the securitization transaction are commercial real estate loans.

(2) *Source of funds.* The third-party purchaser:

(i) Pays for the eligible horizontal residual interest in cash at the closing of the securitization transaction; and

(ii) Does not obtain financing, directly or indirectly, for the purchase of such interest from any other person that is a party to the securitization transaction (including, but not limited to, the sponsor, depositor, or an unaffiliated servicer), other than a person that is a party to the transaction solely by reason of being an investor.

(3) *Third-party review.* The third-party purchaser conducts a review of the credit risk of each securitized asset prior to the sale of the asset-backed securities in the securitization transaction that includes, at a minimum, a review of the underwriting standards, collateral, and expected cash flows of each commercial real estate loan that is collateral for the asset-backed securities.

(4) *Affiliation and control rights.* (i) Except as provided in paragraphs (a)(4)(ii) or (iii) of this section:

(A) The third-party purchaser is not affiliated with any party to the securitization transaction (including, but not limited to, the sponsor, depositor, or servicer) other than investors in the securitization transaction; and

(B) The third-party purchaser or an affiliate of such third-party purchaser does not have control rights in connection with the securitization transaction (including, but not limited to, acting as a servicer for the securitized assets) that are not collectively shared with all other investors in the securitization.

(ii) Notwithstanding paragraph (a)(4)(i)(A) of this section, the third-party purchaser may be affiliated with one or more originators of the securitized assets so long as the assets originated by the affiliated originator or originators collectively comprise less than 10 percent of the unpaid principal balance of the securitized assets included in the securitization transaction at closing of the securitization transaction.

(iii) Paragraph (a)(4)(i) of this section shall not prevent the third-party purchaser from acting as, or being an affiliate of, a servicer for any of the securitized assets, and having such controls rights that are related to such servicing, if the underlying securitization transaction documents provide for the following:

(A) The appointment of an operating advisor (the "Operating Advisor") that:

(*1*) Is not affiliated with other parties to the securitization transaction;

(*2*) Does not directly or indirectly have any financial interest in the securitization transaction other than in fees from its role as Operating Advisor; and

(*3*) Is required to act in the best interest of, and for the benefit of, investors as a collective whole.

(B) Any servicer for the securitized assets that is, or is affiliated with, the third-party purchaser must consult with the Operating Advisor in connection with, and prior to, any major decision in connection with the servicing of the securitized assets, including, without limitation:

(*1*) Any material modification of, or waiver with respect to, any provision of a loan agreement (including a mortgage, deed of trust, or other security agreement);

(*2*) Foreclosure upon or comparable conversion of the ownership of a property; or

(*3*) Any acquisition of a property.

(C) The Operating Advisor shall be responsible for reviewing the actions of any servicer that is, or is affiliated with, the third-party purchaser and for issuing a report to investors and the issuing entity on a periodic basis concerning:

(*1*) Whether the Operating Advisor believes, in its sole discretion exercised in good faith, that such servicer is operating in compliance with any standard required of the servicer as provided in the applicable transaction documents; and

(*2*) What, if any, standard(s) the Operating Advisor believes, in its sole discretion exercised in good faith, with which such servicer has failed to comply;

(D) The Operating Advisor shall have the authority to recommend that a servicer that is, or is affiliated with, a third-party purchaser be replaced by a successor servicer if the Operating Advisor determines, in its sole discretion exercised in good faith, that:

(*1*) The servicer that is, or is affiliated with, the third-party purchaser has failed to comply with a standard required of the servicer as provided in the transaction documents; and

(*2*) Such replacement would be in the best interest of the investors as a collective whole; and

(E) If a recommendation described in paragraph (a)(4)(iii)(D) of this section is made, the servicer that is, or is affiliated with, the third-party purchaser must be replaced unless a majority of each class of ABS interests in the issuing entity eligible to vote on the matter votes to retain the servicer.

(5) *Disclosures.* The sponsor provides, or causes to be provided, to potential investors a reasonable period of time prior to the sale of the asset-backed securities as part of the securitization transaction and, upon request, to the Commission and its appropriate Federal banking agency, if any, the following disclosure in written form, and, with respect to paragraphs (a)(5)(i) through (vii) of this section, under the caption "Credit Risk Retention":

(i) The name and form of organization of the third-party purchaser;

(ii) A description of the third-party purchaser's experience in investing in commercial mortgage-backed securities;

(iii) Any other information regarding the third-party purchaser or the third-party purchaser's retention of the eligible horizontal residual interest that is material to investors in light of the

circumstances of the particular securitization transaction;

(iv) A description of the amount (expressed as a percentage and dollar amount) of the eligible horizontal residual interest that will be retained (or was retained) by the third-party purchaser, as well as the amount of the purchase price paid by the third-party purchaser for such interest;

(v) The amount (expressed as a percentage and dollar amount) of the eligible horizontal residual interest in the securitization transaction that the sponsor would have been required to retain pursuant to § __.5(a) of this part if the sponsor had relied on such section to meet the requirements of § __.3 of this part with respect to the transaction;

(vi) A description of the material terms of the eligible residual horizontal interest retained by the third-party purchaser;

(vii) The material assumptions and methodology used in determining the aggregate amount of ABS interests issued by the issuing entity in the securitization transaction, including those pertaining to any estimated cash flows and the discount rate used; and

(viii) The representations and warranties concerning the securitized assets, a schedule of any securitized assets that are determined do not comply with such representations and warranties, and what factors were used to make the determination that such securitized assets should be included in the pool notwithstanding that the securitized assets did not comply with such representations and warranties, such as compensating factors or a determination that the exceptions were not material.

(6) *Hedging, transfer and pledging.* The third-party purchaser complies with the hedging and other restrictions in § __.14 of this part as if it were the retaining sponsor with respect to the securitization transaction and had acquired the eligible horizontal residual interest pursuant to § __.5 of this part.

(b) *Duty to comply.* (1) The retaining sponsor shall be responsible for compliance with this section.

(2) A retaining sponsor relying on this section:

(i) Shall maintain and adhere to policies and procedures to monitor the third-party purchaser's compliance with the requirements in paragraph (a) of this section (other than paragraphs (a)(1) and (a)(5)); and

(ii) In the event that the sponsor determines that the third-party purchaser no longer complies with any of the requirements of paragraph (a) of this section (other than paragraphs (a)(1) and (a)(5)), shall promptly notify, or cause to be notified, the holders of the ABS interests issued in the securitization transaction of such noncompliance by the third-party purchaser.

§ __.11 Federal National Mortgage Association and Federal Home Loan Mortgage Corporation ABS.

(a) *In general.* The sponsor fully guarantees the timely payment of principal and interest on all ABS interests issued by the issuing entity in the securitization transaction and is:

(1) The Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation operating under the conservatorship or receivership of the Federal Housing Finance Agency pursuant to section 1367 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617) with capital support from the United States; or

(2) Any limited-life regulated entity succeeding to the charter of either the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation pursuant to section 1367(i) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617(i)), provided that the entity is operating with capital support from the United States.

(b) *Certain provisions not applicable.* The provisions of § __.12 and § __.14(b), (c), and (d) of this part shall not apply to a sponsor described in paragraph (a)(1) or (2) of this section, its affiliates, or the issuing entity with respect to a securitization transaction for which the sponsor has retained credit risk in accordance with the requirements of this section.

(c) *Disclosure.* A sponsor utilizing this section shall provide to investors, in written form under the caption "Credit Risk Retention" and, upon request, to the Federal Housing Finance Agency and the Commission, a description of the manner in which it has met the credit risk retention requirements of this part.

§ __.12 Premium capture cash reserve account.

(a) *When creation of a premium capture cash reserve account is required and calculation of amount.* In addition to the economic interest in the credit risk that a retaining sponsor is required to retain, or cause to be retained under § __.3 of this part, the retaining sponsor shall, at closing of the securitization transaction, cause to be established and funded, in cash, a premium capture cash reserve account (as defined in paragraph (b) of this section) in an amount equal to the difference, if a positive amount, between:

(1) The gross proceeds, net of closing costs paid by the sponsor(s) or issuing entity to unaffiliated parties, received by the issuing entity from the sale of ABS interests in the issuing entity to persons other than the retaining sponsor; and

(2)(i) If the retaining sponsor has relied on § __.4, § __.5, § __.6, or § __.7 of this part with respect to the securitization transaction, 95 percent of the par value of all ABS interests in the issuing entity issued as part of the securitization transaction; or

(ii) If the retaining sponsor has relied on § __.8, § __.9, or § __.10 of this part with respect to the securitization transaction, 100 percent of the par value of all ABS interests in the issuing entity issued as part of the securitization transaction.

(b) *Operation of premium capture cash reserve account.* For purposes of this section, a premium capture cash reserve account means an account that meets all of the following conditions:

(1) The account is held by the trustee (or person performing similar functions) in the name and for the benefit of the issuing entity;

(2) Amounts in the account may be invested only in:

(i) United States Treasury securities with maturities of 1 year or less; and

(ii) Deposits in one or more insured depository institutions (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)) that are fully insured by federal deposit insurance; and

(3) Until all ABS interests in the issuing entity are paid in full or the issuing entity is dissolved, no funds may be withdrawn or distributed from the account except as follows:

(i) Amounts in the account shall be released to satisfy payments on ABS interests in the issuing entity on any payment date on which the issuing entity has insufficient funds to satisfy an amount due on an ABS interest prior to the allocation of any losses to:

(A) An eligible horizontal residual interest held pursuant to § __.5, § __.6, § __.9, § __.10, or § __.13 of this part, if any; or

(B) If an eligible horizontal residual interest in the issuing entity is not held pursuant to § __.5, § __.6, § __.9, § __.10, or § __.13 of this part, the class of ABS interests in the issuing entity that:

(*1*) Is allocated losses before other classes; or

(*2*) If the contractual terms of the securitization transaction do not provide for the allocation of losses by class, the class of ABS interests that has the most subordinate claim to payment

of principal or interest by the issuing entity; and

(ii) Interest on investments made in accordance with paragraph (b)(2) of this section may be released to any person once received by the account.

(c) *Calculation of gross proceeds received by issuing entity*—(1) *Anti-evasion provision for certain resales and senior excess spread tranches.* For purposes of paragraph (a)(1) of this section, the gross proceeds received by the issuing entity from the sale of ABS interests to persons other than the retaining sponsor shall include the par value, or if an ABS interest does not have a par value, the fair value, of any ABS interest in the issuing entity that is directly or indirectly transferred to the retaining sponsor in connection with the closing of the securitization transaction and that:

(i) The retaining sponsor does not intend to hold to maturity; or

(ii) Represents a contractual right to receive some or all of the interest and no more than a minimal amount of principal payments received by the issuing entity and that has priority of payment of interest (or principal, if any) senior to the most subordinated class of ABS interests in the issuing entity, *provided, however,* this paragraph (c)(1)(ii) shall not apply to any ABS interest that:

(A) Does not have a par value;

(B) Is held by a sponsor that is relying on § __.4 or § __.6 of this part with respect to the securitization transaction; and

(C) The sponsor is required to retain pursuant to § __.4 or § __.6(a)(1) of this part.

(d) *Disclosures.* A sponsor that is required to establish and fund a premium capture cash reserve account pursuant to this section shall provide, or cause to be provided, to potential investors a reasonable period of time prior to the sale of the asset-backed securities as part of the securitization transaction and, upon request, to the Commission and its appropriate Federal banking agency, if any, the following disclosure in written form under the caption "Credit Risk Retention":

(1) The dollar amount required to be placed in the account pursuant to this section and any other amounts the sponsor will place (or has placed) in the account in connection with the securitization transaction; and

(2) The material assumptions and methodology used in determining the fair value of any ABS interest in the issuing entity that does not have a par value and that was used in calculating the amount required for the premium capture cash reserve account pursuant to paragraph (c) of this section.

Subpart C—Transfer of Risk Retention

§ __.13 Allocation of risk retention to an originator

(a) *In general.* A sponsor choosing to retain a portion of each class of ABS interests in the issuing entity under the vertical risk retention option in § __.4 of this part or an eligible horizontal residual interest pursuant to § __.5(a) of this part with respect to a securitization transaction may offset the amount of its risk retention requirements under § __.4 or § __.5(a) of this part, as applicable, by the amount of the ABS interests or eligible horizontal residual interest, respectively, acquired by an originator of one or more of the securitized assets if:

(1) *Amount of retention.* At the closing of the securitization transaction:

(i) The originator acquires and retains the ABS interests or eligible horizontal residual interest from the sponsor in the same manner as would have been retained by the sponsor under § __.4 or § __.5(a) of this part, as applicable;

(ii) The ratio of the dollar amount of ABS interests or eligible horizontal residual interest acquired and retained by the originator to the total dollar amount of ABS interests or eligible horizontal residual interest otherwise required to be retained by the sponsor pursuant to § __.4 or § __.5(a) of this part, as applicable, does not exceed the ratio of:

(A) The unpaid principal balance of all the securitized assets originated by the originator; to

(B) The unpaid principal balance of all the securitized assets in the securitization transaction;

(iii) The originator acquires and retains at least 20 percent of the aggregate risk retention amount otherwise required to be retained by the sponsor pursuant to § __.4 or § __.5(a) of this part, as applicable; and

(iv) The originator purchases the ABS interests or eligible horizontal residual interest from the sponsor at a price that is equal, on a dollar-for-dollar basis, to the amount by which the sponsor's required risk retention is reduced in accordance with this section, by payment to the sponsor in the form of:

(A) Cash; or

(B) A reduction in the price received by the originator from the sponsor or depositor for the assets sold by the originator to the sponsor or depositor for inclusion in the pool of securitized assets.

(2) *Disclosures.* In addition to the disclosures required pursuant to § __.4(b) or § __.5(c) of this part, the sponsor provides, or causes to be provided, to potential investors a reasonable period of time prior to the sale of the asset-backed securities as part of the securitization transaction and, upon request, to the Commission and its appropriate Federal banking agency, if any, in written form under the caption "Credit Risk Retention", the name and form of organization of any originator that will acquire and retain (or has acquired and retained) an interest in the transaction pursuant to this section, including a description of the form, amount (expressed as a percentage and dollar amount), and nature of the interest, as well as the method of payment for such interest under paragraph (a)(1)(iv).

(3) *Hedging, transferring and pledging.* The originator complies with the hedging and other restrictions in § __.14 of this part with respect to the interests retained by the originator pursuant to this section as if it were the retaining sponsor and was required to retain the interest under subpart B of this part.

(b) *Duty to comply.* (1) The retaining sponsor shall be responsible for compliance with this section.

(2) A retaining sponsor relying on this section:

(i) Shall maintain and adhere to policies and procedures that are reasonably designed to monitor the compliance by each originator that is allocated a portion of the sponsor's risk retention obligations with the requirements in paragraphs (a)(1) and (a)(3) of this section; and

(ii) In the event the sponsor determines that any such originator no longer complies with any of the requirements in paragraphs (a)(1) and (a)(3) of this section, shall promptly notify, or cause to be notified, the holders of the ABS interests issued in the securitization transaction of such noncompliance by such originator.

§ __.14. Hedging, transfer and financing prohibitions.

(a) *Transfer.* A retaining sponsor may not sell or otherwise transfer any interest or assets that the sponsor is required to retain pursuant to subpart B of this part to any person other than an entity that is and remains a consolidated affiliate.

(b) *Prohibited hedging by sponsor and affiliates.* A retaining sponsor and its consolidated affiliates may not purchase or sell a security, or other financial instrument, or enter into an agreement, derivative or other position, with any other person if:

(1) Payments on the security or other financial instrument or under the agreement, derivative, or position are materially related to the credit risk of one or more particular ABS interests, assets, or securitized assets that the retaining sponsor is required to retain with respect to a securitization transaction pursuant to subpart B of this part or one or more of the particular securitized assets that collateralize the asset-backed securities issued in the securitization transaction; and

(2) The security, instrument, agreement, derivative, or position in any way reduces or limits the financial exposure of the sponsor to the credit risk of one or more of the particular ABS interests, assets, or securitized assets that the retaining sponsor is required to retain with respect to a securitization transaction pursuant to subpart B of this part or one or more of the particular securitized assets that collateralize the asset-backed securities issued in the securitization transaction.

(c) *Prohibited hedging by issuing entity.* The issuing entity in a securitization transaction may not purchase or sell a security or other financial instrument, or enter into an agreement, derivative or position, with any other person if:

(1) Payments on the security or other financial instrument or under the agreement, derivative or position are materially related to the credit risk of one or more particular interests, assets, or securitized assets that the retaining sponsor for the transaction is required to retain with respect to the securitization transaction pursuant to subpart B of this part; and

(2) The security, instrument, agreement, derivative, or position in any way reduces or limits the financial exposure of the retaining sponsor to the credit risk of one or more of the particular interests or assets that the sponsor is required to retain pursuant to subpart B of this part.

(d) *Permitted hedging activities.* The following activities shall not be considered prohibited hedging activities by a retaining sponsor, a consolidated affiliate or an issuing entity under paragraph (b) or (c) of this section:

(1) Hedging the interest rate risk (which does not include the specific interest rate risk, known as spread risk, associated with the ABS interest that is otherwise considered part of the credit risk) or foreign exchange risk arising from one or more of the particular ABS interests, assets, or securitized assets required to be retained by the sponsor under subpart B of this part or one or more of the particular securitized assets that underlie the asset-backed securities issued in the securitization transaction; or

(2) Purchasing or selling a security or other financial instrument or entering into an agreement, derivative, or other position with any third party where payments on the security or other financial instrument or under the agreement, derivative, or position are based, directly or indirectly, on an index of instruments that includes asset-backed securities if:

(i) Any class of ABS interests in the issuing entity that were issued in connection with the securitization transaction and that are included in the index represents no more than 10 percent of the dollar-weighted average of all instruments included in the index; and

(ii) All classes of ABS interests in all issuing entities that were issued in connection with any securitization transaction in which the sponsor was required to retain an interest pursuant to subpart B of this part and that are included in the index represent, in the aggregate, no more than 20 percent of the dollar-weighted average of all instruments included in the index.

(e) *Prohibited non-recourse financing.* Neither a retaining sponsor nor any of its consolidated affiliates may pledge as collateral for any obligation (including a loan, repurchase agreement, or other financing transaction) any interest or asset that the sponsor is required to retain with respect to a securitization transaction pursuant to subpart B of this part unless such obligation is with full recourse to the sponsor or consolidated affiliate, respectively.

Subpart D—Exceptions and Exemptions

§ ___.15 Exemption for qualified residential mortgages.

(a) *Definitions.* For purposes of this section, the following definitions shall apply:

Borrower includes any co-borrower, unless the context otherwise requires.

Borrower funds means funds:

(1) Derived from one or more sources identified as acceptable sources of funds in the Additional QRM Standards Appendix to this part; and

(2) That are verified in accordance with the requirements set forth in the Additional QRM Standards Appendix to this part.

Cash-out refinancing means a refinancing transaction in a principal amount that exceeds the sum of the amount used to:

(1) Fully repay the balance outstanding on the borrower's existing first-lien mortgage that is secured by the one-to-four family property being refinanced;

(2) Fully repay the balance outstanding as of the date of the mortgage transaction on any subordinate-lien mortgage that was used in its entirety to purchase such one-to-four family property;

(3) Pay closing or settlement charges required to be included on the related HUD–1 or HUD–1A Settlement Statement or a successor form in accordance with 24 CFR Part 3500 or a successor regulation; and

(4) Disburse up to $500 of cash to the borrower or any other payee.

Closed-end credit means any consumer credit extended by a creditor other than open-end credit.

Combined loan-to-value ratio means, with respect to a first-lien refinancing transaction on a one-to-four family property, the ratio (expressed as a percentage) of:

(1) The sum of:

(i) The principal amount of the first-lien mortgage transaction at the closing of the transaction;

(ii) The unpaid principal amount of any other closed-end credit transaction that to the creditor's knowledge would exist at the closing of the refinancing transaction and that is or would be secured by the same one-to-four family property; and

(iii) The face amount (as if fully drawn) of any open-end credit transaction that to the creditor's knowledge would exist at the closing of the refinancing transaction and that is or would be secured by the same one-to-four family property; to

(2) The estimated market value of the one-to-four family property as determined by a qualifying appraisal.

Consumer credit means credit offered or extended to a borrower primarily for personal, family, or household purposes.

Consumer reporting agency that compiles and maintains files on consumers on a nationwide basis has the same meaning as in 15 U.S.C. 1681a(p).

Creditor has the same meaning as in 15 U.S.C. 1602(f).

Currently performing means the borrower in the mortgage transaction is not currently thirty (30) days past due, in whole or in part, on the mortgage transaction.

Loan-to-value ratio means, with respect to a mortgage transaction to purchase a one-to-four family property, the ratio (expressed as a percentage) of:

(1) The principal amount of the first-lien mortgage transaction at the closing of the mortgage transaction; to

(2) The lesser of:

(i) The estimated market value of the one-to-four family property as

determined by a qualifying appraisal; and

(ii) The purchase price of the one-to-four family property to be paid in connection with the mortgage transaction.

Mortgage originator has the same meaning as in 15 U.S.C. 1602(cc)(2) and the regulations issued thereunder.

Mortgage transaction means a closed-end credit transaction to purchase or refinance a one-to-four family property at least one unit of which is the borrower's principal dwelling.

One-to-four family property means real property that is held in fee simple, on leasehold under a lease for not less than 99 years which is renewable, or under a lease having a period of not less than 10 years to run beyond the maturity date of the mortgage and that is improved by a residential structure that contains one to four units, including but not limited to:

(1) An individual condominium;

(2) An individual cooperative unit; or

(3) An individual manufactured home that is constructed in conformance with the National Manufactured Home Construction and Safety Standards, as evidenced by a certification label affixed to the exterior of the home, and that is erected on or that otherwise is affixed to a foundation in accordance with requirements established by the Federal Housing Administration.

Open-end credit means any consumer credit extended by a creditor under a plan in which:

(1) The creditor reasonably contemplates repeated consumer credit transactions;

(2) The creditor may impose a finance charge from time to time on an outstanding unpaid balance; and

(3) The amount of credit that may be extended to the borrower during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.

Points and fees means:

(1) All items considered to be a finance charge under 12 CFR 226.4(a) and 226.4(b), except:

(i) Interest or the time-price differential; and

(ii) Items excluded from the finance charge under 12 CFR 226.4(c), 226.4(d) and 226.4(e), unless included in paragraphs (2) through (5) of this definition;

(2) All compensation paid directly or indirectly by the borrower or creditor to a mortgage originator, including a mortgage originator that is also the creditor in a table-funded transaction;

(3) All items (other than amounts held for future payment of taxes) listed in 12 CFR 226.4(c)(7) unless:

(i) The charge is bona fide and reasonable;

(ii) The creditor and mortgage originator receive no direct or indirect compensation in connection with the charge; and

(iii) The charge is not paid to an affiliate of the creditor or mortgage originator;

(4) Premiums or other charges payable at or before closing for any credit life, credit disability, credit unemployment, or credit property insurance, or any other accident, loss-of-income, life or health insurance, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract; and

(5) If the mortgage transaction refinances a previous loan made or currently held by the same creditor or an affiliate of the same creditor, all prepayment fees or penalties that are incurred by the consumer in connection with the payment of the previous loan.

Prepayment penalty means a penalty imposed solely because the mortgage obligation is prepaid in full or in part. For purposes of this definition, a prepayment penalty does not include, for example, fees imposed for preparing and providing documents in connection with prepayment, such as a loan payoff statement, a reconveyance, or other document releasing the creditor's security interest in the one-to-four family property securing the loan.

Principal dwelling means a one-to-four family property, or unit thereof, that is occupied or will be occupied by at least one borrower as a principal residence. For purposes of this definition, a borrower can only have one principal dwelling at a time; however, if a borrower buys a new dwelling that will become the borrower's principal dwelling within a year or upon the completion of construction, the new dwelling is considered the principal dwelling for purposes of applying this definition to a credit transaction to purchase the new dwelling.

Qualifying appraisal means an appraisal that meets the requirements of § __.15(d)(11) of this part.

Rate and term refinancing means a refinancing transaction that is not a cash-out refinancing.

Refinancing transaction means:

(1) A closed-end credit transaction secured by a one-to-four family property that is entered into by the borrower that satisfies and replaces an existing credit transaction that was entered into by the same borrower and that is secured by the same one-to-four family property; or

(2) A closed-end credit transaction secured by the borrower's principal dwelling on which there are no existing liens.

Reverse mortgage means a nonrecourse consumer credit transaction in which:

(1) A mortgage, deed of trust, or equivalent consensual security interest securing one or more advances is created in the borrower's principal dwelling; and

(2) Any principal, interest, or shared appreciation or equity is due and payable (other than in the case of default) only after:

(i) The borrower dies;

(ii) The dwelling is transferred; or

(iii) The borrower ceases to occupy the one-to-four family property as a principal dwelling.

Total loan amount means the amount financed, as determined according to 12 CFR 226.18(b), less any cost listed in paragraphs (3), (4) and (5) of the definition of "points of fees" that is both included in the definition of points and fees and financed by the creditor.

(b) *Exemption.* A sponsor shall be exempt from the risk retention requirements in subpart B of this part with respect to any securitization transaction, if:

(1) All of the securitized assets that collateralize the asset-backed securities are qualified residential mortgages;

(2) None of the securitized assets that collateralize the asset-backed securities are other asset-backed securities;

(3) At the closing of the securitization transaction, each qualified residential mortgage collateralizing the asset-backed securities is currently performing; and

(4)(i) The depositor of the asset-backed security certifies that it has evaluated the effectiveness of its internal supervisory controls with respect to the process for ensuring that all assets that collateralize the asset-backed security are qualified residential mortgages and has concluded that its internal supervisory controls are effective;

(ii) The evaluation of the effectiveness of the depositor's internal supervisory controls referenced in paragraph (b)(4)(i) of this section shall be performed, for each issuance of an asset-backed security in reliance on this section, as of a date within 60 days of the cut-off date or similar date for establishing the composition of the asset pool collateralizing such asset-backed security; and

(iii) The sponsor provides, or causes to be provided, a copy of the certification described in paragraph (b)(4)(i) of this section to potential investors a reasonable period of time prior to the sale of asset-backed

securities in the issuing entity, and, upon request, to the Commission and its appropriate Federal banking agency, if any.

(c) *Qualified residential mortgage.* The term "qualified residential mortgage" means a closed-end credit transaction to purchase or refinance a one-to-four family property at least one unit of which is the principal dwelling of a borrower that:

(1) Meets all of the criteria in paragraph (d) of this section; and

(2) Is not:

(i) Made to finance the initial construction of a dwelling;

(ii) A reverse mortgage;

(iii) A temporary or "bridge" loan with a term of twelve months or less, such as a loan to purchase a new dwelling where the borrower plans to sell a current dwelling within twelve months; or

(iv) A timeshare plan described in 11 U.S.C. 101(53D).

(d) *Eligibility criteria*—(1) *First-lien required.* The mortgage transaction is secured by a first lien:

(i) On the one-to-four family property to be purchased or refinanced; and

(ii) That is perfected in accordance with applicable law.

(2) *Subordinate liens.* If the mortgage transaction is to purchase a one-to-four family property, no other recorded or perfected liens on the one-to-four family property would exist, to the creditor's knowledge at the time of the closing of the mortgage transaction, upon the closing of that transaction.

(3) *Original maturity.* At the closing of the mortgage transaction, the maturity date of the mortgage transaction does not exceed 30 years.

(4) *Written Application.* The borrower completed and submitted to the creditor a written application for the mortgage transaction that, as supplemented or amended prior to closing, includes an acknowledgement by the borrower that the information provided in the application is true and correct as of the date executed by the borrower and that any intentional or negligent misrepresentation of the information provided in the application may result in civil liability and/or criminal penalties under 18 U.S.C. 1001.

(5) *Credit history*—(i) *In general.* The creditor has verified and documented that within ninety (90) days prior to the closing of the mortgage transaction:

(A) The borrower is not currently 30 days or more past due, in whole or in part, on any debt obligation;

(B) Within the previous twenty-four (24) months, the borrower has not been 60 days or more past due, in whole or in part, on any debt obligation; and

(C) Within the previous thirty-six (36) months:

(*1*) The borrower has not been a debtor in a case commenced under Chapter 7, Chapter 12, or Chapter 13 of Title 11, United States Code, or been the subject of any Federal or State judicial judgment for the collection of any unpaid debt;

(*2*) The borrower has not had any personal property repossessed; and

(*3*) No one-to-four family property owned by the borrower has been the subject of any foreclosure, deed-in-lieu of foreclosure, or short sale.

(ii) *Safe harbor.* A creditor will be deemed to have met the requirements of paragraph (d)(5)(i) of this section if:

(A) The creditor, no more than 90 days before the closing of the mortgage transaction, obtains a credit report regarding the borrower from at least two consumer reporting agencies that compile and maintain files on consumers on a nationwide basis;

(B) Based on the information in such credit reports, the borrower meets all of the requirements of paragraph (d)(5)(i) of this section, and no information in a credit report subsequently obtained by the creditor before the closing of the mortgage transaction contains contrary information; and

(C) The creditor maintains copies of such credit reports in the loan file for the mortgage transaction.

(6) *Payment terms.* Based on the terms of the mortgage transaction at the closing of the transaction:

(i) The regularly scheduled principal and interest payments on the mortgage transaction:

(A) Would not result in an increase of the principal balance of the mortgage transaction; and

(B) Do not allow the borrower to defer payment of interest or repayment of principal;

(ii) No scheduled payment of principal and interest would be more than twice as large as any earlier scheduled payment of principal and interest;

(iii) If the rate of interest applicable to the mortgage transaction may increase after the closing of the mortgage transaction, any such increase may not exceed:

(A) 2 percent (200 basis points) in any twelve month period; and

(B) 6 percent (600 basis points) over the life of the mortgage transaction; and

(iv) The mortgage transaction does not include or provide for any prepayment penalty.

(7) *Points and fees.* The total points and fees payable by the borrower in connection with the mortgage transaction shall not exceed three percent of the total loan amount.

(8) *Debt-to-income ratios*—(i) *In general.* The creditor has determined that, as of a date that is no more than 60 days prior to the closing of the mortgage transaction, the ratio of:

(A) The borrower's monthly housing debt to the borrower's monthly gross income does not exceed 28 percent; and

(B) The borrower's total monthly debt to the borrower's monthly gross income does not exceed 36 percent.

(ii) *Applicable standards.* For purposes of determining the borrower's compliance with the ratios set forth in paragraph (d)(8)(i) of this section, the creditor shall:

(A) Verify, document, and determine the borrower's monthly gross income in accordance with the effective income standards established in the Additional QRM Standards Appendix to this part; and

(B) Except as provided in paragraph (d)(8)(iii) of this section, verify, document, and determine the borrower's monthly housing debt and total monthly debt in accordance with the standards established in the Additional QRM Standards Appendix to this part.

(iii) *Housing debt.* Notwithstanding paragraph (d)(8)(ii)(B) of this section, for purposes of determining the borrower's compliance with the ratios set forth in paragraph (d)(8)(i) of this section, the creditor shall:

(A) Determine the borrower's monthly periodic payment for principal and interest on the mortgage transaction and, if the mortgage transaction is a refinancing transaction, any other credit transaction (including any open-end credit transaction as if fully drawn) that to the creditor's knowledge would exist at the closing of the refinancing transaction and that would be secured by the one-to-four family property being refinanced, based on:

(*1*) The maximum interest rate that is permitted or required under any feature (including any conversion or other feature that allows a variable interest rate to convert to a fixed interest rate) of the relevant credit transaction documents during the first five years after the date on which the first regular periodic payment will be due; and

(*2*) A payment schedule that fully amortizes the mortgage transaction over the term of the mortgage transaction; and

(B) Include in the borrower's monthly housing debt and total monthly debt the monthly pro rata amount of the following, as applicable, with respect to the one-to-four family property being purchased or refinanced:

(*1*) Real estate taxes;

(*2*) Hazard insurance, flood insurance, mortgage guarantee insurance, and any other required insurance;

(*3*) Homeowners' and condominium association dues;

(*4*) Ground rent or leasehold payments; and

(*5*) Special assessments.

(9) *Loan-to-value ratio*—(i) *Purchase mortgages.* If the mortgage transaction is to purchase a one-to-four family property, at the closing of the mortgage transaction, the loan-to-value ratio of the mortgage transaction does not exceed 80 percent.

(ii) *Rate and term refinancings.* If the mortgage transaction is a rate and term refinancing, at the closing of the mortgage transaction, the combined loan-to-value ratio of the mortgage transaction does not exceed 75 percent.

(iii) *Cash-out refinancings.* If the mortgage transaction is a cash-out refinancing, at the closing of the mortgage transaction, the combined loan-to-value ratio of the mortgage transaction does not exceed 70 percent.

(10) *Down payment.* If the mortgage transaction is for the purchase of a one-to-four family property:

(i) The borrower provides, at closing, a cash down payment in an amount equal to at least the sum of:

(A) The closing costs payable by the borrower in connection with the mortgage transaction;

(B) 20 percent of the lesser of:

(*1*) The estimated market value of the one-to-four family property as determined by a qualifying appraisal; and

(*2*) The purchase price of the one-to-four family property to be paid in connection with the mortgage transaction; and

(C) The difference, if a positive amount, between:

(*1*) The purchase price of the one-to-four family property to be paid in connection with the mortgage transaction; and

(*2*) The estimated market value of the one-to-four family property as determined by a qualifying appraisal;

(ii) The funds used by the borrower to satisfy the down payment required by paragraph (d)(10)(i) of this section:

(A) Must come solely from borrower funds;

(B) May not be subject to any contractual obligation by the borrower to repay; and

(C) May not have been obtained by the borrower from a person or entity with an interest in the sale of the property (other than the borrower); and

(iii) The creditor shall verify and document the borrower's compliance with the conditions set forth in paragraphs (d)(10)(i) and (d)(10)(ii) of this section.

(11) *Appraisal.* The creditor obtained a written appraisal of the property securing the mortgage that was performed not more than 90 days prior to the closing of the mortgage transaction by an appropriately state-certified or state-licensed appraiser that conforms to generally accepted appraisal standards as evidenced by the Uniform Standards of Professional Appraisal Practice (USPAP) promulgated by the Appraisal Standards Board (ASB) of the Appraisal Foundation, the appraisal requirements of the Federal banking agencies, and applicable laws.

(12) *Assumability.* The mortgage transaction is not assumable by any person that was not a borrower under the mortgage transaction at closing.

(13) *Default mitigation.* The mortgage originator—

(i) Includes terms in the mortgage transaction documents under which the creditor commits to have servicing policies and procedures under which the creditor shall—

(A) Mitigate risk of default on the mortgage loan by taking loss mitigation actions, such as loan modification or other loss mitigation alternative, in the event the estimated resulting net present value of such action exceeds the estimated net present value of recovery through foreclosure, without regard to whether the particular action benefits the interests of a particular class of investors in a securitization;

(B) Take into account the borrower's ability to repay and other appropriate underwriting criteria in such loss mitigation actions;

(C) Initiate loss mitigation activities within 90 days after the mortgage loan becomes delinquent (if the delinquency has not been cured);

(D) Implement or maintain servicing compensation arrangements consistent with the obligations under paragraphs (d)(13)(i)(A), (B), and (C) of this section;

(E) Implement procedures for addressing any whole loan owned by the creditor (or any of its affiliates) and secured by a subordinate lien on the same property that secures the first mortgage loan if the borrower becomes more than 90 days past due on the first mortgage loan;

(F) If the first mortgage loan will collateralize any asset-backed securities, disclose or require to be disclosed to potential investors within a reasonable period of time prior to the sale of the asset-backed securities a description of the procedures to be implemented pursuant to paragraph (d)(13)(i)(E) of this section; and

(G) Not sell, transfer or assign servicing rights for the mortgage loan unless the agreement requires the purchaser, transferee or assignee servicer to abide by the default mitigation commitments of the creditor under this paragraph (d)(13)(i) as if the purchaser, transferee or assignee were the creditor under this section.

(ii) Provides disclosure of the foregoing default mitigation commitments to the borrower at or prior to the closing of the mortgage transaction.

(e) *Repurchase of loans subsequently determined to be non-qualified after closing.* A sponsor that has relied on the exemption provided in paragraph (b) of this section with respect to a securitization transaction shall not lose such exemption with respect to such transaction if, after closing of the securitization transaction, it is determined that one or more of the residential mortgage loans collateralizing the asset-backed securities does not meet all of the criteria to be a qualified residential mortgage *provided that:*

(1) The depositor complied with the certification requirement set forth in paragraph (b)(4) of this section;

(2) The sponsor repurchases the loan(s) from the issuing entity at a price at least equal to the remaining aggregate unpaid principal balance and accrued interest on the loan(s) no later than 90 days after the determination that the loans do not satisfy the requirements to be a qualified residential mortgage; and

(3) The sponsor promptly notifies, or causes to be notified, the holders of the asset-backed securities issued in the securitization transaction of any loan(s) included in such securitization transaction that is (or are) required to be repurchased by the sponsor pursuant to paragraph (e)(2) of this section, including the amount of such repurchased loan(s) and the cause for such repurchase.

§ __.16 Definitions applicable to qualifying commercial mortgages, commercial loans, and auto loans.

The following definitions apply for purposes of §§ __.17 through __.20 of this part:

Appraisal Standards Board means the board of the Appraisal Foundation that establishes generally accepted standards for the appraisal profession.

Automobile loan:

(1) Means any loan to an individual to finance the purchase of, and is secured by a first lien on, a passenger car or other passenger vehicle, such as a minivan, van, sport-utility vehicle,

pickup truck, or similar light truck for personal, family, or household use; and

(2) Does not include any:

(i) Loan to finance fleet sales;

(ii) Personal cash loan secured by a previously purchased automobile;

(iii) Loan to finance the purchase of a commercial vehicle or farm equipment that is not used for personal, family, or household purposes;

(iv) Lease financing; or

(v) Loan to finance the purchase of a vehicle with a salvage title.

Combined loan-to-value (CLTV) ratio means, at the time of origination, the sum of the principal balance of a first-lien mortgage loan on the property, plus the principal balance of any junior-lien mortgage loan that, to the creditor's knowledge, would exist at the closing of the transaction and that is secured by the same property, divided by:

(1) For acquisition funding, the lesser of the purchase price or the estimated market value of the real property based on an appraisal that meets the requirements set forth in § __.19(b)(2)(ii) of this part; or

(2) For refinancing, the estimated market value of the real property based on an appraisal that meets the requirements set forth in § __.19(b)(2)(ii) of this part.

Commercial loan means a secured or unsecured loan to a company or an individual for business purposes, other than any:

(1) Loan to purchase or refinance a one-to-four family residential property;

(2) Loan for the purpose of financing agricultural production; or

(3) Loan for which the primary source (fifty (50) percent or more) of repayment is expected to be derived from rents collected from persons or firms that are not affiliates of the borrower.

Commercial real estate (CRE) loan:

(1) Means a loan secured by a property with five or more single family units, or by nonfarm nonresidential real property, the primary source (fifty (50) percent or more) of repayment for which is expected to be derived from:

(i) The proceeds of the sale, refinancing, or permanent financing of the property; or

(ii) Rental income associated with the property other than rental income derived from any affiliate of the borrower; and

(2) Does not include:

(i) A land development and construction loan (including 1- to 4-family residential or commercial construction loans);

(ii) Any other land loan;

(iii) A loan to a real estate investment trusts (REITs); or

(iv) An unsecured loan to a developer.

Debt service coverage (DSC) ratio means:

(1) For qualifying leased CRE loans, qualifying multi-family loans, and other CRE loans, the ratio of:

(i) The annual NOI less the annual replacement reserve of the CRE property at the time of origination of the CRE loans; to

(ii) The sum of the borrower's annual payments for principal and interest on any debt obligation.

(2) For commercial loans, the ratio of:

(i) The borrower's EBITDA as of the most recently completed fiscal year; to

(ii) The sum of the borrower's annual payments for principal and interest on any debt obligation.

Debt to income (DTI) ratio means the ratio of:

(1) The borrower's total debt (for automobile loans), including the monthly amount due on the automobile loan; to

(2) The borrower's monthly income.

Earnings before interest, taxes, depreciation, and amortization (EBITDA) means the annual income of a business before expenses for interest, taxes, depreciation and amortization, as determined in accordance with U.S. Generally Accepted Accounting Principles (GAAP).

Environmental risk assessment means a process for determining whether a property is contaminated or exposed to any condition or substance that could result in contamination that has an adverse effect on the market value of the property or the realization of the collateral value.

First lien means a lien or encumbrance on property that has priority over all other liens or encumbrances on the property.

Junior lien means a lien or encumbrance on property that is lower in priority relative to other liens or encumbrances on the property.

Leverage ratio means the ratio of:

(1) The borrower's total debt (for commercial loans); to

(2) The borrower's EBITDA.

Machinery and equipment (M&E) collateral means collateral for a commercial loan that consists of machinery and equipment that is identifiable by make, model, and serial number.

Model year means the year determined by the manufacturer and reflected on the vehicle's Motor Vehicle Title as part of the vehicle description.

Net operating income (NOI) refers to the income a CRE property generates after all expenses have been deducted for federal income tax purposes, except for depreciation, debt service expenses, and federal and state income taxes, and excluding any unusual and nonrecurring items of income.

New vehicle means any vehicle that:

(1) Is not a used vehicle; and

(2) Has not been previously sold to an end user.

Payment-in-kind (PIK) means payments of principal or accrued interest that are not paid in cash when due, and instead are paid by increasing the principal or by providing shares or stock in the borrowing company. A PIK loan is a type of loan that typically does not provide for any cash payments of principal or interest from the borrower to the lender between the drawdown date and the maturity or refinancing date.

Purchase price means:

(1) For a new vehicle, the amount paid by the borrower for the new vehicle net of any incentive payments or manufacturer cash rebates; and

(2) For a vehicle other than a new vehicle, the lesser of:

(i) The purchase price as would be determined for a new vehicle; or

(ii) The retail value of the used vehicle, as determined by a nationally recognized automobile pricing agency and based on the manufacturer, year, model, features, and condition of the vehicle.

Qualified tenant means

(1) A tenant with a triple net lease who has satisfied all obligations with respect to the property in a timely manner; or

(2) A tenant who originally had a triple net lease that subsequently expired and currently is leasing the property on a month-to-month basis, has occupied the property for at least three years prior to the date of origination, and has satisfied all obligations with respect to the property in a timely manner.

Qualifying leased CRE loan means a CRE loan secured by commercial nonfarm real property, other than a multi-family property or a hotel, inn, or similar property:

(1) That is occupied by one or more qualified tenants pursuant to a lease agreement with a term of no less than one (1) month; and

(2) Where no more than 20 percent of the aggregate gross revenue of the property is payable from one or more tenants who:

(i) Are subject to a lease that will terminate within six months following the date of origination; or

(ii) Are not qualified tenants.

Qualifying multi-family loan:

(1) Means a CRE loan secured by any residential property (other than a hotel, motel, inn, hospital, nursing home, or other similar facility where dwellings are not leased to residents):

(i) That consists of five or more dwelling units (including apartment buildings, condominiums, cooperatives and other similar structures) primarily for residential use; and

(ii) Where at least seventy-five (75) percent of the NOI is derived from residential rents and tenant amenities (including income from parking garages, health or swim clubs, and dry cleaning), and not from other commercial uses.

Replacement reserve means the monthly capital replacement or maintenance amount based on the property type, age, construction and condition of the property that is adequate to maintain the physical condition and NOI of the property.

Salvage title means a form of vehicle title branding, which notes that the vehicle has been severely damaged and/or deemed a total loss and uneconomical to repair by an insurance company that paid a claim on the vehicle.

Total debt, with respect to a borrower, means:

(1) In the case of an automobile loan, the sum of:

(i) All monthly housing payments (rent- or mortgage-related, including property taxes, insurance and home owners association fees); and

(ii) Any of the following that are dependent upon the borrower's income for payment:

(A) Monthly payments on other debt and lease obligations, such as credit card loans or installment loans, including the monthly amount due on the automobile loan;

(B) Estimated monthly amortizing payments for any term debt, debts with other than monthly payments and debts not in repayment (such as deferred student loans, interest-only loans); and

(C) Any required monthly alimony, child support or court-ordered payments; and

(2) In the case of a commercial loan, the outstanding balance of all long-term debt (obligations that have a remaining maturity of more than one year) and the current portion of all debt that matures in one year or less.

Total liabilities ratio means the ratio of:

(1) The borrower's total liabilities, determined in accordance with U.S. GAAP; to

(2) The sum of the borrower's total liabilities and equity, less the borrower's intangible assets, with each component determined in accordance with U.S. GAAP.

Trade-in allowance means the amount a vehicle purchaser is given as a credit at the purchase of a vehicle for the fair exchange of the borrower's existing vehicle to compensate the dealer for some portion of the vehicle purchase price, except that such amount shall not exceed the trade-in value of the used vehicle, as determined by a nationally recognized automobile pricing agency and based on the manufacturer, year, model, features, and condition of the vehicle.

Triple net lease means a lease pursuant to which the lessee is required to pay rent as well as all taxes, insurance, and maintenance expenses associated with the property.

Uniform Standards of Professional Appraisal Practice (USPAP) means the standards issued by the Appraisal Standards Board for the performance of an appraisal, an appraisal review, or an appraisal consulting assignment.

Used vehicle:

(1) Means any vehicle driven more than the limited use necessary in transporting or road testing the vehicle prior to the initial sale of the vehicle; and

(2) Does not include any vehicle sold only for scrap or parts (title documents surrendered to the State and a salvage certificate issued).

§ __.17 Exceptions for qualifying commercial loans, commercial mortgages, and auto loans.

The risk retention requirements in subpart B of this part shall not apply to securitization transactions that satisfy the standards provided in §§ __.18, __.19, or __.20 of this part.

§ __.18 Underwriting standards for qualifying commercial loans.

(a) *General.* The securitization transaction—

(1) Is collateralized solely (excluding cash and cash equivalents) by one or more commercial loans, each of which meets all of the requirements of paragraph (b) of this section; and

(2) Does not permit reinvestment periods.

(b) *Underwriting, product and other standards.* (1) Prior to origination of the commercial loan, the originator:

(i) Verified and documented the financial condition of the borrower:

(A) As of the end of the borrower's two most recently completed fiscal years; and

(B) During the period, if any, since the end of its most recently completed fiscal year;

(ii) Conducted an analysis of the borrower's ability to service its overall debt obligations during the next two years, based on reasonable projections;

(iii) Determined that, based on the previous two years' actual performance, the borrower had:

(A) A total liabilities ratio of 50 percent or less;

(B) A leverage ratio of 3.0 or less; and

(C) A DSC ratio of 1.5 or greater;

(iv) Determined that, based on the two years of projections, which include the new debt obligation, following the closing date of the loan, the borrower will have:

(A) A total liabilities ratio of 50 percent or less;

(B) A leverage ratio of 3.0 or less;

(C) A DSC ratio of 1.5 or greater; and

(v) If the loan is originated on a secured basis, obtained a first-lien security interest on all of the property pledged to collateralize the loan.

(2) The loan documentation for the commercial loan includes covenants that:

(i) Require the borrower to provide to the originator or subsequent holder, and the servicer, of the commercial loan the borrower's financial statements and supporting schedules on an ongoing basis, but not less frequently than quarterly;

(ii) Prohibit the borrower from retaining or entering into a debt arrangement that permits payments-in-kind;

(iii) Impose limits on:

(A) The creation or existence of any other security interest with respect to any of the borrower's property;

(B) The transfer of any of the borrower's assets; and

(C) Any change to the name, location or organizational structure of the borrower, or any other party that pledges collateral for the loan;

(iv) Require the borrower and any other party that pledges collateral for the loan to:

(A) Maintain insurance that protects against loss on any collateral for the commercial loan at least up to the amount of the loan, and that names the originator or any subsequent holder of the loan as an additional insured or loss payee;

(B) Pay taxes, charges, fees, and claims, where non-payment might give rise to a lien on any collateral;

(C) Take any action required to perfect or protect the security interest of the originator or any subsequent holder of the loan in the collateral for the commercial loan or the priority thereof, and to defend the collateral against claims adverse to the lender's interest;

(D) Permit the originator or any subsequent holder of the loan, and the servicer of the loan, to inspect the collateral for the commercial loan and the books and records of the borrower; and

(E) Maintain the physical condition of any collateral for the commercial loan.

(3) Loan payments required under the loan agreement are:

(i) Based on straight-line amortization of principal and interest that fully amortize the debt over a term that does not exceed five years from the date of origination; and

(ii) To be made no less frequently than quarterly over a term that does not exceed five years.

(4) The primary source of repayment for the loan is revenue from the business operations of the borrower.

(5) The loan was funded within the six (6) months prior to the closing of the securitization transaction.

(6) At the closing of the securitization transaction, all payments due on the loan are contractually current.

(7) (i) The depositor of the asset-backed security certifies that it has evaluated the effectiveness of its internal supervisory controls with respect to the process for ensuring that all assets that collateralize the asset-backed security meet all of the requirements set forth in paragraphs (b)(1) through (b)(6) of this section and has concluded that its internal supervisory controls are effective;

(ii) The evaluation of the effectiveness of the depositor's internal supervisory controls referenced in paragraph (b)(7)(i) of this section shall be performed, for each issuance of an asset-backed security, as of a date within 60 days of the cut-off date or similar date for establishing the composition of the asset pool collateralizing such asset-backed security; and

(iii) The sponsor provides, or causes to be provided, a copy of the certification described in paragraph (b)(7)(i) of this section to potential investors a reasonable period of time prior to the sale of asset-backed securities in the issuing entity, and, upon request, to its appropriate Federal banking agency, if any.

(c) *Buy-back requirement.* A sponsor that has relied on the exception provided in paragraph (a) of this section with respect to a securitization transaction shall not lose such exception with respect to such transaction if, after the closing of the securitization transaction, it is determined that one or more of the loans collateralizing the asset-backed securities did not meet all of the requirements set forth in paragraphs (b)(1) through (b)(6) of this section *provided that:*

(1) The depositor complied with the certification requirement set forth in paragraph (b)(7) of this section;

(2) The sponsor repurchases the loan(s) from the issuing entity at a price at least equal to the remaining principal balance and accrued interest on the loan(s) no later than ninety (90) days after the determination that the loans do not satisfy all of the requirements of paragraphs (b)(1) through (b)(6) of this section; and

(3) The sponsor promptly notifies, or causes to be notified, the holders of the asset-backed securities issued in the securitization transaction of any loan(s) included in such securitization transaction that is required to be repurchased by the sponsor pursuant to paragraph (c)(2) of this section, including the principal amount of such repurchased loan(s) and the cause for such repurchase.

§ __.19 Underwriting standards for qualifying CRE loans.

(a) *General.* The securitization transaction is collateralized solely (excluding cash and cash equivalents) by one or more CRE loans, each of which meets all of the requirements of paragraph (b) of this section.

(b) *Underwriting, product and other standards.*(1) The CRE loan must be secured by a first lien on the commercial real estate.

(2) Prior to origination of the CRE loan, the originator:

(i) Verified and documented the current financial condition of the borrower;

(ii) Obtained a written appraisal of the real property securing the loan that:

(A) Was performed not more than six months from the origination date of the loan by an appropriately state-certified or state-licensed appraiser;

(B) Conforms to generally accepted appraisal standards as evidenced by the Uniform Standards of Professional Appraisal Practice (USPAP) promulgated by the Appraisal Standards Board and the appraisal requirements of the Federal banking agencies (OCC: 12 CFR part 34, subpart C; FRB: 12 CFR part 208, subpart E, and 12 CFR part 225, subpart G; and FDIC: 12 CFR part 323); and

(C) Provides an "as is" opinion of the market value of the real property, which includes an income valuation approach that uses a discounted cash flow analysis;

(iii) Qualified the borrower for the CRE loan based on a monthly payment amount derived from a straight-line amortization of principal and interest over the term of the loan (but not exceeding 20 years);

(iv) Conducted an environmental risk assessment to gain environmental information about the property securing the loan and took appropriate steps to mitigate any environmental liability determined to exist based on this assessment;

(v) Conducted an analysis of the borrower's ability to service its overall debt obligations during the next two years, based on reasonable projections;

(vi) Determined that, based on the previous two years' actual performance, the borrower had:

(A) A DSC ratio of 1.5 or greater, if the loan is a qualifying leased CRE loan, net of any income derived from a tenant(s) who is not a qualified tenant(s);

(B) A DSC ratio of 1.5 or greater, if the loan is a qualifying multi-family property loan; or

(C) A DSC ratio of 1.7 or greater, if the loan is any other type of CRE loan;

(vii) Determined that, based on two years of projections, which include the new debt obligation, following the origination date of the loan, the borrower will have:

(A) A DSC ratio of 1.5 or greater, if the loan is a qualifying leased CRE loan, net of any income derived from a tenant(s) who is not a qualified tenant(s);

(B) A DSC ratio of 1.5 or greater, if the loan is a qualifying multi-family property loan; or

(C) A DSC ratio of 1.7 or greater, if the loan is any other type of CRE loan.

(3) The loan documentation for the CRE loan includes covenants that:

(i) Require the borrower to provide to the originator and any subsequent holder of the commercial loan, and the servicer, the borrower's financial statements and supporting schedules on an ongoing basis, but not less frequently than quarterly, including information on existing, maturing and new leasing or rent-roll activity for the property securing the loan, as appropriate; and

(ii) Impose prohibitions on:

(A) The creation or existence of any other security interest with respect to any collateral for the CRE loan;

(B) The transfer of any collateral pledged to support the CRE loan; and

(C) Any change to the name, location or organizational structure of the borrower, or any other party that pledges collateral for the loan;

(iii) Require the borrower and any other party that pledges collateral for the loan to:

(A) Maintain insurance that protects against loss on any collateral for the CRE loan, at least up to the amount of the loan, and names the originator or any subsequent holder of the loan as an additional insured or loss payee;

(B) Pay taxes, charges, fees, and claims, where non-payment might give rise to a lien on any collateral for the CRE loan;

(C) Take any action required to perfect or protect the security interest of the

originator or any subsequent holder of the loan in the collateral for the CRE loan or the priority thereof, and to defend such collateral against claims adverse to the originator's or subsequent holder's interest;

(D) Permit the originator or any subsequent holder of the loan, and the servicer, to inspect the collateral for the CRE loan and the books and records of the borrower or other party relating to the collateral for the CRE loan;

(E) Maintain the physical condition of the collateral for the CRE loan;

(F) Comply with all environmental, zoning, building code, licensing and other laws, regulations, agreements, covenants, use restrictions, and proffers applicable to the collateral;

(G) Comply with leases, franchise agreements, condominium declarations, and other documents and agreements relating to the operation of the collateral, and to not modify any material terms and conditions of such agreements over the term of the loan without the consent of the originator or any subsequent holder of the loan, or the servicer; and

(H) Not materially alter the collateral for the CRE loan without the consent of the originator or any subsequent holder of the loan, or the servicer.

(4) The loan documentation for the CRE loan prohibits the borrower from obtaining a loan secured by a junior lien on any property that serves as collateral for the CRE loan, unless such loan finances the purchase of machinery and equipment and the borrower pledges such machinery and equipment as additional collateral for the CRE loan.

(5) The CLTV ratio for the loan is:

(i) Less than or equal to 65 percent; or

(ii) Less than or equal to 60 percent, if the capitalization rate used in an appraisal that meets the requirements set forth in paragraph (b)(2)(ii) of this section is less than or equal to the sum of:

(A) The 10-year swap rate, as reported in the Federal Reserve Board H.15 Report as of the date concurrent with the effective date of an appraisal that meets the requirements set forth in paragraph (b)(2)(ii) of this section; and

(B) 300 basis points.

(6) All loan payments required to be made under the loan agreement are:

(i) Based on straight-line amortization of principal and interest over a term that does not exceed 20 years; and

(ii) To be made no less frequently than monthly over a term of at least ten years.

(7) Under the terms of the loan agreement:

(i) Any maturity of the note occurs no earlier than ten years following the date of origination;

(ii) The borrower is not permitted to defer repayment of principal or payment of interest; and

(iii) The interest rate on the loan is:

(A) A fixed interest rate; or

(B) An adjustable interest rate and the borrower, prior to or concurrently with origination of the CRE loan, obtained a derivative that effectively results in a fixed interest rate.

(8) The originator does not establish an interest reserve at origination to fund all or part of a payment on the loan.

(9) At the closing of the securitization transaction, all payments due on the loan are contractually current.

(10) (i) The depositor of the asset-backed security certifies that it has evaluated the effectiveness of its internal supervisory controls with respect to the process for ensuring that all assets that collateralize the asset-backed security meet all of the requirements set forth in paragraphs (b)(1) through (9) of this section and has concluded that its internal supervisory controls are effective;

(ii) The evaluation of the effectiveness of the depositor's internal supervisory controls referenced in paragraph (b)(10)(i) of this section shall be performed, for each issuance of an asset-backed security, as of a date within 60 days of the cut-off date or similar date for establishing the composition of the asset pool collateralizing such asset-backed security; and

(iii) The sponsor provides, or causes to be provided, a copy of the certification described in paragraph (b)(10)(i) of this section to potential investors a reasonable period of time prior to the sale of asset-backed securities in the issuing entity, and, upon request, to its appropriate Federal banking agency, if any.

(c) *Buy-back requirement.* A sponsor that has relied on the exception provided in paragraph (a) of this section with respect to a securitization transaction shall not lose such exception with respect to such transaction if, after the closing of the securitization transaction, it is determined that one or more of the CRE loans collateralizing the asset-backed securities did not meet all of the requirements set forth in paragraphs (b)(1) through (b)(9) of this section *provided that:*

(1) The depositor has complied with the certification requirement set forth in paragraph (b)(10) of this section;

(2) The sponsor repurchases the loan(s) from the issuing entity at a price at least equal to the remaining principal balance and accrued interest on the loan(s) no later than ninety (90) days after the determination that the loans do not satisfy all of the requirements of paragraphs (b)(1) through (b)(9) of this section; and

(3) The sponsor promptly notifies, or causes to be notified, the holders of the asset-backed securities issued in the securitization transaction of any loan(s) included in such securitization transaction that is required to be repurchased by the sponsor pursuant to paragraph (c)(2) of this section, including the principal amount of such repurchased loan(s) and the cause for such repurchase.

§ __.20 Underwriting standards for qualifying auto loans.

(a) *General.* The securitization transaction is collateralized solely (excluding cash and cash equivalents) by one or more automobile loans, each of which meets all of the requirements of paragraph (b) of this section.

(b) *Underwriting, product and other standards.* (1) Prior to origination of the automobile loan, the originator:

(i) Verified and documented that within 30 days of the date of origination:

(A) The borrower was not currently 30 days or more past due, in whole or in part, on any debt obligation;

(B) Within the previous twenty-four (24) months, the borrower has not been 60 days or more past due, in whole or in part, on any debt obligation;

(C) Within the previous thirty-six (36) months, the borrower has not:

(*1*) Been a debtor in a proceeding commenced under Chapter 7 (Liquidation), Chapter 11 (Reorganization), Chapter 12 (Family Farmer or Family Fisherman plan), or Chapter 13 (Individual Debt Adjustment) of the U.S. Bankruptcy Code; or

(*2*) Been the subject of any Federal or State judicial judgment for the collection of any unpaid debt;

(D) Within the previous thirty-six (36) months, no one-to-four family property owned by the borrower has been the subject of any foreclosure, deed in lieu of foreclosure, or short sale; or

(E) Within the previous thirty-six (36) months, the borrower has not had any personal property repossessed;

(ii) Determined and documented that, upon the origination of the loan, the borrower's DTI ratio is less than or equal to thirty-six (36) percent. For the purpose of making the determination under paragraph (b)(1)(ii) of this section, the originator must:

(A) Verify and document all income of the borrower that the originator

includes in the borrower's effective monthly income (using payroll stubs, tax returns, profit and loss statements, or other similar documentation); and

(B) On or after the date of the borrower's written application and prior to origination, obtain a credit report regarding the borrower from a consumer reporting agency that compiles and maintain files on consumers on a nationwide basis (within the meaning of 15 U.S.C. 1681a(p)) and verify that all outstanding debts reported in the borrower's credit report are incorporated into the calculation of the borrower's DTI ratio under paragraph (b)(1)(ii) of this section;

(2) An originator will be deemed to have met the requirements of paragraph (b)(1)(i) of this section if:

(i) The originator, no more than 90 days before the closing of the loan, obtains a credit report regarding the borrower from at least two consumer reporting agencies that compile and maintain files on consumers on a nationwide basis (within the meaning of 15 U.S.C. 1681a(p));

(ii) Based on the information in such credit reports, the borrower meets all of the requirements of paragraph (b)(1)(i) of this section, and no information in a credit report subsequently obtained by the originator before the closing of the mortgage transaction contains contrary information; and

(iii) The originator obtains electronic or hard copies of such credit reports.

(3) At closing of the automobile loan, the borrower makes a down payment from the borrower's personal funds and trade-in allowance, if any, that is at least equal to the sum of:

(i) The full cost of the vehicle title, tax, and registration fees;

(ii) Any dealer-imposed fees; and

(iii) 20 percent of the vehicle purchase price.

(4) The transaction documents require the originator, subsequent holder of the loan, or an agent of the originator or subsequent holder of the loan to maintain physical possession of the title for the vehicle until the loan is repaid in full and the borrower has otherwise satisfied all obligations under the terms of the loan agreement.

(5) If the loan is for a new vehicle, the terms of the loan agreement provide a maturity date for the loan that does not exceed 5 years from the date of origination.

(6) If the loan is for a vehicle other than a new vehicle, the term of the loan (as set forth in the loan agreement) plus the difference between the current model year and the vehicle's model year does not exceed 5 years.

(7) The terms of the loan agreement:

(i) Specify a fixed rate of interest for the life of the loan;

(ii) Provide for a monthly payment amount that:

(A) Is based on straight-line amortization of principal and interest over the term of the loan; and

(B) Do not permit the borrower to defer repayment of principal or payment of interest; and

(C) Require the borrower to make the first payment on the automobile loan within 45 days of the date of origination.

(8) At the closing of the securitization transaction, all payments due on the loan are contractually current; and

(9) (i) The depositor of the asset-backed security certifies that it has evaluated the effectiveness of its internal supervisory controls with respect to the process for ensuring that all assets that collateralize the asset-backed security meet all of the requirements set forth in paragraphs (b)(1) through (b)(8) of this section and has concluded that its internal supervisory controls are effective;

(ii) The evaluation of the effectiveness of the depositor's internal supervisory controls referenced in paragraph (b)(9)(i) of this section shall be performed, for each issuance of an asset-backed security, as of a date within 60 days of the cut-off date or similar date for establishing the composition of the asset pool collateralizing such asset-backed security; and

(iii) The sponsor provides, or causes to be provided, a copy of the certification described in paragraph (b)(9)(i) of this section to potential investors a reasonable period of time prior to the sale of asset-backed securities in the issuing entity, and, upon request, to its appropriate Federal banking agency, if any.

(c) *Buy-back requirement.* A sponsor that has relied on the exception provided in this paragraph (a) of this section with respect to a securitization transaction shall not lose such exception with respect to such transaction if, after the closing of the securitization transaction, it is determined that one or more of the automobile loans collateralizing the asset-backed securities did not meet all of the requirements set forth in paragraphs (b)(1) through (b)(8) of this section *provided that:*

(1) The depositor has complied with the certification requirement set forth in paragraph (b)(9) of this section;

(2) The sponsor repurchases the loan(s) from the issuing entity at a price at least equal to the remaining principal balance and accrued interest on the loan(s) no later than 90 days after the determination that the loans do not satisfy all of the requirements of paragraphs (b)(1) through (b)(8) of this section; and

(3) The sponsor promptly notifies, or causes to be notified, the holders of the asset-backed securities issued in the securitization transaction of any loan(s) included in such securitization transaction that is required to be repurchased by the sponsor pursuant to paragraph (c)(2) of this section, including the principal amount of such repurchased loan(s) and the cause for such repurchase.

§ __.21 General exemptions.

(a) This part shall not apply to:

(1) Any securitization transaction that:

(i) Is collateralized solely (excluding cash and cash equivalents) by residential, multifamily, or health care facility mortgage loan assets that are insured or guaranteed as to the payment of principal and interest by the United States or an agency of the United States; or

(ii) Involves the issuance of asset-backed securities that:

(A) Are insured or guaranteed as to the payment of principal and interest by the United States or an agency of the United States; and

(B) Are collateralized solely (excluding cash and cash equivalents) by residential, multifamily, or health care facility mortgage loan assets or interests in such assets.

(2) Any securitization transaction that is collateralized solely (excluding cash and cash equivalents) by loans or other assets made, insured, guaranteed, or purchased by any institution that is subject to the supervision of the Farm Credit Administration, including the Federal Agricultural Mortgage Corporation;

(3) Any asset-backed security that is a security issued or guaranteed by any State of the United States, or by any political subdivision of a State or territory, or by any public instrumentality of a State or territory that is exempt from the registration requirements of the Securities Act of 1933 by reason of section 3(a)(2) of that Act (15 U.S.C. 77c(a)(2)); and

(4) Any asset-backed security that meets the definition of a qualified scholarship funding bond, as set forth in section 150(d)(2) of the Internal Revenue Code of 1986 (26 U.S.C. 150(d)(2)).

(5) Any securitization transaction that:

(i) Is collateralized solely (other than cash and cash equivalents) by existing

asset-backed securities issued in a securitization transaction:

(A) For which credit risk was retained as required under subpart B of this part; or

(B) That was exempted from the credit risk retention requirements of this part pursuant to subpart D of this part;

(ii) Is structured so that it involves the issuance of only a single class of ABS interests; and

(iii) Provides for the pass-through of all principal and interest payments received on the underlying ABS (net of expenses of the issuing entity) to the holders of such class.

(b) This part shall not apply to any securitization transaction if the asset-backed securities issued in the transaction are:

(1) Collateralized solely (excluding cash and cash equivalents) by obligations issued by the United States or an agency of the United States;

(2) Collateralized solely (excluding cash and cash equivalents) by assets that are fully insured or guaranteed as to the payment of principal and interest by the United States or an agency of the United States (other than those referred to in paragraph (a)(1)(i) of this section); or

(3) Fully guaranteed as to the timely payment of principal and interest by the United States or any agency of the United States;

(c) *Rule of construction.* Securitization transactions involving the issuance of asset-backed securities that are either issued, insured, or guaranteed by, or are collateralized by obligations issued by, or loans that are issued, insured, or guaranteed by, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a Federal home loan bank shall not on that basis qualify for exemption under this section.

§ __.22 Safe harbor for certain foreign-related transactions.

(a) *In general.* This part shall not apply to a securitization transaction if all the following conditions are met:

(1) The securitization transaction is not required to be and is not registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*);

(2) No more than 10 percent of the dollar value by proceeds (or equivalent if sold in a foreign currency) of all classes of ABS interests sold in the securitization transaction are sold to U.S. persons or for the account or benefit of U.S. persons;

(3) Neither the sponsor of the securitization transaction nor the issuing entity is:

(i) Chartered, incorporated, or organized under the laws of the United States, any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States (each of the foregoing, a "U.S. jurisdiction");

(ii) An unincorporated branch or office (wherever located) of an entity chartered, incorporated, or organized under the laws of a U.S. jurisdiction; or

(iii) An unincorporated branch or office located in a U.S. jurisdiction of an entity that is chartered, incorporated, or organized under the laws of a jurisdiction other than a U.S. jurisdiction; and

(4) If the sponsor or issuing entity is chartered, incorporated, or organized under the laws of a jurisdiction other than a U.S. jurisdiction, no more than 25 percent (as determined based on unpaid principal balance) of the assets that collateralize the ABS interests sold in the securitization transaction were acquired by the sponsor or issuing entity, directly or indirectly, from:

(i) A consolidated affiliate of the sponsor or issuing entity that is chartered, incorporated, or organized under the laws of a U.S. jurisdiction; or

(ii) An unincorporated branch or office of the sponsor or issuing entity that is located in a U.S. jurisdiction.

(b) *Evasions prohibited.* In view of the objective of these rules and the policies underlying Section 15G of the Exchange Act, the safe harbor described in paragraph (a) of this section is not available with respect to any transaction or series of transactions that, although in technical compliance with such paragraph (a), is part of a plan or scheme to evade the requirements of section 15G and this Regulation. In such cases, compliance with section 15G and this part is required.

§ __.23 Additional exemptions.

(a) *Securitization transactions.* The federal agencies with rulewriting authority under section 15G(b) of the Exchange Act (15 U.S.C. 78o–11(b)) with respect to the type of assets involved may jointly provide a total or partial exemption of any securitization transaction as such agencies determine may be appropriate in the public interest and for the protection of investors.

(b) *Exceptions, exemptions, and adjustments.* The Federal banking agencies and the Commission, in consultation with the Federal Housing Finance Agency and the Department of Housing and Urban Development, may jointly adopt or issue exemptions, exceptions or adjustments to the requirements of this part, including exemptions, exceptions or adjustments for classes of institutions or assets in accordance with section 15G(e) of the Exchange Act (15 U.S.C. 78o–11(e)).

Appendix A to Part ____—Additional QRM Standards; Standards for Determining Acceptable Sources of Borrower Funds, Borrower's Monthly Gross Income, Monthly Housing Debt, and Total Monthly Debt

I. Borrower Funds to Close

A. Cash and Savings/Checking Accounts as Acceptable Sources of Funds

1. Earnest Money Deposit

a. The lender must verify with documentation, the deposit amount and source of funds, if the amount of the earnest money deposit:

i. Exceeds 2 percent of the sales price, or

ii. Appears excessive based on the borrower's history of accumulating savings. Satisfactory documentation includes:

iii. A copy of the borrower's cancelled check

iv. Certification from the deposit-holder acknowledging receipt of funds, or

v. Separate evidence of the source of funds.

b. Separate evidence includes a verification of deposit (VOD) or bank statement showing that the average balance was sufficient to cover the amount of the earnest money deposit, at the time of the deposit.

2. Savings and Checking Accounts

a. A VOD, along with the most recent bank statement, may be used to verify savings and checking accounts.

b. If there is a large increase in an account, or the account was recently opened, the lender must obtain from the borrower a credible explanation of the source of the funds.

3. Cash Saved at Home

a. Borrowers who have saved cash at home and are able to adequately demonstrate the ability to do so, are permitted to have this money included as an acceptable source of funds to close the mortgage.

b. To include cash saved at home when assessing the borrower's cash assets, the:

i. Money must be verified, whether deposited in a financial institution, or held by the escrow/title company, and

ii. Borrower must provide satisfactory evidence of the ability to accumulate such savings.

4. Verifying Cash Saved at Home

Verifying the cash saved at home assets requires the borrower to explain in writing:

a. How the funds were accumulated, and

b. The amount of time it took to accumulate the funds.

The lender must determine the reasonableness of the accumulation, based on the:

c. Borrower's income stream

d. Time period during which the funds were saved

e. Borrower's spending habits, and

f. Documented expenses and the borrower's history of using financial institutions.

Note: Borrowers with checking and/or savings accounts are less likely to save money at home, than individuals with no history of such accounts.

5. Cash Accumulated With Private Savings Clubs

a. Some borrowers may choose to use non-traditional methods to save money by making deposits into private savings clubs. Often, these private savings clubs pool resources for use among the membership.

b. If a borrower claims that the cash to close mortgage is from savings held with a private savings club, he/she *must* be able to adequately document the accumulation of the funds with the club.

6. Requirements for Private Savings Clubs

a. While private savings clubs are not supervised banking institutions, the clubs must, at a minimum, have:

i. Account ledgers

ii. Receipts from the club

iii. Verification from the club treasurer, and

iv. Identification of the club.

b. The lender must reverify the information, and the underwriter must be able to determine that:

i. It was reasonable for the borrower to have saved the money claimed, and

ii. There is no evidence that the funds were borrowed with an expectation of repayment.

B. Investments as an Acceptable Source of Funds

1. IRAs, Thrift Savings Plans, and 401(k)s and Keogh Accounts

Up to 60 percent of the value of assets such as IRAs, thrift savings plans, 401(k) and Keogh accounts may be included in the underwriting analysis, unless the borrower provides conclusive evidence that a higher percentage may be withdrawn, after subtracting any:

a. Federal income tax, and

b. Withdrawal penalties.

Notes:

i. Redemption evidence is required.

ii. The portion of the assets not used to meet closing requirements, after adjusting for taxes and penalties may be counted as reserves.

2. Stocks and Bonds

The monthly or quarterly statement provided by the stockbroker or financial institution managing the portfolio may be used to verify the value of stocks and bonds.

Note: The actual receipt of funds must be verified and documented.

3. Savings Bonds

Government issued bonds are counted at the original purchase price, unless eligibility for redemption and the redemption value are confirmed.

Note: The actual receipt of funds at redemption must be verified.

C. Gifts as an Acceptable Source of Funds

1. Description of Gift Funds

In order for funds to be considered a gift there must be no expected or implied repayment of the funds to the donor by the borrower.

Note: The portion of the gift not used to meet closing requirements may be counted as reserves.

2. Who can provide a gift?

An outright gift of the cash investment is acceptable if the donor is:

a. The borrower's relative

b. The borrower's employer or labor union

c. A charitable organization

d. A governmental agency or public entity that has a program providing home ownership assistance to

i. Low- and moderate-income families

ii. First-time homebuyers, or

e. A close friend with a clearly defined and documented interest in the borrower.

3. Who cannot provide a gift?

a. The gift donor may not be a person or entity with an interest in the sale of the property, such as:

i. The seller

ii. The real estate agent or broker

iii. The builder, or

iv. An associated entity.

b. Gifts from these sources are considered inducements to purchase, and must be subtracted from the sales price.

Note: This applies to properties where the seller is a government agency selling foreclosed properties, such as the US Department of Veterans Affairs (VA) or Rural Housing Services.

4. Lender Responsibility for Verifying the Acceptability of Gift Fund Sources

a. Regardless of when gift funds are made available to a borrower, the lender must be able to determine that the gift funds were *not* provided by an unacceptable source, and were the donor's own funds.

b. When the transfer occurs at closing, the lender is responsible for verifying that the closing agent received the funds from the donor for the amount of the gift, and that the funds were from an acceptable source.

5. Requirements Regarding Donor Source of Funds

a. As a general rule, how a donor obtains gift funds is not of concern, provided that the funds are not derived in any manner from a party to the sales transaction.

b. Donors may borrow gift funds from any other acceptable source, provided the mortgage borrowers are not obligors to any note to secure money borrowed to give the gift.

6. Equity Credit

Only family members may provide equity credit as a gift on property being sold to other family members.

7. Payment of Consumer Debt Must Result in Sales Price Reduction

a. The payment of consumer debt by third parties is considered to be an inducement to purchase.

b. While sellers and other parties may make contributions subject to any percentage limitation of the sales price of a property toward a buyer's actual closing costs and financing concessions, this applies *exclusively* to the mortgage financing provision.

c. When someone other than a family member has paid off debts or other expenses on behalf of the borrower:

i. The funds must be treated as an inducement to purchase, and

ii. There *must* be a dollar for dollar reduction to the sales price when calculating the maximum insurable mortgage.

Note: The dollar for dollar reduction to the sales price also applies to gift funds not meeting the requirement that:

i. The gift be for down payment assistance, and

ii. That it be provided by an acceptable source.

8. Using Downpayment Assistance Programs

a. Downpayment assistance programs providing gifts administered by

charitable organizations, such as nonprofits should be carefully monitored. Nonprofit entities should not provide gifts to pay off:

i. Installment loans
ii. Credit cards
iii. Collections
iv. Judgments, and
v. Similar debts.

b. Lenders *must* ensure that a gift provided by a charitable organization meets these requirements and that the transfer of funds is properly documented.

9. Gifts From Charitable Organizations That Lose or Give Up Their Federal Tax-Exempt Status

If a charitable organization makes a gift that is to be used for all, or part, of a borrower's down payment, and the organization providing the gift loses or gives up its Federal tax exempt status, the gift will be recognized as an acceptable source of the down payment provided that:

a. The gift is made to the borrower
b. The gift is properly documented, and
c. The borrower has entered into a contract of sale (including any amendments to purchase price) *on, or before,* the date the IRS officially announces that the charitable organization's tax exempt status is terminated.

10. Lender Responsibility for Ensuring That an Entity Is a Charitable Organization

a. The lender is responsible for ensuring that an entity is a charitable organization as defined by Section 501(a) of the Internal Revenue Code (IRC) of 1986 (26 U.S.C. 150(d)(2)) pursuant to Section 501(c)(3) of the IRC.

b. One resource available to lenders for obtaining this information is the Internal Revenue Service (IRS) Publication 78, *Cumulative List of Organizations described in Section 170(c) of the Internal Revenue Code of 1986,* which contains a list of organizations eligible to receive tax-deductible charitable contributions.

c. The IRS has an online version of this list that can help lenders and others conduct a search of these organizations. The online version can be found at *http://apps.irs.gov/app/pub78* using the following instructions to obtain the latest update:

i. Enter search data and click "Search"
ii. Click "Search for Charities" under the "Charities & Non-Profits Topics" heading on the left-hand side of the page
iii. Click "Recent Revocations and Deletions from Cumulative List" under the "Additional Information" heading in the middle of the page, and
iv. Click the name of the organization if the name appears on the list displayed.

D. Gift Fund Required Documentation

1. Gift Letter Requirement

A lender must document any borrower gift funds through a gift letter, signed by the donor and borrower. The gift letter must show the donor's name, address, telephone number, specify the dollar amount of the gift, and state the nature of the donor's relationship to the borrower and that no repayment is required. If sufficient funds required for closing are not already verified in the borrower's accounts, document the transfer of the gift funds to the borrower's accounts, in accordance with the instructions described in section (I)(D)(2).

2. Documenting the Transfer of Gift Funds

The lender must document the transfer of the gift funds from the donor to the borrower. The table below describes the requirements for the transfer of gift funds.

If the gift funds . . .	Then . . .
• Are in the borrower's account	Obtain • A copy of the withdrawal document showing that the withdrawal is from the donor's account, and • The borrower's deposit slip and bank statement showing the deposit.
• Are to be provided at closing, and • Are in the form of a certified check from the donor's account	Obtain a • Bank statement showing the withdrawal from the donor's account, and • Copy of the certified check.
• Are to be provided at closing, and • Are in the form of a cashier's check, money order, official check, or other type of bank check	Have the donor provide a withdrawal document or cancelled check for the amount of the gift, showing that the funds came from the donor's personal account.
• Are to be provided at closing, and • Are in the form of an electronic wire transfer to the closing agent	Have the donor provide documentation of the wire transfer. **Note:** The lender must obtain and keep the documentation of the wire transfer in its mortgage loan application binder. While the document does not need to be provided in the insurance binder, it must be available for inspection.
• Are being borrowed by the donor, and • Documentation from the bank or other savings account is *not* available	Have the donor provide written evidence that the funds were borrowed from an acceptable source, not from a party to the transaction, including the lender. IMPORTANT: *Cash on hand* is not an acceptable source of donor gift funds.

E. Property Related Acceptable Sources of Funds

1. Type of Personal Property

In order to obtain cash for closing, a borrower may sell various personal property items. The types of personal property items that a borrower can sell include

a. Cars
b. Recreational vehicles
c. Stamps
d. Coins, and
e. Baseball card collections.

2. Sale of Personal Property Documentation Requirement

a. If a borrower plans to sell personal property items to obtain funds for closing, he/she must provide

i. Satisfactory estimate of the worth of the personal property items, and

ii. Evidence that the items were sold.

b. The estimated worth of the items being sold may be in the form of

i. Published value estimates issued by organizations, such as automobile dealers, or philatelic or numismatic associations, or

ii. A separate written appraisal by a qualified appraiser with no financial interest in the loan transaction.

c. Only the *lesser* of the estimated value or actual sales prices are considered as assets to close.

3. Net Sales Proceeds From a Property

a. The net proceeds from an arms-length sale of a currently owned property may be used for the cash investment on a new house. The borrower must provide satisfactory evidence of the accrued cash sales proceeds.

b. If the property has not sold by the time of underwriting, condition loan approval by verifying the actual proceeds received by the borrower. The lender must document the

i. Actual sale, and

ii. Sufficiency of the net proceeds required for settlement.

Note: If the property has not sold by the time of the subject settlement, the existing mortgage must be included as a liability for qualifying purposes.

4. Commission From the Sale of the Property

a. If the borrower is a licensed real estate agent entitled to a real estate commission from the sale of the property being purchased, then he/she may use that amount for the cash investment, with no adjustment to the maximum mortgage required.

b. A family member entitled to the commission may also provide gift funds to the borrower.

5. Trade Equity

a. The borrower may agree to trade his/her real property to the seller as part of the cash investment. The amount of the borrower's equity contribution is determined by

i. Using the *lesser* of the property's appraised value or sales price, and

ii. Subtracting all liens against the property being traded, along with any real estate commission.

b. In order to establish the property value, the borrower must provide

i. A residential appraisal no more than six months old to determine the property's value, and

ii. Evidence of ownership.

Note: If the property being traded has an FHA-insured mortgage, assumption processing requirements and restrictions apply.

6. Rent Credit

a. The cumulative amount of rental payments that exceed the appraiser's estimate of fair market rent may be considered accumulation of the borrower's cash investment.

b. The following *must* be included in the endorsement package:

i. Rent with option to purchase agreement, and

ii. Appraiser's estimate of market rent.

c. Conversely, treat the rent as an inducement to purchase with an appropriate reduction to the mortgage, *if* the sales agreement reveals that the borrower

i. Has been living in the property rent-free, or

ii. Has an agreement to occupy the property as a rental considerably below fair market value in anticipation of eventual purchase.

d. Exception: An exception may be granted when a builder

i. Fails to deliver a property at an agreed to time, and

ii. Permits the borrower to occupy an existing or other unit for less than market rent until construction is complete.

7. Sweat Equity Considered a Cash Equivalent

Labor performed, or materials furnished by the borrower before closing on the property being purchased (known as "sweat equity"), may be considered the equivalent of a cash investment, to the amount of the estimated cost of the work or materials.

Note: Sweat equity may also be "gifted," subject to

i. The additional requirements in section (I)(E)(8), and

ii. The gift fund requirements described in section (I)(D).

8. Additional Sweat Equity Requirements

The table below describes additional requirements for applying sweat equity as a cash equivalent and as an acceptable source of borrower funds.

Sweat Equity Category	Requirement
Existing Construction	Only repairs or improvements listed on the appraisal are eligible for sweat equity. Any work completed or materials provided before the appraisal are *not* eligible.
Proposed Construction	The sales contract must indicate the tasks to be performed by the borrower during construction.
Borrower's Labor	The borrower must demonstrate his/her ability to complete the work in a satisfactory manner. The lender must document the contributory value of the labor either through • The appraiser's estimate, or • A cost-estimating service.
Delayed Work	The following *cannot* be included as sweat equity: • Delayed work (on-site escrow) • Clean up • Debris removal, and • Other general maintenance.
Cash Back	Cash back to the borrower in sweat equity transactions is *not* permitted.
Sweat Equity on Property Not Being Purchased	Sweat equity is *not* acceptable on property other than the property being purchased. Compensation for work performed on other properties must be • In cash, and • Properly documented.
Source of Funds Evidence	Evidence of the following must be provided if the borrower furnishes funds and materials: • Source of the funds, and • Market value of the materials.

9. Trade-In Manufactured Home

An acceptable source of borrower cash investment commonly associated with manufactured homes is the sale or trade-in of another manufactured home that is not considered real estate. Trade-ins for cash funds are considered a seller inducement and are not permitted.

II. Borrower Eligibility

A. Stability of Income

1. Effective Income

Income may not be used in calculating the borrower's income ratios if it comes from any source that cannot be verified, is not stable, or will not continue.

2. Verifying Employment History

a. The lender must verify the borrower's employment for the most recent two full years, and the borrower must

i. Explain any gaps in employment that span one or more months, and

ii. Indicate if he/she was in school or the military for the recent two full years, providing Evidence supporting this claim, such as college transcripts, or discharge papers.

b. Allowances can be made for seasonal employment, typical for the building trades and agriculture, if documented by the lender.

Note: A borrower with a 25 percent or greater ownership interest in a business is considered self employed and will be evaluated as a self employed borrower for underwriting purposes.

3. Analyzing a Borrower's Employment Record

a. When analyzing the probability of continued employment, lenders must examine:

i. The borrower's past employment record

ii. Qualifications for the position

iii. Previous training and education, and

iv. The employer's confirmation of continued employment.

b. Favorably consider a borrower for a mortgage if he/she changes jobs frequently within the same line of work, but continues to advance in income or benefits. In this analysis, income stability takes precedence over job stability.

4. Borrowers Returning to Work After an Extended Absence

A borrower's income may be considered effective and stable when recently returning to work after an extended absence if he/she:

a. Is employed in the current job for six months or longer, and

b. Can document a two year work history prior to an absence from employment using

i. Traditional employment verifications, and/or

ii. Copies of W–2 forms or pay stubs.

Note: An acceptable employment situation includes individuals who took several years off from employment to raise children, then returned to the workforce.

c. Important: Situations not meeting the criteria listed above may only be considered as compensating factors. Extended absence is defined as six months.

B. Salary, Wage and Other Forms of Income

1. General Policy on Borrower Income Analysis

a. The income of each borrower who will be obligated for the mortgage debt must be analyzed to determine whether his/her income level can be reasonably expected to continue through at least the first three years of the mortgage loan.

b. In most cases, a borrower's income is limited to salaries or wages. Income from other sources can be considered as effective, when properly verified and documented by the lender.

Notes:

i. Effective income for borrowers planning to retire during the first three-year period must include the amount of:

a. Documented retirement benefits

b. Social Security payments, or

c. Other payments expected to be received in retirement.

ii. Lenders *must not* ask the borrower about possible, future maternity leave.

2. Overtime and Bonus Income

a. Overtime and bonus income can be used to qualify the borrower if he/she has received this income for the past two years, and it will likely continue. If the employment verification states that the overtime and bonus income is unlikely to continue, it may not be used in qualifying.

b. The lender must develop an average of bonus or overtime income for the past two years. Periods of overtime and bonus income less than two years may be acceptable, provided the lender can justify and document in writing the reason for using the income for qualifying purposes.

3. Establishing an Overtime and Bonus Income Earning Trend

a. The lender *must* establish and document an earnings trend for overtime and bonus income. If either type of income shows a continual decline, the lender *must* document in writing a sound rationalization for including the income when qualifying the borrower.

b. A period of more than two years must be used in calculating the average overtime and bonus income if the income varies significantly from year to year.

4. Qualifying Part-Time Income

a. Part-time and seasonal income can be used to qualify the borrower if the lender documents that the borrower has worked the part-time job uninterrupted for the past two years, and plans to continue. Many low and moderate income families rely on part-time and seasonal income for day to day needs, and lenders should not restrict consideration of such income when qualifying these borrowers.

b. Part-time income received for less than two years may be included as effective income, provided that the lender justifies and documents that the income is likely to continue.

c. Part-time income not meeting the qualifying requirements may be considered as a compensating factor only.

Note: For qualifying purposes, "part-time" income refers to employment taken to supplement the borrower's income from regular employment; part-time employment is not a primary job and it is worked less than 40 hours.

5. Income from Seasonal Employment

a. Seasonal income is considered uninterrupted, and may be used to qualify the borrower, if the lender documents that the borrower:

i. Has worked the same job for the past two years, and

ii. Expects to be rehired the next season.

b. Seasonal employment includes:

i. Umpiring baseball games in the summer, or

ii. Working at a department store during the holiday shopping season.

6. Primary Employment Less Than 40 Hour Work Week

a. When a borrower's primary employment is less than a typical 40-hour work week, the lender should evaluate the stability of that income as regular, on-going primary employment.

b. Example: A registered nurse may have worked 24 hours per week for the last year. Although this job is less than the 40-hour work week, it is the borrower's primary employment, and should be considered effective income.

7. Commission Income

a. Commission income *must* be averaged over the previous two years. To qualify commission income, the borrower must provide:

i. Copies of signed tax returns for the last two years, and

ii. The most recent pay stub.

b. Commission income showing a decrease from one year to the next requires significant compensating factors before a borrower can be approved for the loan.

c. Borrowers whose commission income was received for more than one year, but less than two years may be considered favorably if the underwriter can:

i. Document the likelihood that the income will continue, and

ii. Soundly rationalize accepting the commission income.

Notes:

i. Unreimbursed business expenses must be subtracted from gross income.

ii. A commissioned borrower is one who receives more than 25 percent of his/her annual income from commissions.

iii. A tax transcript obtained directly from the IRS may be used in lieu of signed tax returns, and the cost of the transcript may be charged to the borrower.

8. Qualifying Commission Income Earned for Less Than One Year

a. Commission income earned for less than one year is *not* considered effective income. Exceptions may be made for situations in which the borrower's compensation was changed from salary to commission within a similar position with the same employer.

b. A borrower may also qualify when the portion of earnings *not* attributed to commissions would be sufficient to qualify the borrower for the mortgage.

9. Employer Differential Payments

If the employer subsidizes a borrower's mortgage payment through direct payments, the amount of the payments:

a. Is considered gross income, and

b. Cannot be used to offset the mortgage payment directly, even if the employer pays the servicing lender directly.

10. Retirement Income

Retirement income must be verified from the former employer, or from Federal tax returns. If any retirement income, such as employer pensions or 401(k)s, will cease within the first full three years of the mortgage loan, the income may *only* be considered as a compensating factor.

11. Social Security Income

Social Security income must be verified by the Social Security Administration or on Federal tax returns. If any benefits expire within the first full three years of the loan, the income source may be considered *only* as a compensating factor.

Notes:

i. The lender must obtain a complete copy of the current awards letter.

ii. Not all Social Security income is for retirement-aged recipients; therefore, documented continuation is required.

iii. Some portion of Social Security income may be "grossed up" if deemed nontaxable by the IRS.

12. Automobile Allowances and Expense Account Payments

a. Only the amount by which the borrower's automobile allowance or expense account payments *exceed* actual expenditures may be considered income.

b. To establish the amount to add to gross income, the borrower must provide the following:

i. IRS Form 2106, *Employee Business Expenses,* for the previous two years, and

ii. Employer verification that the payments will continue.

c. If the borrower uses the standard per-mile rate in calculating automobile expenses, as opposed to the actual cost method, the portion that the IRS considers depreciation may be added back to income.

d. Expenses that must be treated as recurring debt include:

i. The borrower's monthly car payment, and

ii. Any loss resulting from the calculation of the difference between the actual expenditures and the expense account allowance.

C. Borrowers Employed by a Family Owned Business

1. Income Documentation Requirement

In addition to normal employment verification, a borrower employed by a family owned businesses are required to provide evidence that he/she is not an owner of the business, which may include:

a. Copies of signed personal tax returns, or

b. A signed copy of the corporate tax return showing ownership percentage.

Note: A tax transcript obtained directly from the IRS may be used in lieu of signed tax returns, and the cost of the transcript may be charged to the borrower.

D. General Information on Self Employed Borrowers and Income Analysis

1. Definition: Self Employed Borrower

A borrower with a 25 percent or greater ownership interest in a business is considered self employed.

2. Types of Business Structures

There are four basic types of business structures. They include:

a. Sole proprietorships

b. Corporations

c. Limited liability or "S" corporations, and

d. Partnerships.

3. Minimum Length of Self Employment

a. Income from self employment is considered stable, and effective, if the borrower has been self employed for two or more years.

b. Due to the high probability of failure during the first few years of a business, the requirements described in the table below are necessary for borrowers who have been self employed for less than two years.

If the period of self employment is . . .	Then . . .
Between one and two years	To be eligible for a mortgage loan, the individual must have at least two years of documented previous successful employment in the line of work in which the individual is self employed, or in a related occupation. **Note:** A combination of one year of employment and formal education or training in the line of work in which the individual is self employed or in a related occupation is also acceptable.
Less than one year	The income from the borrower may not be considered effective income.

4. General Documentation Requirements for Self Employed Borrowers

Self employed borrowers must provide the following documentation:

a. Signed, dated individual tax returns, with all applicable tax schedules for the most recent two years

b. For a corporation, "S" corporation, or partnership, signed copies of Federal business income tax returns for the last two years, with all applicable tax schedules

c. Year to date profit and loss (P&L) statement and balance sheet, and

d. Business credit report for corporations and "S" corporations.

5. Establishing a Borrower's Earnings Trend

a. When qualifying a borrower for a mortgage loan, the lender must establish the borrower's earnings trend from the previous two years using the borrower's tax returns.

b. If a borrower:

i. Provides quarterly tax returns, the income analysis may include income through the period covered by the tax filings, or

ii. Is *not* subject to quarterly tax returns, or does not file them, then the income shown on the P&L statement may be included in the analysis, provided the income stream based on the P&L is consistent with the previous years' earnings.

c. If the P&L statements submitted for the current year show an income stream considerably *greater* than what is supported by the previous year's tax returns, the lender must base the income analysis solely on the income verified through the tax returns.

d. If the borrower's earnings trend for the previous two years is *downward* and the most recent tax return or P&L is *less than the prior year's tax return,* the borrower's most recent year's tax return or P&L must be used to calculate his/her income.

6. Analyzing the Business's Financial Strength

a. To determine if the business is expected to generate sufficient income for the borrower's needs, the lender must carefully analyze the business's financial strength, including the:

i. Source of the business's income

ii. General economic outlook for similar businesses in the area.

b. Annual earnings that are stable or increasing are acceptable, while businesses that show a significant decline in income over the analysis period are not acceptable.

E. Income Analysis: Individual Tax Returns (IRS Form 1040)

1. General Policy on Adjusting Income Based on a Review of IRS Form 1040

The amount shown on a borrower's IRS Form 1040 as *adjusted gross income* must either be increased or decreased based on the lender's analysis of the individual tax return and any related tax schedules.

2. Guidelines for Analyzing IRS Form 1040

The table below contains guidelines for analyzing IRS Form 1040:

IRS Form 1040 heading	Description
Wages, Salaries and Tips	An amount shown under this heading may indicate that the individual • Is a salaried employee of a corporation, or • Has other sources of income. This section may also indicate that the spouse is employed, in which case the spouse's income must be subtracted from the borrower's adjusted gross income.
Business Income and Loss (from Schedule C).	Sole proprietorship income calculated on Schedule C is business income. Depreciation or depletion may be added back to the adjusted gross income.
Rents, Royalties, Partnerships (from Schedule E).	Any income received from rental properties or royalties may be used as income, after adding back any depreciation shown on Schedule E. xxx
Capital Gain and Losses (from Schedule D).	Capital gains or losses generally occur only one time, and should not be considered when determining effective income. However, if the individual has a constant turnover of assets resulting in gains or losses, the capital gain or loss must be considered when determining the income. Three years' tax returns are required to evaluate an earning trend. If the trend • Results in a gain, it may be added as effective income, or • Consistently shows a loss, it must be deducted from the total income. Lender must document anticipated continuation of income through verified assets. *Example:* A lender can consider the capital gains for an individual who purchases old houses, remodels them, and sells them for profit.
Interest and Dividend Income (from Schedule B).	This taxable/tax-exempt income may be added back to the adjusted gross income only if it • Has been received for the past two years, and • Is expected to continue. If the interest-bearing asset will be liquidated as a source of the cash investment, the lender must appropriately adjust the amount.
Farm Income or Loss (from Schedule F)	Any depreciation shown on Schedule F may be added back to the adjusted gross income.
IRA Distributions, Pensions, Annuities, and Social Security Benefits.	The non-taxable portion of these items may be added back to the adjusted gross income, if the income is expected to continue for the first three years of the mortgage.
Adjustments to Income	Adjustments to income may be added back to the adjusted gross income if they are • IRA and Keogh retirement deductions • Penalties on early withdrawal of savings • Health insurance deductions, and • Alimony payments.
Employee Business Expenses	Employee business expenses are actual cash expenses that must be deducted from the adjusted gross income.

F. Income Analysis: Corporate Tax Returns (IRS Form 1120)

1. Description: Corporation

A Corporation is a state-chartered business owned by its stockholders.

2. Need To Obtain Borrower Percentage of Ownership Information

a. Corporate compensation to the officers, generally in proportion to the percentage of ownership, is shown on the

i. Corporate tax return IRS Form 1120, and

ii. Individual tax returns.

b. When a borrower's percentage of ownership does not appear on the tax returns, the lender *must* obtain the information from the corporation's accountant, along with evidence that the borrower has the right to any compensation.

3. Analyzing Corporate Tax Returns

a. In order to determine a borrower's self employed income from a corporation the adjusted business income must

i. Be determined, and

ii. Multiplied by the borrower's percentage of ownership in the business.

b. The table below describes the items found on IRS Form 1120 for which an adjustment must be made in order to determine adjusted business income.

Adjustment item	Description of adjustment
Depreciation and Depletion	Add the corporation's depreciation and depletion back to the after-tax income.
Taxable Income	Taxable income is the corporation's net income before Federal taxes. Reduce taxable income by the tax liability.
Fiscal Year vs. Calendar Year	If the corporation operates on a fiscal year that is different from the calendar year, an adjustment must be made to relate corporate income to the individual tax return.
Cash Withdrawals	The borrower's withdrawal of cash from the corporation may have a severe negative impact on the corporation's ability to continue operating.

G. Income Analysis: "S" Corporation Tax Returns (IRS Form 1120S)

1. Description: "S" Corporation

a. An "S" Corporation is generally a small, start-up business, with gains and losses passed to stockholders in proportion to each stockholder's percentage of business ownership.

b. Income for owners of "S" corporations comes from W–2 wages, and is taxed at the individual rate. The IRS Form 1120S, *Compensation of Officers* line item is transferred to the borrower's individual IRS Form 1040.

2. Analyzing "S" Corporation Tax Returns

a. "S" corporation depreciation and depletion may be added back to income in proportion to the borrower's share of the corporation's income.

b. In addition, the income must also be reduced proportionately by the total obligations payable by the corporation in less than one year.

c. *IMPORTANT:* The borrower's withdrawal of cash from the corporation may have a severe negative impact on the corporation's ability to continue operating, and must be considered in the income analysis.

H. Income Analysis: Partnership Tax Returns (IRS Form 1065)

1. Description: Partnership

a. A Partnership is formed when two or more individuals form a business, and share in profits, losses, and responsibility for running the company.

b. Each partner pays taxes on his/her proportionate share of the partnership's net income.

2. Analyzing Partnership Tax Returns

a. Both general and limited partnerships report income on IRS Form 1065, and the partners' share of income is carried over to Schedule E of IRS Form 1040.

b. The lender must review IRS Form 1065 to assess the viability of the business. Both depreciation and depletion may be added back to the income in proportion to the borrower's share of income.

c. Income must also be reduced proportionately by the total obligations payable by the partnership in less than one year.

d. *IMPORTANT:* Cash withdrawals from the partnership may have a severe negative impact on the partnership's ability to continue operating, and must be considered in the income analysis.

III. Non-Employment Related Borrower Income

A. Alimony, Child Support, and Maintenance Income Criteria

Alimony, child support, or maintenance income may be considered effective, if:

1. Payments are likely to be received consistently for the first three years of the mortgage

2. The borrower provides the required documentation, which includes a copy of the

1. Final divorce decree

ii. Legal separation agreement,

iii. Court order, or

iv. Voluntary payment agreement, and

3. The borrower can provide acceptable evidence that payments have been received during the last 12 months, such as

i. Cancelled checks

ii. Deposit slips

iii. Tax returns, or

iv. Court records.

Notes:

i. Periods less than 12 months may be acceptable, provided the lender can adequately document the payer's ability and willingness to make timely payments.

ii. Child support may be "grossed up" under the same provisions as non-taxable income sources.

B. Investment and Trust Income

1. Analyzing Interest and Dividends

a. Interest and dividend income may be used as long as tax returns or account statements support a two-year receipt history. This income must be averaged over the two years.

b. Subtract any funds that are derived from these sources, and are required for the cash investment, before calculating the projected interest or dividend income.

2. Trust Income

a. Income from trusts may be used if guaranteed, constant payments will continue for at least the first three years of the mortgage term.

b. Required trust income documentation includes a copy of the Trust Agreement or other trustee statement, confirming the

i. Amount of the trust

ii. Frequency of distribution, and
iii. Duration of payments.

c. Trust account funds may be used for the required cash investment if the borrower provides adequate documentation that the withdrawal of funds will not negatively affect income. The borrower may use funds from the trust account for the required cash investment, but the trust income used to determine repayment ability cannot be affected negatively by its use.

3. Notes Receivable Income

a. In order to include notes receivable income to qualify a borrower, he/she must provide

i. A copy of the note to establish the amount and length of payment, and

ii. Evidence that these payments have been consistently received for the last 12 months through deposit slips, cancelled checks, or tax returns.

b. If the borrower is not the original payee on the note, the lender must establish that the borrower is now a holder in due course, and able to enforce the note.

4. Eligible Investment Properties

Follow the steps in the table below to calculate an investment property's income or loss if the property to be subject to a mortgage is an eligible investment property.

Step	Action
1	Subtract the monthly payment (PITI) from the monthly net rental income of the subject property. **Note:** Calculate the monthly net rental by taking the gross rents, and subtracting the 25 percent reduction for vacancies and repairs.
2	Does the calculation in Step 1 yield a positive number? • If *yes,* add the number to the borrower's monthly gross income. • If *no,* and the calculation yields a negative number, consider it a recurring monthly obligation.

C. Military, Government Agency, and Assistance Program Income

1. Military Income

a. Military personnel not only receive base pay, but often times are entitled to additional forms of pay, such as

i. Income from variable housing allowances
ii. Clothing allowances
iii. Flight or hazard pay
iv. Rations, and
v. Proficiency pay.

b. These types of additional pay are acceptable when analyzing a borrower's income as long as the probability of such pay to continue is verified in writing.

Note: The tax-exempt nature of some of the above payments should also be considered.

2. VA Benefits

a. Direct compensation for service-related disabilities from the Department of Veterans Affairs (VA) is acceptable, provided the lender receives documentation from the VA.

b. Education benefits used to offset education expenses are *not* acceptable.

3. Government Assistance Programs

a. Income received from government assistance programs is acceptable as long as the paying agency provides documentation indicating that the income is expected to continue for at least three years.

b. If the income from government assistance programs will not be received for at least three years, it may be considered as a compensating factor.

c. Unemployment income *must* be documented for two years, and there must be reasonable assurance that this income will continue. This requirement may apply to seasonal employment.

4. Mortgage Credit Certificates

a. If a government entity subsidizes the mortgage payments either through direct payments or tax rebates, these payments may be considered as acceptable income.

b. Either type of subsidy may be added to gross income, or used directly to offset the mortgage payment, before calculating the qualifying ratios.

5. Homeownership Subsidies

a. A monthly subsidy may be treated as income, if a borrower is receiving subsidies under the housing choice voucher home ownership option from a public housing agency (PHA). Although continuation of the homeownership voucher subsidy beyond the first year is subject to Congressional appropriation, for the purposes of underwriting, the subsidy will be assumed to continue for at least three years.

b. If the borrower is receiving the subsidy directly, the amount received is treated as income. The amount received may also be treated as non taxable income and be "grossed up" by 25 percent, which means that the amount of the subsidy, plus 25 percent of that subsidy may be added to the borrower's income from employment and/or other sources.

c. Lenders may treat this subsidy as an "offset" to the monthly mortgage payment (that is, reduce the monthly mortgage payment by the amount of the home ownership assistance payment before dividing by the monthly income to determine the payment-to-income and debt-to-income ratios). The subsidy payment must not pass through the borrower's hands.

d. The assistance payment must be:

i. Paid directly to the servicing lender, or

ii. Placed in an account that only the servicing lender may access.

Note: Assistance payments made directly to the borrower *must* be treated as income.

D. Rental Income

1. Analyzing the Stability of Rental Income

a. Rent received for properties owned by the borrower is acceptable as long as the lender can document the stability of the rental income through

i. A current lease

ii. An agreement to lease, or

iii. A rental history over the previous 24 months that is free of unexplained gaps greater than three months (such gaps could be explained by student, seasonal, or military renters, or property rehabilitation).

b. A separate schedule of real estate is not required for rental properties as long as all properties are documented on the URLA.

Note: The underwriting analysis may not consider rental income from any property being vacated by the borrower, except under the circumstances described below.

2. Rental Income From Borrower Occupied Property

a. The rent for multiple unit property where the borrower resides in one or more units and charges rent to tenants of other units may be used for qualifying purposes.

b. Projected rent for the tenant-occupied units *only* may:

i. Be considered gross income, only after deducting vacancy and maintenance factors, and

ii. Not be used as a direct offset to the mortgage payment.

3. Income from Roommates in a Single Family Property

a. Income from roommates in a single family property occupied as the borrower's primary residence is *not* acceptable. Rental income from boarders however, is acceptable, if the boarders are related by blood, marriage, or law.

b. The rental income may be considered effective, if shown on the borrower's tax return. If not on the tax return, rental income paid by the boarder

i. May be considered a compensating factor, and

ii. Must be adequately documented by the lender.

4. Documentation Required To Verify Rental Income

Analysis of the following required documentation is necessary to verify all borrower rental income:

a. IRS Form 1040 Schedule E; and

b. Current leases/rental agreements.

5. Analyzing IRS Form 1040 Schedule E

a. The IRS Form 1040 Schedule E is required to verify all rental income. Depreciation shown on Schedule E may be added back to the net income or loss.

b. Positive rental income is considered gross income for qualifying purposes, while negative income must be treated as a recurring liability.

c. The lender must confirm that the borrower still owns each property listed, by comparing Schedule E with the real estate owned section of the URLA. If the borrower owns six or more units in the same general area, a map must be provided disclosing the locations of the units, as evidence of compliance with FHA's seven-unit limitation.

6. Using Current Leases To Analyze Rental Income

a. The borrower can provide a current signed lease or other rental agreement for a property that was acquired since the last income tax filing, and is not shown on Schedule E.

b. In order to calculate the rental income:

i. Reduce the gross rental amount by 25 percent for vacancies and maintenance

ii. Subtract PITI and any homeowners' association dues, and

iii. Apply the resulting amount to income, if positive, or recurring debts, if negative.

7. Exclusion of Rental Income From Property Being Vacated by the Borrower

Underwriters may *not* consider any rental income from a borrower's principal residence that is being vacated in favor of another principal residence, except under the conditions described below:

Notes: i. This policy assures that a borrower either has sufficient income to make both mortgage payments without any rental income, or has an equity position not likely to result in defaulting on the mortgage on the property being vacated.

ii. This applies *solely* to a principal residence being vacated in favor of another principal residence. It does *not* apply to existing rental properties disclosed on the loan application and confirmed by tax returns (Schedule E of form IRS 1040).

8. Policy Exceptions Regarding the Exclusion of Rental Income From a Principal Residence Being Vacated by a Borrower

When a borrower vacates a principal residence in favor of another principal residence, the rental income, reduced by the appropriate vacancy factor, *may* be considered in the underwriting analysis under the circumstances listed in the table below.

Exception	Description
Relocations	The borrower is relocating with a new employer, or being transferred by the current employer to an area not within reasonable and locally-recognized commuting distance. A properly executed lease agreement (that is, a lease signed by the borrower and the lessee) of at least one year's duration after the loan is closed is required. **Note:** Underwriters should also obtain evidence of the security deposit and/or evidence the first month's rent was paid to the homeowner.
Sufficient Equity in Vacated Property	The borrower has a loan-to-value ratio of 75 percent or less, as determined either by • A current (no more than six months old) residential appraisal, or • Comparing the unpaid principal balance to the original sales price of the property. **Note:** The appraisal, in addition to using forms Fannie Mae1004/Freddie Mac 70, may be an exterior-only appraisal using form Fannie Mae/Freddie Mac 2055, and for condominium units, form Fannie Mae 1075/Freddie Mac 466.

E. Non Taxable and Projected Income

1. Types of Non Taxable Income

Certain types of regular income may not be subject to Federal tax. Such types of non taxable income include

a. Some portion of Social Security, some Federal government employee retirement income, Railroad Retirement Benefits, and some state government retirement income

b. Certain types of disability and public assistance payments

c. Child support

d. Military allowances, and

e. Other income that is documented as being exempt from Federal income taxes.

2. Adding Non Taxable Income to a Borrower's Gross Income

a. The amount of continuing tax savings attributed to regular income not subject to Federal taxes may be added to the borrower's gross income.

b. The percentage of non-taxable income that may be added *cannot* exceed the appropriate tax rate for the income amount. Additional allowances for dependents are *not* acceptable.

c. The lender:

i. Must document and support the amount of income *grossed up* for any non-taxable income source, and

ii. Should use the tax rate used to calculate the borrower's last year's income tax.

Note: If the borrower is not required to file a Federal tax return, the tax rate to use is 25 percent.

3. Analyzing Projected Income

a. Projected or hypothetical income is *not* acceptable for qualifying purposes. However, exceptions are permitted for income from the following sources:

i. Cost-of-living adjustments

ii. Performance raises, and

iii. Bonuses.

b. For the above exceptions to apply, the income must be

i. Verified in writing by the employer, and

ii. Scheduled to begin within 60 days of loan closing.

4. Project Income for New Job

a. Projected income is acceptable for qualifying purposes for a borrower scheduled to start a new job within 60 days of loan closing if there is a guaranteed, non-revocable contract for employment.

b. The lender must verify that the borrower will have sufficient income or cash reserves to support the mortgage payment and any other obligations between loan closing and the start of employment. Examples of this type of scenario are teachers whose contracts begin with the new school year, or physicians beginning a residency after the loan closes fall under this category.

c. The loan is not eligible for endorsement if the loan closes more than 60 days before the borrower starts the new job. To be eligible for endorsement, the lender must obtain from the borrower a pay stub or other acceptable evidence indicating that he/she has started the new job.

IV. Borrower Liabilities: Recurring Obligations

1. Types of Recurring Obligations

Recurring obligations include:
a. All installment loans
b. Revolving charge accounts
c. Real estate loans
d. Alimony
e. Child support, and
f. Other continuing obligations.

2. Debt to Income Ratio Computation for Recurring Obligations

a. The lender must include the following when computing the debt to income ratios for recurring obligations:
i. Monthly housing expense, and
ii. Additional recurring charges extending ten months or more, such as
a. Payments on installment accounts
b. Child support or separate maintenance payments
c. Revolving accounts, and
d. Alimony.

b. Debts lasting less than ten months must be included if the amount of the debt affects the borrower's ability to pay the mortgage during the months immediately after loan closing, especially if the borrower will have limited or no cash assets after loan closing.

Note: Monthly payments on revolving or open-ended accounts, regardless of the balance, are counted as a liability for qualifying purposes even if the account appears likely to be paid off within 10 months or less.

3. Revolving Account Monthly Payment Calculation

If the credit report shows any revolving accounts with an outstanding balance but no specific minimum monthly payment, the payment must be calculated as the greater of
a. 5 percent of the balance, or
b. $10.

Note: If the actual monthly payment is documented from the creditor or the lender obtains a copy of the current statement reflecting the monthly payment, that amount may be used for qualifying purposes.

4. Reduction of Alimony Payment for Qualifying Ratio Calculation

Since there are tax consequences of alimony payments, the lender may choose to treat the monthly alimony obligation as a reduction from the borrower's gross income when calculating qualifying ratios, rather than treating it as a monthly obligation.

V. Borrower Liabilities: Contingent Liability

1. Definition: Contingent Liability

A contingent liability exists when an individual is held responsible for payment of a debt if another party, jointly or severally obligated, defaults on the payment.

2. Application of Contingent Liability Policies

The contingent liability policies described in this topic apply unless the borrower can provide conclusive evidence from the debt holder that there is no possibility that the debt holder will pursue debt collection against him/her should the other party default.

3. Contingent Liability on Mortgage Assumptions

Contingent liability must be considered when the borrower remains obligated on an outstanding FHA-insured, VA-guaranteed, or conventional mortgage secured by property that:

a. Has been sold or traded within the last 12 months without a release of liability, or

b. Is to be sold on assumption without a release of liability being obtained.

4. Exemption From Contingent Liability Policy on Mortgage Assumptions

When a mortgage is assumed, contingent liabilities need not be considered if the

a. Originating lender of the mortgage being underwritten obtains, from the servicer of the assumed loan, a payment history showing that the mortgage has been current during the previous 12 months, or

b. Value of the property, as established by an appraisal or the sales price on the HUD–1 *Settlement Statement* from the sale of the property, results in a loan-to-value (LTV) ratio of 75 percent or less.

5. Contingent Liability on Cosigned Obligations

a. Contingent liability applies, and the debt must be included in the underwriting analysis, if an individual applying for a mortgage is a cosigner/co-obligor on:
i. A car loan
ii. A student loan
iii. A mortgage, or
iv. Any other obligation.

b. If the lender obtains documented proof that the primary obligor has been making regular payments during the previous 12 months, and does not have a history of delinquent payments on the loan during that time, the payment does not have to be included in the borrower's monthly obligations.

VI. Borrower Liabilities: Projected Obligations and Obligations Not Considered Debt

1. Projected Obligations

a. Debt payments, such as a student loan or balloon note scheduled to begin or come due within 12 months of the mortgage loan closing, must be included by the lender as anticipated monthly obligations during the underwriting analysis.

b. Debt payments do not have to be classified as projected obligations if the borrower provides written evidence that the debt will be deferred to a period outside the 12-month timeframe.

c. Balloon notes that come due within one year of loan closing must be considered in the underwriting analysis.

2. Obligations Not Considered Debt

Obligations not considered debt, and therefore not subtracted from gross income, include
a. Federal, state, and local taxes
b. Federal Insurance Contributions Act (FICA) or other retirement contributions, such as 401(k) accounts (including repayment of debt secured by these funds)
c. Commuting costs
d. Union dues
e. Open accounts with zero balances
f. Automatic deductions to savings accounts
g. Child care, and
h.Voluntary deductions.

END OF COMMON RULE

Adoption of the Common Rule Text

The proposed adoption of the common rules by the agencies, as modified by agency-specific text, is set forth below:

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Chapter I

List of Subjects in 12 CFR Part 43

Banks and banking, Credit risk, National banks, Reporting and recordkeeping requirements, Risk retention, Securitization, Mortgages, Commercial loans, Commercial real estate, Auto loans.

Authority and Issuance

For the reasons stated in the Common Preamble, the Office of the Comptroller of the Currency proposes to amend chapter I of Title 12, Code of Federal Regulations as follows:

PART 43—CREDIT RISK RETENTION

1. The authority citation for part 43 is added to read as follows:

Authority: 12 U.S.C. 1 *et seq.,* 93a, 161, 1818, and 15 U.S.C. 78o–11.

2. Part 43 is added as set forth at the end of the Common Preamble.

3. Section 43.1 is added to read as follows:

§ 43.1 Authority, purpose, scope, and reservation of authority.

(a) *Authority.* This part is issued under the authority of 12 U.S.C. 1 *et seq.,* 93a, 161, 1818, and 15 U.S.C. 78o–11.

(b) *Purpose.* (1) This part requires securitizers to retain an economic interest in a portion of the credit risk for any asset that the securitizer, through the issuance of an asset-backed security, transfers, sells, or conveys to a third party. This part specifies the permissible types, forms, and amounts of credit risk retention, and it establishes certain exemptions for securitizations collateralized by assets that meet specified underwriting standards.

(2) Nothing in this part shall be read to limit the authority of the OCC to take supervisory or enforcement action, including action to address unsafe or unsound practices or conditions, or violations of law.

(c) *Scope.* This part applies to any securitizer that is a national bank, a Federal branch or agency of a foreign bank, or an operating subsidiary thereof.

(d) *Effective dates.* This part shall become effective:

(1) With respect to any securitization transaction collateralized by residential mortgages, one year after the date on which final rules under section 15G(b) of the Exchange Act (15 U.S.C. 78o–11(b)) are published in the **Federal Register**; and

(2) With respect to any other securitization transaction, two years after the date on which final rules under section 15G(b) of the Exchange Act (15 U.S.C. 78o–11(b)) are published in the **Federal Register**.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

12 CFR Chapter II

List of Subjects in 12 CFR Part 244

Banks and banking, Bank holding companies, State member banks, Foreign banking organizations, Edge and agreement corporations, Credit risk, Reporting and recordkeeping requirements, Risk retention, Securitization, Mortgages, Commercial loans, Commercial real estate, Auto loans.

Authority and Issuance

For the reasons set forth in the Supplementary Information, the Board of Governors of the Federal Reserve System proposes to add the text of the common rule as set forth at the end of the Supplementary Information as Part 244 to chapter II of Title 12, Code of Federal Regulations, modified as follows:

PART 244—CREDIT RISK RETENTION (REGULATION RR)

4. The authority citation for part 244 is added to read as follows:

Authority: 12 U.S.C. 221 *et seq.,* 1818, 1841 *et seq.,* 3103 *et seq.,* and 15 U.S.C. 78o–11.

5. Section 244.1 is added to read as follows:

§ 244.1 Authority, purpose, and scope

(a) *Authority.* (1) *In general.* This part (Regulation RR) is issued by the Board of Governors of the Federal Reserve System under section 15G of the Securities Exchange Act of 1934, as amended (Exchange Act) (15 U.S.C. 78o–11), as well as under the Federal Reserve Act, as amended (12 U.S.C. 221 *et seq.*); section 8 of the Federal Deposit Insurance Act (FDI Act), as amended (12 U.S.C. 1818); the Bank Holding Company Act of 1956, as amended (BHC Act) (12 U.S.C. 1841 *et seq.*); and the International Banking Act of 1978, as amended (12 U.S.C. 3101 *et seq.*).

(2) Nothing in this part shall be read to limit the authority of the Board to take action under provisions of law other than 15 U.S.C. 78o–11, including action to address unsafe or unsound practices or conditions, or violations of law or regulation, under section 8 of the FDI Act.

(b) *Purpose.* This part requires any securitizer to retain an economic interest in a portion of the credit risk for any asset that the securitizer, through the issuance of an asset-backed security, transfers, sells, or conveys to a third party in a transaction within the scope of section 15G of the Exchange Act. This part specifies the permissible types, forms, and amounts of credit risk retention, and establishes certain exemptions for securitizations collateralized by assets that meet specified underwriting standards or that otherwise qualify for an exemption.

(c) *Scope.* (1) This part applies to any securitizer that is:

(i) A state member bank (as defined in 12 CFR 208.2(g)); or

(ii) Any subsidiary of a state member bank.

(2) Section 15G of the Exchange Act and the rules issued thereunder apply to any securitizer that is:

(i) A bank holding company (as defined in 12 U.S.C. 1842);

(ii) A foreign banking organization (as defined in 12 CFR 211.21(o));

(iii) An Edge or agreement corporation (as defined in 12 CFR 211.1(c)(2) and (3));

(iv) A nonbank financial company that the Financial Stability Oversight Council has determined under section 113 of the Dodd–Frank Wall Street Reform and Consumer Protection Act (the Dodd–Frank Act) (12 U.S.C. 5323) shall be supervised by the Board and for which such determination is still in effect; or

(v) Any subsidiary of the foregoing. The Federal Reserve will enforce section 15G of the Exchange Act and the rules issued thereunder under section 8 of the FDI Act against any of the foregoing entities.

(3) On and after the transfer date established under section 311 of the Dodd-Frank Act (12 U.S.C. 5411), the Federal Reserve will enforce section 15G of the Exchange Act and the rules issued thereunder under section 8 of the FDI Act against any securitizer that is a savings and loan holding company and any subsidiary thereof (as defined in 12 U.S.C. 1467a).

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Chapter III

List of Subjects in 12 CFR Part 373

Banks, Banking, State nonmember banks, Credit risk, Reporting and recordkeeping requirements, Risk retention, Securitization, Mortgages, Commercial loans, Commercial real estate, Auto loans.

Authority and Issuance

For the reasons set forth in the Supplementary Information, the Federal Deposit Insurance Corporation proposes to add the text of the common rule as set forth at the end of the Supplementary Information as Part 373 to chapter III of Title 12, Code of Federal Regulations, modified as follows:

PART 373—CREDIT RISK RETENTION

6. The authority citation for part 373 is added to read as follows:

Authority: 12 U.S.C. 1801 *et seq.* and 3103 *et seq.,* and 15 U.S.C. 78o–11.

7. Section 373.1 is added to read as follows:

§ 373.1 Purpose and scope.

(a) *Authority.* (1) *In general.* This part is issued by the Federal Deposit Insurance Corporation (FDIC) under section 15G of the Securities Exchange Act of 1934, as amended (Exchange Act) (15 U.S.C. 78o–11), as well as the Federal Deposit Insurance Act (12 U.S.C. 1801 *et seq.*) and the International Banking Act of 1978, as amended (12 U.S.C. 3101 *et seq.*).

(2) Nothing in this part shall be read to limit the authority of the FDIC to take action under provisions of law other than 15 U.S.C. 78o–11, including to address unsafe or unsound practices or conditions, or violations of law or regulation under section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818).

(b) *Purpose.* This part requires securitizers to retain an economic interest in a portion of the credit risk for any asset that the securitizer, through the issuance of an asset-backed security, transfers, sells, or conveys to a third party in a transaction within the scope of section 15G of the Exchange Act. This part specifies the permissible types, forms, and amounts of credit risk retention, and it establishes certain exemptions for securitizations collateralized by assets that meet specified underwriting standards or that otherwise qualify for an exemption.

(c) *Scope.* This part applies to any securitizer that is:

(1) A state nonmember bank (as defined in 12 U.S.C. 1813(e)(2));

(2) An insured federal or state branch of a foreign bank (as defined in 12 CFR 347.202); or

(3) Any subsidiary of the foregoing.

FEDERAL HOUSING FINANCE AGENCY

List of Subjects in 12 CFR Part 1234

Government sponsored enterprises, Mortgages, Securities.

Authority and Issuance

For the reasons stated in the Supplementary Information, and under the authority of 12 U.S.C. 4526, the Federal Housing Finance Agency proposes to add the text of the common rule as set forth at the end of the Supplementary Information as Part 1234 of subchapter B of chapter XII of title 12 of the Code of Federal Regulations, modified as follows:

CHAPTER XII—FEDERAL HOUSING FINANCE AGENCY

SUBCHAPTER B—ENTITY REGULATIONS

PART 1234—CREDIT RISK RETENTION

8. The authority citation for part 1234 is added to read as follows:

Authority: 12 U.S.C. 4511(b), 4526, 4617; 15 U.S.C. 78o–11(b)(2).

9. Section 1234.1 is added to read as follows:

§ 1234.1 Purpose, scope and reservation of authority.

(a) *Purpose.* This part requires securitizers to retain an economic interest in a portion of the credit risk for any residential mortgage asset that the securitizer, through the issuance of an asset-backed security, transfers, sells, or conveys to a third party in a transaction within the scope of section 15G of the Exchange Act. This part specifies the permissible types, forms, and amounts of credit risk retention, and it establishes certain exemptions for securitizations collateralized by assets that meet specified underwriting standards or that otherwise qualify for an exemption.

(b) *Scope.* Effective [DATE ONE YEAR AFTER PUBLICATION IN THE FEDERAL REGISTER AS A FINAL RULE], this part will apply to any securitizer that is an entity regulated by the Federal Housing Finance Agency.

(c) *Reservation of authority.* Nothing in this part shall be read to limit the authority of the Director of the Federal Housing Finance Agency to take supervisory or enforcement action, including action to address unsafe or unsound practices or conditions, or violations of law.

10. Amend § 1234.16 as follows:

a. Revise the section heading to read as set forth below.

b. In the introductory text, remove the words "§ 1234.17 through § 1234.20" and add in their place the words "§ 1234.19".

c. Remove the definitions of "Automobile loan", "Commercial loan", "Debt to income (DTI) ratio", "Earnings before interest, taxes, depreciation, and amortization (EBITDA)", "Leverage Ratio", "Machinery and equipment (M&E) collateral", "Model year", "New vehicle", "Payment-in-kind (PIK)", "Purchase price", "Salvage title", "Total debt", "Total liabilities ratio", "Trade-in allowance" and "Used vehicle".

d. Revise the definition of "Debt service coverage (DSC) ratio" to read as follows:

§ 1234.16 Definitions applicable to qualifying commercial mortgages.

* * * * *

Debt service coverage (DSC) ratio means the ratio of:

(1) The annual NOI less the annual replacement reserve of the CRE property at the time of origination of the CRE loans; to

(2) The sum of the borrower's annual payments for principal and interest on any debt obligation.

* * * * *

§§ 1234.17, 1234.18, and 1234.20 [Removed and reserved]

11. Remove and reserve §§ 1234.17, 1234.18 and 1234.20.

12. Amend § 1234.19 as follows:

a. Revise the section heading to read as set forth below.

b. Add introductory text to read as set forth below.

§ 1234.19 Exception for qualifying CRE loans.

The risk retention requirements in subpart B of this part shall not apply to securitization transactions that satisfy the standards provided in this section.

* * * * *

SECURITIES AND EXCHANGE COMMISSION

17 CFR Chapter II

List of Subjects in 17 CFR Part 246

Reporting and recordkeeping requirements, Securities.

Authority and Issuance

For the reasons stated in the Supplementary Information, the Securities and Exchange Commission proposes the amendments to 17 CFR chapter II under the authority set forth in Sections 7, 10, 19(a), and 28 of the Securities Act and Sections 3, 13, 15, 15G, 23 and 36 of the Exchange Act.

PART 246—CREDIT RISK RETENTION

13. The authority citation for part 246 is added to read as follows:

Authority: 15 U.S.C. 77g, 77j, 77s, 77z–3, 78c, 78m, 78o, 78o–11, 78w, 78mm.

14. Part 246 is added as set forth at the end of the Common Preamble.

15. Section 246.1 is added to read as follows:

§ 246.1 Authority, purpose and scope.

(a) *Authority and purpose.* This part (Regulation RR) is issued by the Securities and Exchange Commission ("Commission") jointly with the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and, in the case of the securitization of any residential mortgage asset, together with the Secretary of Housing and Urban Development and the Federal Housing Finance Agency, pursuant to Section 15G of the Securities Exchange Act of 1934 (15 U.S.C. 78o–11). The Commission also is issuing this part pursuant to its authority under Sections 7, 10, 19(a), and 28 of the Securities Act and Sections 3, 13, 15, 23, and 36 of the Exchange Act. This part requires securitizers to retain an economic interest in a portion of the credit risk for any asset that the securitizer, through the issuance of an asset-backed security, transfers, sells, or conveys to a third party. This part specifies the permissible types, forms, and amounts of credit risk retention, and establishes certain exemptions for securitizations collateralized by assets that meet specified underwriting standards or otherwise qualify for an exemption.

(b) The authority of the Commission under this part shall be in addition to the authority of the Commission to otherwise enforce the federal securities laws, including, without limitation, the antifraud provisions of the securities laws.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 267

List of Subjects in 24 CFR Part 267

Mortgages.

Authority and Issuance

For the reasons stated in the **SUPPLEMENTARY INFORMATION**, HUD proposes to add the text of the common rule as set forth at the end of the **SUPPLEMENTARY INFORMATION** to 24 CFR chapter II, subchapter B, as a new part 267 to read as follows:

PART 267—CREDIT RISK RETENTION

16. The authority citation for part 267 is added to read as follows:

Authority: 15 U.S.C. 78–o–11; 42 U.S.C. 3535(d).

17. Section 267.1 is added to read as follows:

§ 267.1 Credit risk retention exceptions and exemptions for HUD programs.

The credit risk retention regulations codified at 12 CFR part 43 (Office of the Comptroller of the Currency); 12 CFR part 244 (Federal Reserve System); 12 CFR part 373 (Federal Deposit Insurance Corporation); 17 CFR part 246 (Securities and Exchange Commission); and 12 CFR part 1234 (Federal Housing Finance Agency) include exceptions and exemptions in Subpart D of each of these codified regulations for certain transactions involving programs and entities under the jurisdiction of the Department of Housing and Urban Development.

Dated: March 28, 2011.

John Walsh,

Acting Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System, March 30, 2011.

Jennifer J. Johnson,

Secretary of the Board.

Dated at Washington, DC, this 29th of March 2011.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

Dated: March 29, 2011.

Edward J. Demarco,

Acting Director, Federal Housing Finance Agency.

By the Securities and Exchange Commission.

Dated: March 30, 2011.

Elizabeth M. Murphy,

Secretary.

Jointly prescribed with the Agencies.

By the Department of Housing and Urban Development.

Dated: March 31, 2011.

Shaun Donovan,

Secretary.

[FR Doc. 2011–8364 Filed 4–28–11; 8:45 am]

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Part III

Department of Energy

Federal Energy Regulatory Commission

18 CFR Part 35

Electricity Market Transparency Provisions of Section 220 of the Federal Power Act; Proposed Rule

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM10–12–000]

Electricity Market Transparency Provisions of Section 220 of the Federal Power Act

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission proposes to amend its regulations pursuant to section 220 of the Federal Power Act (FPA), as enacted by section 1281 of the Energy Policy Act of 2005 (EPAct 2005), to facilitate price transparency in markets for the sale and transmission of electric energy in interstate commerce. In doing so, the Commission proposes to require market participants that are excluded from the Commission's jurisdiction under FPA section 205 and have more than a *de minimis* market presence to file Electric Quarterly Reports (EQR) with the Commission.

In addition, the Commission proposes to refine the existing EQR filing requirements by directing all filers to: report the transaction date and time, as well as the type of rate by which the price in the transaction or contract was set (*i.e.,* fixed price, formula, index, regional transmission organization/ independent system operator (RTO/ISO) price, or index); indicate whether the transaction was reported to an index publisher; identify the broker or exchange used for a transaction, if applicable; and report electronic tag (e-Tag) ID data in EQRs. The Commission also proposes to: Standardize the unit for reporting energy and capacity transactions; omit the time zone from the contract section; and eliminate the Data Universal Numbering System (DUNS) data requirement. These refinements to the existing EQR filing requirements reflect the evolving nature of electricity markets and promote greater price transparency and confidence in electricity markets.

DATES: Comments are due June 28, 2011.

ADDRESSES: You may submit comments, identified by docket number by any of the following methods:

- *Agency Web Site: http://ferc.gov.* Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.
- *Mail/Hand Delivery:* Commenters unable to file comments electronically must mail or hand-deliver an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT:
Maria Vouras, Office of Enforcement, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8062, *Maria.Vouras@ferc.gov.*
Christina Switzer, Office of General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6379, *Christina.Switzer@ferc.gov.*
William Sauer, Office of Enforcement, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6639, *William. Sauer@ferc.gov.*

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Notice of Proposed Rulemaking—April 21, 2011

1. To facilitate price transparency in markets for the sale and transmission of electric energy in interstate commerce, the Federal Energy Regulatory Commission (Commission) proposes to revise its regulations to require market participants that are excluded from the Commission's jurisdiction under section 205 of the Federal Power Act (FPA) [1] and have more than a *de minimis* market presence to file Electric Quarterly Reports (EQR) with the Commission.[2] In doing so, the Commission proposes to exercise its

[1] 16 U.S.C. 824d. For ease of reference, this Notice of Proposed Rulemaking (NOPR) refers to market participants that are not public utilities under section 201(f) of the FPA as "non-public utilities." FPA section 201(f) provides: No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 *et seq.*) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. 16 U.S.C. 824(f).

[2] These proposed requirements would not apply to a transaction for the purchase or sale of wholesale electric energy or transmission services within the Electric Reliability Council of Texas (ERCOT), consistent with the exclusion set forth in FPA section 220(f). 16 U.S.C. 824t(f).

[3] 16 U.S.C. 824t.

[4] EPAct 2005, Pub. L. 109–58, 119 Stat. 594 (2005).

authority under section 220 of the FPA,[3] as adopted in the Energy Policy Act of 2005 (EPAct 2005).[4] This proposal would allow the Commission and the public to gain a more complete picture of wholesale power and transmission markets in interstate commerce by providing additional information concerning price formation and market concentration in these markets. Public access to additional sales and transmission-related information in the EQR would improve market participants' ability to assess supply and demand fundamentals and to price interstate wholesale market transactions. It also would strengthen the Commission's ability to identify potential exercises of market power or manipulation and to better evaluate the competitiveness of the interstate wholesale markets.

2. In addition, the Commission proposes to make certain revisions to the existing EQR filing requirements and apply those revisions to all market participants filing EQRs. The Commission proposes to revise the EQRs currently filed by public utilities under FPA section 205(c) and that will be filed by non-public utilities under FPA section 220. These revisions include the addition of new fields for: (1) Reporting the transaction date and time, as well as the type of rate; (2) indicating whether the sales transaction was reported to an index publisher; (3) identifying the broker or exchange used for a sales transaction, if applicable; and (4) reporting electronic tag (e-Tag) ID data. The Commission also proposes to eliminate the time zone from the contract section and the Data Universal Numbering System (DUNS) data requirement. Further, the Commission proposes to standardize the unit for reporting energy and capacity transactions. These refinements to the existing EQR filing requirements reflect the evolving nature of electricity markets, would increase market transparency for the Commission and the public, and would allow market participants to file the information in the most efficient manner possible.[5]

I. Background

A. Order No. 2001

3. The Commission set forth the EQR filing requirements in Order No. 2001.[6] Order No. 2001 requires public utilities to electronically file EQRs summarizing transaction information for short-term and long-term cost-based sales and market-based rate sales and the contractual terms and conditions in their agreements for all jurisdictional services.[7] The Commission established the EQR reporting requirements to help ensure the collection of information needed to perform its regulatory functions over transmission and sales,[8] while making data more useful to the public and allowing public utilities to better fulfill their responsibility under FPA section 205(c)[9] to have rates on file in a convenient form and place.[10] As noted in Order No. 2001, the EQR data is designed to "provide greater price transparency, promote competition, enhance confidence in the fairness of the markets, and provide a better means to detect and discourage discriminatory practices."[11]

4. Since issuing Order No. 2001, the Commission has provided guidance and refined the reporting requirements, as necessary, to simplify the filing requirements and to reflect changes in the Commission's rules and regulations.[12] For instance, in 2007 the Commission adopted an Electric Quarterly Report Data Dictionary, which provides in one document the definitions of certain terms and values used in filing EQR data.[13] Moreover, in 2007, the Commission required transmission capacity reassignment to be reported in the EQR.[14] The refinements to the existing EQR requirements that we are proposing in this NOPR build upon the Commission's prior improvements to the reporting requirements and further enhance the goals of providing greater price transparency, promoting competition, instilling confidence in the fairness of the markets, and providing a better means to detect and discourage discriminatory and manipulative practices.

B. EPAct 2005

5. In EPAct 2005, Congress added section 220 to the FPA,[15] directing the Commission to "facilitate price transparency in markets for the sale and transmission of electric energy in interstate commerce" with "due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers."[16] FPA section 220 grants the Commission authority to obtain and disseminate "information about the availability and prices of wholesale electric energy and transmission service to the Commission, State commissions, buyers and sellers of wholesale electric energy, users of transmission services, and the public."[17] The statute specifies that the Commission may obtain this information from "any market participant,"[18] except for entities with a *de minimis* market presence.[19] EPAct 2005 added a similar transparency provisions in the Natural Gas Act.[20]

6. In 2006, Commission staff conducted an extensive outreach effort to formulate options for implementing EPAct 2005's transparency provisions for wholesale natural gas and electricity markets. As a result, the Commission used its new transparency authority to adopt additional filing and posting requirements for the sale or transportation of physical natural gas in interstate commerce in Orders No. 704 and 720. Order No. 704 requires buyers and sellers of more than a *de minimis* volume of natural gas to report aggregate volumes of relevant transactions in an

[5] The Commission also is reviewing the software currently used to file EQRs.

[6] *Revised Public Utility Filing Requirements,* Order No. 2001, 67 FR 31043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127, *reh'g denied,* Order No. 2001–A, 100 FERC ¶ 61,074, *reh'g denied,* Order No. 2001–B, 100 FERC ¶ 61,342, *order directing filing,* Order No. 2001–C, 101 FERC ¶ 61,314 (2002), *order directing filing,* Order No. 2001–D, 102 FERC ¶ 61,334, *order refining filing requirements,* Order No. 2001–E, 105 FERC ¶ 61,352 (2003), *order on clarification,* Order No. 2001–F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements,* Order No. 2001–G, 72 FR 56735 (Oct. 4, 2007), 120 FERC ¶ 61,270, *order on reh'g and clarification,* Order No. 2001–H, 73 FR 1876 (Jan. 10, 2008), 121 FERC ¶ 61,289 (2007), *order revising filing requirements,* Order No. 2001–I, 73 FR 65526 (Nov. 4, 2008), 125 FERC ¶ 61,103 (2008).

[7] Order No. 2001, FERC Stats. & Regs. ¶ 31,127.

[8] *Id.* P 13–14.

[9] 16 U.S.C. 824d(c).

[10] Order No. 2001, FERC Stats. & Regs.¶ 31,127 at P 31.

[11] *Id.* P 31.

[12] *See, e.g., Revised Public Utility Filing Requirements for Electric Quarterly Reports,* 124 FERC ¶ 61,244 (2008) (providing guidance on the filing of information on transmission capacity reassignments in EQRs); *Notice of Electric Quarterly Reports Technical Conference,* 73 FR 2477 (Jan. 15, 2008) (announcing a technical conference to discuss changes associated with the EQR Data Dictionary).

[13] Order No. 2001–G, 120 FERC ¶ 61,270.

[14] *Preventing Undue Discrimination and Preference in Transmission Service,* Order No. 890, 72 FR 12266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241, at P 817, *order on reh'g,* Order No. 890–A, 73 FR 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g and clarification,* Order No. 890–B, 73 FR 39092 (July 8, 2008), 123 FERC ¶ 61,299 (2008), *order on reh'g,* Order No. 890–C, 74 FR 12540 (March 25, 2009), 126 FERC ¶ 61,228 (2009), *order on clarification,* Order No. 890–D, 74 FR 61511 (Nov. 25, 2009), 129 FERC ¶ 61,126.

[15] 16 U.S.C. 824t.

[16] In addition, FPA section 220(b)(1–2) directs the Commission to exempt from disclosure information that is "detrimental to the operation of an effective market or [that would] jeopardize system security," and "to ensure that consumers and competitive markets are protected from the adverse effects of potential collusion or other anticompetitive behaviors that can be facilitated by untimely public disclosure of proprietary trading information." 16 U.S.C. 824t(b)(1–2).

[17] 16 U.S.C. 824t(a)(2).

[18] *Id.* 824t(a)(3)(A).

[19] *Id.* 824t(d).

[20] 15 U.S.C. 717t–2.

annual filing.[21] In Order No. 720, the Commission required major non-interstate pipelines to post daily scheduled volume and other data for certain receipt and delivery points.[22] Order No. 720 also requires interstate pipelines to post information regarding no-notice service.[23]

7. The Commission declined to extend such requirements to wholesale electricity markets because, at the time of the Natural Gas Transparency Notice of Proposed Rulemaking, the Commission was considering other reforms to its regulation of electricity markets.[24] In particular, the Commission was undertaking open access transmission service reforms and the more general review of competition in wholesale electricity markets.[25] As a result of these efforts, the Commission issued two final rules. In Order No. 890, the Commission exercised its remedial authority "to limit further opportunities for undue discrimination, by minimizing areas of discretion, addressing ambiguities and clarifying various aspects of the *pro forma* [Open Access Transmission Tariff]."[26] Moreover, in Order No. 719, the Commission made reforms "to improve the operation [and competitiveness] of organized wholesale electric power markets" in connection with "fulfilling its statutory mandate to ensure supplies of electric energy at just, reasonable and not unduly discriminatory or preferential rates."[27] Although these final rules improved transparency in wholesale markets in a number of ways, the Commission believes the revisions proposed in this order are necessary to facilitate price transparency in wholesale electricity markets.

C. Notice of Inquiry

8. On January 21, 2010, the Commission issued a Notice of Inquiry[28] seeking comments on whether the Commission should apply the EQR filing requirements to non-public utilities and whether the Commission should consider other refinements to the existing EQR filing requirements. In response to the Transparency NOI, the Commission received 40 comments. Of those comments, twenty-eight discuss extending the EQR filings to non-public utilities; five discuss EQR refinements; and six discuss both. We have considered these comments in drafting the proposals in this NOPR, and we invite further comments on these proposals.

II. Discussion

A. Extending the EQR Filing Requirements to Non-Public Utilities

1. Background

a. Need for Information from Non-Public Utilities

9. Currently, market participants that fall within the Commission's jurisdiction under FPA section 205(c)[29] must file EQRs summarizing contractual terms and conditions in their agreements for jurisdictional services, including market-based rate sales, cost-based sales, transmission service, and transmission capacity reassignments. In addition, EQR filers must provide detailed transactional information for power sales and transmission capacity reassignments made during the most recent calendar quarter.

10. Transactions made by both public utility and non-public utility market participants provide critical pricing information that market participants can use to make better-informed decisions about, among other things, sales, purchases, and infrastructure investments. Access to reliable data reduces differences in available information among various market participants, results in greater market confidence, lowers transaction costs, and ultimately supports competitive markets, which helps lower electricity costs for consumers. Applying the EQR filing requirements to the non-public utilities that fall above the *de minimis* threshold will increase price transparency to the public and the Commission and aid the Commission in its oversight of wholesale power and transmission markets. As the Commission explained in implementing the transparency provisions under section 23 of the Natural Gas Act:

> The Commission's market-oriented policies for the wholesale natural gas industry require that interested persons have broad confidence that reported market prices accurately reflect the interplay of legitimate market forces. Without confidence in the fairness of price formation, the true value of transactions is very difficult to determine. Further, price transparency makes it easier for us to ensure that jurisdictional prices are "just and reasonable."[30]

11. Based on the most recent data available in the 2009 U.S. Energy Information Administration's (EIA) Form 861, non-public utilities account for significant volumes of the 3.2 billion MWh of total annual wholesale electricity sales made within the 48 contiguous states (excluding ERCOT).[31] In particular, about 29 percent of those wholesale sales are made by non-public utilities. Non-public utilities make a significant portion of sales in certain regional wholesale markets within the United States. The 2009 EIA Form 861 data indicates that non-public utilities account for 60 and 70 percent of wholesale sales within the Western Electric Coordinating Council (WECC) and SERC Reliability Corporation (SERC) regions, respectively. Similarly, non-public utilities make up about 80 percent of all wholesale sales that occur within the Florida Reliability Coordinating Council (FRCC). Given non-public utilities' significant presence in national and regional wholesale electricity markets, obtaining information about their sales transactions is important to unmasking how prices are formed in electricity markets. The lack of information from non-public utilities results in an incomplete picture of these markets, and hampers the ability of the public

[21] *Transparency Provisions of Section 23 of the Natural Gas Act,* Order No. 704, 73 FR 1014 (Jan. 4, 2008), FERC Stats. & Regs. ¶ 31,260, at P 32 (2007), *order on reh'g,* Order No. 704–A, 73 FR 55726 (Sept. 26, 2008), FERC Stats. & Regs. ¶ 31,275, *order dismissing reh'g and clarification,* Order No. 704–B, 125 FERC ¶ 61,302 (2008), *order granting clarification,* Order No. 704–C, 75 FR 35632 (June 23, 2010), 131 FERC ¶ 61,246 (2010); *see also, Pipeline Posting Requirements under Section 23 of the Natural Gas Act,* Order No. 720, 73 FR 73494 (Dec. 2, 2008), FERC Stats. & Regs. ¶ 31,283, at P 3 (2008), *order on reh'g,* Order No. 720–A, 73 FR 73494 (Dec. 2, 2008), FERC Stats. & Regs. ¶ 31,302, *order on reh'g and clarification,* Order No. 720–B, 75 FR 44893 (July 30, 2010), FERC Stats. & Regs. ¶ 31,314 (2010).

[22] Order No. 720, FERC Stats. & Regs. ¶ 31,283 at P 1.

[23] *Id.*

[24] *See Transparency Provisions of Section 23 of the Natural Gas Act; Transparency Provisions of the Energy Policy Act,* Notice of Proposed Rulemaking, 72 FR 20791 (April 26, 2007), FERC Stats. & Regs. ¶ 32,614, at P 9–11 (2007) (Natural Gas Transparency NOPR) ("The Commission does not propose action with respect to electric markets at this time. The Commission has recently addressed and is currently addressing electric market transparency in other proceedings.").

[25] *Id.*

[26] Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 40.

[27] *Wholesale Competition in Regions with Organized Electric Markets,* Order No. 719, 73 FR 64100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008), *order on reh'g,* Order No. 719–A, 74 FR 37776 (July 29, 2009), FERC Stats. & Regs. ¶ 31,292, *order on reh'g and clarification,* Order No. 719–B, 129 FERC ¶ 61,252 (2009).

[28] *Electricity Market Transparency Provisions of Section 220 of the Federal Power Act,* Notice of Inquiry, 75 FR 4805 (Jan. 29, 2010), FERC Stats. & Regs. ¶ 35,565 (2010) (Transparency NOI).

[29] FPA section 205(c) requires public utilities to file all rates and charges for any transmission or sale subject to the Commission's jurisdiction in a convenient form and place for public inspection. 16 U.S.C. 824d(c).

[30] Order No. 704–A, 124 FERC ¶ 61,269 at P 3; *see also* Order No. 704, FERC Stats. & Regs. ¶ 31,260 at P 7.

[31] *See* U.S. Energy Information Administration, *Form EIA–861, Annual Electric Power Industry Report* (April 2010), *available at http://www.eia.doe.gov/cneaf/electricity/page/eia861.html.*

and the Commission to detect and address the potential exercise of market power and manipulation.

12. Among the refinements this NOPR proposes to the EQR filing requirements is a requirement that all market participants provide information about the index publishers, if any, to which they report their transactions and any broker or exchange they use. This information would provide greater transparency regarding electricity index prices and how well those index prices reflect market forces, thus creating greater confidence in the electricity market. In addition, this NOPR proposes several refinements to the EQR filing requirements, including requiring all filers to report: (1) The transaction date and time; (2) the type of rate by which the price in the transaction or contract was set (*i.e.,* fixed price, formula, index, or RTO/ISO price); and (3) e-Tag ID data. The Commission also proposes to: (1) Standardize the unit for reporting energy and capacity transactions; (2) omit the time zone from the contract section; and (3) eliminate the DUNS number requirement.

13. Section 220(a)(4) of the FPA requires the Commission to "consider the degree of price transparency provided by existing price publishers and providers of trade processing services, and * * * rely on such publishers and services to the maximum extent possible." As discussed below, we have reviewed existing publications and we believe that the additional data that would be required under this NOPR is not available through existing sources and is necessary to provide a complete picture of price formation in wholesale power markets.

b. Notice of Inquiry Regarding Extending the EQR Filing Requirements

14. In the Transparency NOI, the Commission sought comments regarding whether the Commission should extend the EQR filing requirements to non-public utilities. The Commission also sought comments on what information the Commission should collect, whether the Commission should establish a threshold for reporting, and the burden on market participants that would have to adapt their existing systems to be able to provide the information. The Commission also asked whether extending the filing requirements would impact market liquidity.

2. Commission Authority

a. Comments

15. Several commenters question whether the Commission has the authority to extend the EQR filing requirements to non-public utilities.[32] Many of these commenters emphasize that the Commission's jurisdiction under section 220 is limited to collecting information regarding wholesale electricity and transmission markets. They point to section 220(b), which states that "[t]he Commission may prescribe rules * * * [that] provide for the dissemination, on a timely basis, of information about the availability and prices of wholesale electric energy and transmission service."[33] They argue that non-public utilities constitute a small percentage of the wholesale market, and therefore information from these market participants will not enhance transparency significantly.[34] In addition, Alaska Power argues that utilities in Alaska do not engage in energy and transmission transactions in interstate commerce and, therefore, should not be required to file EQRs. Many commenters also argue that there is a lack of evidence to support imposing the EQR filing requirements on non-public utilities.[35] For instance, NRECA and TANC argue that, in the Transparency NOI, the Commission overstated the volume of sales that would be reported if the Commission extended the filing requirements to non-public utilities.[36] APPA asserts that EIA statistics on non-public utility sales cited by the Commission in the Transparency NOI reflect bundled retail sales to consumers rather than information on wholesale sales, which is relevant to the Commission's oversight of jurisdictional wholesale markets.[37] NRECA and TANC claim that the Commission should have excluded retail sales from EIA's estimate of electric utility sales that are made by entities other than public utilities.[38] TANC also asserts that the Commission should have excluded sales from utilities in ERCOT because those utilities are outside the Commission's section 220 jurisdiction. APPA asserts that the Commission's efforts would be better spent focusing on Regional Transmission Organization (RTO) and Independent System Operators (ISO) market transparency.

16. NRECA and TANC further contend that the absence of EQR information from non-public utilities has not hampered the Commission's ability to approve market-based rates. For example, TANC argues that the Commission has been conducting *ex ante* and *ex post* analyses of public utilities' market power and has been approving and evaluating mergers for decades without information from non-jurisdictional entities.

17. Cities/M–S–R state that entities under consideration in this proceeding have no statutory obligation to file their energy sales agreements with the Commission, nor are their rates subject to reasonableness determinations before the Commission. Accordingly, Cities/M–S–R argue that there is no need to use the EQR mechanism to replace other filing obligations, such as an annual filing with the EIA, for entities exempt from section 205 of the FPA.

18. Other commenters argue that the Commission has the authority under the FPA to extend the EQR filing requirements to non-public utilities. EEI asserts that section 220 provides the Commission with clear authority and responsibility to extend the EQR filing requirements. DC Energy notes that section 205 also provides the Commission with broad authority to require otherwise exempt entities to provide information related to the rates for jurisdictional services.

19. Several commenters also support the Commission's effort to increase transparency in wholesale electricity markets and assert that the additional reporting requirements will assist the Commission in carrying out its statutory obligations.[39] The City of Dover states that reporting is needed to enable the Commission to understand the impact of certain transactions. DC Energy strongly supports the Commission's efforts and argues that such reporting will help facilitate the detection of market power. In addition, California PUC states that the additional filing requirements can help state regulatory agencies: (1) Oversee utility procurement; (2) establish statewide renewable portfolio standards, energy efficiency initiatives, demand response programs, and capacity market activities; and (3) further greenhouse gas policies.

[32] APPA; NRECA; Southwest Transmission; EMCOS; Public Systems; East Texas Electric Cooperatives; Cities/M–S–R; TANC; MID; New York Public Power; Delaware Municipal; California DWR; Public Power Council; Allegheny; Utah Associated Municipal; NCPA; NYMPA/MEUA.

[33] 16 U.S.C. 824t(b).

[34] APPA; NRECA; EMCOS; Public Systems; East Texas Electric Cooperatives; TANC; Delaware Municipal; Utah Associated Municipal; NYMPA/MEUA.

[35] Southwest Transmission; East Texas Electric Cooperatives; TANC; Utah Associated Municipal.

[36] NRECA at 11; TANC at 16.

[37] APPA at 5–6.

[38] NRECA at 11.

[39] *See, e.g.,* City of Dover at 1; DC Energy at 5–6; California PUC at 2–3; PG&E at 3; Wisconsin Electric at 2; EEI at 3.

b. Discussion

20. The market transparency provisions in section 220 of the FPA direct the Commission to "facilitate price transparency" in markets for the sale and transmission of electric energy in interstate commerce.[40] The transparency provisions authorize the Commission to "prescribe such rules as the Commission determines necessary and appropriate" for the dissemination of "information about the availability and prices of wholesale electric energy and transmission service."[41] These provisions expand the Commission's authority to collect such information, not only from public utilities, but "from any market participant"[42] with more than a *de minimis* market presence.[43] The Commission proposes, in this NOPR, to fulfill its responsibility under section 220 of the FPA by requiring non-public utilities with more than a *de minimis* market presence in wholesale markets to comply with the EQR filing requirements outlined in the next section.

21. Currently, market participants that fall within the Commission's jurisdiction under FPA section 205 must file EQRs. Section 201(f) of the FPA exempts certain entities (*i.e.,* Federal entities, municipalities, and certain cooperatives with Rural Electrification Act financing and that sell less than 4,000,000 MWh of electricity per year) from the Commission's section 205 jurisdiction.[44] However, the transparency provisions in FPA section 220 specifically permit the Commission to obtain price and availability information from "any market participant." The phrase "any market participant" is not defined in section 220 and is not limited to public utilities subject to the Commission's jurisdiction under section 205 of the FPA.

22. We interpret "any market participant" to include non-public utilities that fall under FPA section 201(f).[45] Such an interpretation of "any market participant" is consistent with the broad mandate in section 220 to "facilitate price transparency in the markets for the sale and transmission of electric energy in interstate commerce, having due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers." Furthermore, in EPAct 2005, Congress amended section 201(b)(2) of the FPA[46] to provide that, "[n]otwithstanding section 201(f)," the entities described in section 201(f) shall be subject to the Commission's jurisdiction for purposes of carrying out certain provisions, including FPA section 220. Thus, reading FPA section 201(b)(2) in conjunction with section 220, EPAct 2005 granted the Commission authority to collect information concerning the availability and prices of wholesale electric energy and transmission service from entities that are not public utilities.

23. We disagree with certain commenters' assertions that information about wholesale sales made by non-public utilities will not significantly enhance price transparency because non-public utilities are a small percentage of the wholesale market. As noted above, based on 2009 EIA Form 861 data, non-public utility sales account for approximately 29 percent of wholesale sales in the 48 contiguous states (excluding ERCOT),[47] while non-public utilities account for 60 and 70 percent of wholesale sales within the WECC and SERC regions, respectively. Similarly, non-public utilities make up about 80 percent of all wholesale sales that occur within FRCC. Given non-public utilities' significant presence in national and regional wholesale electricity markets, obtaining information about their sales transactions is essential to understanding how prices are formed in electricity markets.

24. Certain commenters dispute the accuracy of the 29 percent figure cited in the Transparency NOI[48] as the percentage of wholesale sales made by non-public utilities, arguing that the Commission incorrectly relied on EIA statistics pertaining to non-public utility bundled sales instead of wholesale sales. In particular, NRECA, APPA, and TANC argue that the Transparency NOI calculated the 29 percent figure based on EIA's figures for retail electric utility sales, labeled "Sales to Ultimate Consumers." In fact, however, the Commission arrived at the 29 percent figure in the Transparency NOI by using the 2007 EIA Form 861 wholesale sales data classified by EIA as "Sales for Resale," and not "Sales to Ultimate Consumers."[49] This 29 percent figure remains the same using the most recently available date (i.e. 2009) from EIA Form 861.[50] Thus, the percentages of wholesale sales made by non-public utilities cited in the Transparency NOI and this NOPR are accurate.

25. With respect to APPA's comments that the Commission should focus on increasing market transparency in RTOs/ISOs instead of increasing market transparency by requiring non-public utilities to file EQRs, we agree that transparency in the organized markets is important. In fact, the RTOs/ISOs already make available a significant amount of information about the availability and prices for wholesale sales and transmission service within their markets. For example, in Order No. 719, the Commission further promoted transparency in RTO/ISO markets by directing RTOs/ISOs to reduce the lag time for the release of offer and bid data and requiring RTOs/ISOs to justify in compliance filings their policy regarding the aggregation of offer data and cost data, discussing how the policy avoids participant harm and the possibility of collusion, while fostering market transparency.[51] However, notwithstanding the high value the Commission places on market transparency in RTO/ISO markets, we continue to believe that increasing transparency broadly across all markets subject to the Commission's jurisdiction by requiring all market participants,

[40] 16 U.S.C. 824t(a)(1).

[41] *Id.* at 824t(a)(2).

[42] *Id.* at 824t(a)(3). This section states, in relevant part, that "[t]he Commission may obtain the information described in paragraph (2) from *any market participant.*" *Id.* (emphasis added).

[43] *Id.* at 824t(d).

[44] *Id.* at 824(f).

[45] *See id.* at 824t(a)(3)(A).

[46] FPA section 201(b)(2) states that: Notwithstanding section 201(f), the provisions of sections * * * 220 * * * shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this Act with respect to such provisions. *Id.* at 824(b)(2).

[47] The Commission has excluded ERCOT from its calculations consistent with FPA section 220(f), which states that section 220 does not apply to wholesale sales of electric energy or transmission services within ERCOT. *Id.* at 824t(f). However, ERCOT members would need to report wholesale power sale contract and transaction information in EQR to the extent they make interstate sales outside of ERCOT.

[48] Specifically, the Transparency NOI stated that EIA's Electric Power Industry Overview 2007 estimated that 29 percent of electric utility sales are made by publicly-owned electric utilities (municipals, public utility districts or public power districts, state authorities, irrigation districts, and joint municipal action agencies, consumer-owned rural electric cooperatives, and Federal electric utilities). *See* Transparency NOI, FERC Stats. & Regs. ¶ 35,565 at P 9 & n. 21 (citing Energy Information Administration, Electric Power Industry Overview 2007 (March 2009) *available at http://www.eia.doe.gov/cneaf/electricity/page/prim2/toc2.html*).

[49] *See* Annual Electric Power Industry Report Instructions, *available at http://www.eia.doe.gov/cneaf/electricity/forms/eia861.pdf.*

[50] At the time that the Commission issued the Transparency NOI, EIA had not yet released the data for 2009.

[51] *See Wholesale Competition in Regions with Organized Electric Markets,* Order No. 719, 73 FR 64100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008), *order on reh'g,* Order No. 719–A, 74 FR 37776 (Jul. 29, 2009), FERC Stats. & Regs. ¶ 31,292, *order on reh'g,* Order No. 719–B, 129 FERC ¶ 61,252 (2009).

including non-public utilities with more than a *de minimis* presence in those markets, to provide information through EQRs is equally important.

26. NRECA's and TANC's arguments that the Commission should not require non-public utilities to report information in the EQR because the Commission has been approving market-based rates and evaluating mergers for decades without such information miss the mark. Disseminating information through the EQR about wholesale sales made by non-public utilities would benefit the Commission, market participants and the public in several different ways in addition to improving the Commission's ability to evaluate jurisdictional sellers' market-based rate authorizations and proposed mergers and acquisitions. Information about non-public utility sales would provide a more complete view of the prices and volumes that underlie price formation in the wholesale power markets. Information on all sales, rather than sales made only by public utilities, would allow market participants to value their transactions more accurately and increase confidence that market prices reflect all relevant supply and demand forces. Such information, in combination with other information tools, would also allow the Commission to better monitor for indications of market power and manipulation at major trading hubs and on electricity indices. For example, without the inclusion of non-public utility transactions in the EQR, the Commission may incorrectly conclude that substantial market price deviations, or other indicators, at major trading hubs or on electricity indices are attributable to the exercise of market power or manipulation by a public utility, when in fact, those price deviations reflect legitimate market forces caused by significant volumes being transacted by non-public utilities.

27. In addition, as the Commission explained in the Transparency NOI, obtaining EQR information from non-public utilities would strengthen the Commission's oversight of its market-based rate program under FPA section 205 and provide a better basis for considering whether to approve merger and acquisition proposals under FPA section 203.[52] The Commission's market-based rate program is grounded in an *ex ante* analysis of whether to grant a seller market-based rate authority and an *ex post* analysis of whether a seller with market-based rate authority has obtained excessive market share since it was granted authorization to transact at market-based rates or since the last review of such rates.[53] One tool used in some cases to conduct an *ex ante* analysis of whether to grant market-based rate authority to a seller is the delivered price test (DPT). The DPT defines the relevant market by identifying potential suppliers based on market prices, input costs, and transmission availability, and then calculates each supplier's economic capacity and available economic capacity for each season/load condition.[54] Rather than relying on a DPT analysis for analyzing a market-based rate seller's authority that is based on proxy prices and published price indices for sales by non-public utilities, obtaining more complete price and volume information for sales of electricity by non-public utilities would more accurately reflect market prices, improve the quality of the DPT results and assist the Commission in identifying whether sellers can exercise market power. The DPT also is used by the Commission to evaluate the effect on competition with respect to proposed mergers and acquisitions under FPA section 203. Therefore, obtaining more complete price and volume information would provide a better basis for considering whether to approve merger and acquisition proposals.

28. Such information from non-public utilities would also provide the Commission with important actual sales information for performing *ex post* analysis of whether a jurisdictional seller with market-based rate authority has gained an excessive market share since the original authorization to transact at market-based rates or since the Commission's last review of such rates. Information about sales by non-public utility market participants will allow the Commission to compare prices for power sold by jurisdictional sellers with those of non-public utility sellers in the same market.

29. Cities/M–S–R argues that the EQR mechanism should not replace other filings made by non-public utilities, such as an annual filing with the EIA, because non-public utilities have no statutory obligation to file sales agreements with the Commission and their rates are not subject to the Commission's reasonableness determinations. Although non-public utilities are not subject to the same filing requirements and rate determinations under FPA sections 205 and 206 as public utilities are, we propose that reporting in the EQR is the proper mechanism for non-public utilities to make information about their wholesale sales and transmission available to the public. As we note below, existing sources of information about non-public utility wholesale sales are insufficient to facilitate price transparency. The EQR is an established public reporting process that already provides substantial transparency into public utility sales. Furthermore, by requiring non-public utilities to file information in the EQR in the format used by public utilities, we can help ensure the consistency and comparability of the information. Consistency and comparability between filers is important because wholesale markets do not distinguish between sellers that are subject to the Commission's FPA section 205 jurisdiction or the Commission's regulations and sellers that are typically exempt from such Commission's jurisdiction. Expanding the applicability of the Commission's EQR filing requirements allows the Commission and the public to equally evaluate all transactions in the market.

30. With respect to Cities/M–S–R's arguments that they do not file sales agreements or need reasonableness determinations from the Commission on their rates, so they should not be required to file EQRs, we note that our jurisdiction under FPA section 220's transparency provisions is limited to the dissemination of information that will aid in market transparency for the public and the Commission. Section 220 gives the Commission no jurisdiction related to, nor do our proposed regulations govern, the rates, terms, and conditions of service of market

[52] *See* Transparency NOI, 130 FERC ¶ 61,039 at P 10–12.

[53] The Ninth Circuit Court of Appeals upheld the Commission's market-based rate regulatory scheme because it relies on a "system [that] consists of a finding that the applicant lacks market power (or has taken sufficient steps to mitigate market power), coupled with strict reporting requirements to ensure that the rate is 'just and reasonable' and that markets are not subject to manipulation." *State of California, ex rel. Bill Lockyer* v. *FERC,* 383 F.3d 1006, 1013 (9th Cir. 2004), *cert. denied* (S. Ct. Nos. 06–888 and 06–1100, June 18, 2007) (*Lockyer*).

[54] *See Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities,* Order No. 697, 72 FR 39904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, *clarified,* 121 FERC ¶ 61,260 (2007), *order on reh'g,* Order No. 697–A, 73 FR 25832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268, *clarified,* 124 FERC ¶ 61,055, *order on reh'g,* Order No. 697–B, 73 FR 79610 (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g,* Order No. 697–C, 74 FR 30924 (June 29, 2009), FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g,* Order No. 697–D, 75 FR 14342 (March 25, 2010), FERC Stats. & Regs. ¶ 31,305 (2010). The Commission requires the DPT if a seller fails one of the indicative screens. The indicative screens analyze the number of megawatts of capacity an applicant owns or controls, rather than analyzing actual price data. However, "sellers that do not pass the indicative screens are allowed to provide additional analysis for Commission consideration," including price data. Order No. 697, FERC Stats. & Regs ¶ 31,252 at P 62.

participants that are excluded from the Commission's FPA section 205 jurisdiction. The Commission is requiring only the posting of information important to ensuring market transparency and is not engaging in traditional regulation of rates, terms and conditions of service for non-public utilities.

31. In response to Alaska Power, we propose to exempt utilities located entirely in Alaska from the EQR filing requirements because they are electrically isolated from the contiguous United States. In addition, we propose to apply this exemption to utilities located entirely in Hawaii.

3. Proposed Filing Requirements for Non-Public Utilities

a. Existing Sources of Information

i. Comments

32. California DWR, NRECA, New York Public Power, City of Fayetteville, and SWP argue that section 220 of the FPA requires the Commission to determine that existing price publications are insufficient before establishing any new reporting requirements. Commenters also urge the Commission to consider whether new reporting requirements would be duplicative of existing sources, such as EIA reports, ISO/RTO data, and private index publishers.[55] Public Systems claim that the Commission may not impose EQR filing requirements on market participants in New England because RTOs in New England already provide the public with extensive data regarding price and the availability of wholesale electric energy. SWP also suggests that the Commission could combine data from multiple sources, such as the California Independent System Operator (CAISO), existing EQRs, and pricing publications, to conduct *ex ante* or *ex post* market analyses.

33. According to APPA, before expanding EQR requirements to non-public utilities, the Commission should look closely at the amount and type of wholesale sales these utilities actually make and consider other sources of available information on such sales, such as EIA publications and forms, to determine whether the additional information supplied through their EQR filings would help in achieving the Transparency NOI's stated goals. NRECA and Cities/M–S–R state that cooperatives and other electric utilities annually file form EIA–861, "Annual Electric Power Industry Report," with the EIA. They explain that this form includes information such as peak load, generation, electric purchases, sales and revenues. Moreover, NRECA states that EIA provides access to the daily volumes, high and low prices, and weighted average prices from hubs around the country. In addition, NRECA states that cooperatives that receive Rural Utilities Service (RUS) financing are required to file RUS Form 12, which includes such information as electric purchases, sales, and revenues and is publicly available through a database purchased from Ventyx.[56] NRECA also states that the Energy Management Institute provides results of a daily survey of wholesale transactions that they conduct in all the major trading regions of the country. Furthermore, TANC and NRECA note that forward market prices are available through the New York Mercantile Exchange and the IntercontinentalExchange. Finally, Sam Rayburn Municipal believes that any additional reporting requirement would be duplicative because its power supply structure is simple and reported in detail in its formal financing, accounting and engineering documents.[57]

ii. Discussion

34. In carrying out Congress' directive to facilitate price transparency in wholesale sales and transmission markets, FPA section 220 requires that the Commission consider the degree of price transparency provided by existing price publishers and trade processing services, and rely on such publishers and services to the maximum extent possible.[58] As pointed out by commenters, there are already a number of sources of publicly available information about wholesale markets, including EIA and RUS forms, RTOs/ISOs, electric index publishers, and commercial data providers that provide varying degrees of price transparency. However, the Commission believes the degree of price transparency provided by existing sources is insufficient for facilitating price transparency.

35. The two most significant publicly available forms that capture information about non-public utility power sales are the EIA Form 861 and the RUS Form 12. EIA Form 861 reports total volume (MWh) and revenue associated with a filer's wholesale power sales for an entire year.[59] However, Form EIA Form 861 does not detail individual wholesale transactions, including the counterparty, location, price, and delivery timeframe as well as other transaction details contained in EQR. Rather, EIA Form 861 filers report their aggregated annual volume of sales for resale and corresponding revenues. RUS Form 12 provides accounting details for power transaction by entities that fall under 7 U.S.C. 901 authority.[60] RUS Form 12 provides considerably more detail than EIA Form 861 through the inclusion of the energy purchaser and other contract details for individual energy sales.[61] However, RUS Form 12 provides only limited price transparency because the form does not contain information on delivery location and time. Delivery location and time are critical for gaining insight into price formation.[62] Without transaction-specific delivery location and time information, Form EIA 861 and RUS Form 12 do not provide sufficient price transparency into wholesale electricity markets. Therefore, expanding EQR filing requirements to non-public utilities would provide price transparency that is not available through EIA Form 861 or RUS Form 12.

36. RTOs/ISOs post extensive information about RTO/ISO wholesale market prices and market participant bid/offer data that provide valuable transparency for spot wholesale power markets run by RTOs/ISOs. These postings contain detailed location, market and product information. However, these postings are limited to the wholesale electricity markets that are administered by RTOs and ISOs. In addition, publicly posted RTO/ISO data does not provide price transparency into the bilateral transactions entered into by market participants within the RTO/ISO balancing authority area that can impact RTO/ISO market price formation. These bilateral transactions are frequently

[55] *See, e.g.,* East Texas Electric Cooperatives at 2–3; New York Public Power at 3–4; NRECA at 6–8; Cities/M–S–R at 10–11; DEMEC at 3–4; Public Systems at 11–15; TANC at 10–11, 14–15; SWP at 8.

[56] Ventyx is a commercial provider that offers Velocity Suite, an application that includes data from generation and transmission cooperatives, distribution cooperatives, municipal utilities, and other market participants exempt from the Commission's FPA section 205 jurisdiction.

[57] Sam Rayburn Municipal at 2.

[58] *See* 16 U.S.C. 824t(a)(4).

[59] On line 12 of Schedule 2, Part B, EIA Form 861 collects information on electricity "Sales for Resale." *http://www.eia.doe.gov/cneaf/electricity/forms/eia861.pdf.*

[60] RUS Form 12b SE itemizes sales of electricity while RUS Form 12b PP itemizes purchases of electricity. *http://www.usda.gov/rus/dcs/electric-forms/form12-2006.pdf, http://www.usda.gov/rus/dcs/downloads/form12/1717b-3.pdf.*

[61] RUS Form 12b SE data field "Statistical Classification (b)" provides detail on whether the sale is for requirements service, long-term firm service or intermediate-term firm service, among other classifications. *http://www.usda.gov/rus/dcs/downloads/form12/1717b-3.pdf.*

[62] For example, one would expect power sold in a load-constrained area during on-peak hours to be priced very differently from power sold in a generation-rich area during off-peak hours.

scheduled into the RTO/ISO market.[63] The terms of bilateral transactions are often not reported to RTO/ISO markets and not included in publicly posted price and bid/offer data. While some bilateral transactions are already reported in the EQR, expanding the EQR filing requirements to include non-public utilities would give the Commission and the public a better view into bilateral transactions. This data would also enhance the RTO/ISO market monitoring units' ability to monitor RTO/ISO markets. Thus, expanding EQR filing requirements to non-public utilities would provide valuable price transparency into bilateral wholesale electricity markets that is not currently captured in publicly posted data from RTOs/ISOs.

37. Existing daily index publications provide a degree of price transparency into spot wholesale electricity markets by capturing certain transactions. However, this price transparency is limited because these index publications do not capture longer-term transactions. Expanding EQR filing requirements to non-public utilities would provide price transparency for longer-term transactions not included in daily index publications.

38. Organized exchanges, such as the Intercontinental Exchange, also provide valuable price information, but that information is limited only to prices for particular power products at standardized locations. Finally, commercial data providers, like Ventyx, provide a valuable service by collecting and packaging existing publicly available data. However, their products are limited by the availability of existing information, and therefore do not, in themselves, increase price transparency.

39. In addition, information about non-public utility transmission service and reassigned transmission capacity sales may be available in the Open Access Same-Time Information System (OASIS). However, information on OASIS is not readily accessible to the public. Thus, requiring information about non-public utility transmission service and reassigned transmission capacity sales to be made publicly available through the EQR will facilitate price transparency in the transmission markets and aid the public and the Commission in detecting and addressing possible market power and manipulation in these markets.

[63] For example, NYISO estimates that approximately 50 percent of the energy scheduled in their markets was transacted bilaterally. *See http://www.nyiso.com/public/about_nyiso/understanding_the_markets/energy_market/index.jsp.*

b. Scope of Proposed EQR Filing Requirements for Non-Public Utilities

i. Comments

40. BPA and Cities/M–S–R question whether the Commission needs all of the information included in the EQR and whether quarterly filings are necessary. In particular, BPA believes that the critical information that the Commission needs to measure the size of the relevant market is contained in the transaction section, Field Numbers 46–67, and that the information in the contract section would not be necessary or helpful to the Commission. In addition, APPA and Salt River note that the Commission may need to customize the EQR filing forms to reflect the types of information applicable to public power entities.[64] However, EEI states that if particular reporting requirements do not apply to a given filer, it can simply indicate "not applicable."

41. In addition, BPA asserts that the burden would be greatly reduced if the Commission were to limit the filing requirements for BPA to wholesale power sales at market-based rates. Thus, BPA supports excluding the cost-based sales to consumer-owned utilities, direct services industries, and inter-business line transmission services transactions.

42. APPA asserts that sales by joint action agencies, state agencies, and power or water districts to their own members should not be reported.[65] APPA argues that if the Commission expands EQR filing requirements to public power utilities, these agencies and districts should only be required to file EQR information on their excess power sales (*i.e.,* sales to entities other than their member utilities or long-term distribution customers). TAPS and Public Power argue that joint-action agencies should not be required to report transactional information on long-term, wholesale sales of power to their member utilities. In addition, TAPS argues that generation and transmission (G&T) cooperatives' sales to their members should not be included. TAPS explains that although technically at wholesale, such sales are analogous to a vertically integrated utility's internal supply of its retail sales unit and subsequent retail sale, neither of which is reported through public utilities' EQRs.[66]

43. LPPC and Salt River argue that the Commission should avoid requirements for reporting on long-term power supply arrangements that are solely between non-jurisdictional entities. For instance, LPPC argues that the power sold under long-term arrangements between non-jurisdictional entities is not a factor to market participants when considering competitive purchases or sales nor is it relevant to the Commission's market manipulation oversight. Thus, such power arrangements do not factor into the market over which the Commission has oversight.[67]

44. By contrast, PG&E, Wisconsin Electric, and EEI believe that market participants that are excluded from the Commission's section 205 jurisdiction should file the same data elements that jurisdictional entities are required to file under the EQR Data Dictionary.

ii. Commission Proposal

45. The Commission proposes to apply the same EQR requirements to non-public utilities that it currently requires from public utilities, with some adjustments, as discussed below. In particular, the Commission proposes that non-public utilities be required to report the same information about wholesale sales, transmission service, and transmission capacity reassignments that are currently reported by public utilities. Expanding the same EQR data elements to non-public utilities will help ensure comparability and consistency with filings by public utilities, which will make it easier for market participants and the public to use the information. In addition, requiring the same sales and transmission-related information from non-public utilities will allow the Commission to better evaluate the performance of wholesale markets as a whole and make it easier to determine that jurisdictional prices are "just and reasonable."

46. In their comments, several market participants suggest that non-public utilities should not be required to file certain sales in the EQR, such as certain cost-based sales. BPA, for instance, suggested that cost-based sales to consumer-owned utilities, inter-business line transmission services transactions and sales to direct services industries, which are developed based on cost-based rates, should not be filed.[68] Other commenters suggest that joint action agencies should not be required to report transactional information on the long-term, wholesale sales of power to their member utilities.

47. The Commission proposes that all wholesale sales, including cost-based and market-based sales, be included in EQR filings from non-public utilities with more than a *de minimis* market

[64] Salt River at 4–5.

[65] APPA at 5.

[66] TAPS at 2, 12.

[67] LPPC at 3.

[68] Cities/M–S–R at 9.

presence. Although several commenters argue that certain sales, such as sales by joint action agencies, state agencies, and power or water districts to their own members, should not be reported, we conclude that excluding these wholesale sales in the EQR adversely impacts price transparency in wholesale electricity markets. Specifically, these sales can impact market prices regardless of whether or not they are made by entities that fall under the Commission's FPA section 205 jurisdiction. For instance, if the agencies and districts did not supply their members, then the members would have to purchase supply from other sources in the market. Also, depending on these agency and district rules, the members may be able to sell excess power into the market. In either case, these sales would have an effect on the formation of prevailing market prices. Sales transactions by non-public utilities, whether cost-based or market-based, can influence wholesale electricity markets. Excluding certain segments of wholesale sales would result in an incomplete picture of wholesale price formation and would hamper the ability of the public and Commission to detect and address the potential exercise of market power and manipulation.

48. Furthermore, we agree with TAPS that a vertically integrated utility that internally supplies its retail sales unit would not need to report that supply in the EQR because there is no wholesale sale in this situation. However, in the case of a G&T cooperative selling to its member cooperatives to meet the members' load obligations, this would constitute a wholesale sale that must be reported in the EQR. Such reporting is consistent with how jurisdictional cooperatives report their sales in the EQR. Any subsequent sale by a member cooperative to its retail customers would be a retail sale that is not reported in the EQR.

49. We believe that certain data fields in the EQR may not be applicable to filings made by non-public utilities. For example, contract data Field Number 19 (FERC Tariff Reference) and transaction data Field Number 50 (FERC Tariff Reference) require filers to insert a "FERC Tariff Reference." Non-public utilities may not possess an appropriate FERC Tariff Reference (Fields 19 and 50) for certain wholesale contracts and transactions. In cases where a FERC Tariff Reference is not applicable, the Commission proposes to require that a filer state that the appropriate FERC Tariff Reference is "Not Required," or "n/r," in their EQR filing. However, if the sale relates to a previously filed reciprocal open access transmission tariff (OATT), the Commission proposes that the appropriate reference to the reciprocal OATT be included in the EQR. In addition, non-public utilities can mark as "Not Required," or "n/r," for the "Product Type Information" captured in Field Number 30, which relates to whether the transaction is "cost-based," "capacity reassignment," "market-based," or "other," because the values for Field Number 30 are defined based on types of FERC-approved tariffs.

50. In its comments, BPA noted that the information necessary for the Commission to measure the size of a relevant market for merger analysis can be found in the transaction section (Field Numbers 46 through 67) of the EQR, but that the contract section (Field Numbers 14 through 45) does not appear to be necessary or helpful for merger analysis. The Commission agrees with BPA's assessment that the transaction section would be the relevant data fields in the EQR to use in determining the size of a wholesale energy market. However, the EQR's function is not limited to merger analysis, as discussed above.

51. Furthermore, limiting EQR data to only transactions data would significantly detract from the Commission's efforts to facilitate price transparency under FPA section 220. The contract section of the EQR provides critical price transparency information in several ways. First, the contract section provides information and valuable context on when rates were established and the terms of the rates. Without contextual information, such as when and how a rate was agreed upon, the sales price that is reported in the transaction section (Field Number 64) might appear anomalous compared to other prices reported in the transaction section. Second, there are a number of products and agreements that are reported solely on the contract section of the EQR, such as emergency energy, interconnection agreements, membership agreements, and must run agreements.[69] These products and agreements can impact a market participant's ability to make sales and access transmission, which are aspects of price formation. Therefore, excluding them would limit the price transparency impact associated with expanding the EQR to non-public utilities.

c. Burden

i. Comments

52. EEI believes that the burden on non-public utilities would be no greater than the burden on jurisdictional entities, once systems are in place to collect and compile the information. However, several commenters state that complying with any additional reporting requirements would be a significant burden for municipals and cooperatives. Public Power Council states that the EQR requirements are burdensome and the value of the information that the Commission would collect from most Northwest public power entities does not justify the cost that would be expended by non-public utilities to produce the information. Further, Utah Associated Municipal states that filing EQRs to report those sales made every hour of every day to nearly every member utility would give the Commission no useful information relevant to its purposes.

53. Cities/M–S–R argue that it is unnecessarily burdensome for the Commission to collect transaction data for market transparency purposes on a quarterly basis and state that the Commission has created annual, not quarterly, reporting requirements under the natural gas transparency provisions. Cities/M–S–R also assert that the data required on Form 552 for natural gas transactions is less involved than EQR data fields and creates a more limited burden on responding parties. Further, Cities/M–S–R state that the scope of the EQR information is broader than necessary and the frequency is too great for the limited purpose of obtaining information to improve the Commission's delivered price test analysis.

54. According to APPA, a number of its members estimated that they would require from two weeks to nine months for the initial setup, and one to three days to compile, verify, and file the EQR each quarter. The City of Fayetteville states that it has not done a detailed cost/time analysis, but believes that it would fall in the upper quartile of the time estimates reported in the APPA comments. Allegheny estimates that significant computer system changes and additional ongoing personnel resources may be required, the costs of which would need to be passed along to the cooperative's customers. Salt River estimates that it would need at least six months to develop an internal EQR filing program. In addition, Salt River encourages the Commission to provide guidance through workshops or training sessions and to provide opportunities for interaction with staff while

[69] For a detailed list, please refer to Appendix B in the *Electric Quarterly Report Data Dictionary,* Version 1.1, available at *http://www.ferc.gov/docs-filing/eqr/soft-tools/eqrdatadictionary.pdf.*

preparing initial filings, and to allow sufficient time to ensure completeness and accuracy of the filings. Based on its own experience, DC Energy states that, while the burden will vary depending on the scope and amount of activities, there would be an upfront time investment of 2–4 person-weeks to design and implement an EQR tracking/reporting system, and an ongoing reporting burden of 2–3 person-days per quarter. It states that this estimate is based on a "self-build model" and believes there also are off-the-shelf products that will automatically generate these reports for an entity, resulting in less of a burden.

55. BPA states that the burden would be greatly reduced if the Commission were to limit the filing requirements for BPA to wholesale power sales at market-based rates (thereby excluding inter-business line transmission services transactions, and the statutorily-mandated cost-based sales to consumer-owned utilities and direct services industries[70]) and eliminate the fields associated with contract data. BPA also argues that it should not be required to report transmission services sales made by BPA's functionally separated Power Services section to its Transmission Services section because these inter-business line transactions are not discretionary, open market transactions that would aid the Commission in evaluating market power issues.

ii. Discussion

56. We acknowledge that enhancing price transparency by extending the EQR filing requirements to non-public utility market participants will impose a new burden on those market participants. However, we believe that, on balance, the benefit of increased price transparency stemming from the filing of such information will outweigh the burden on these market participants above the *de minimis* threshold. We assume that most non-public utilities already capture transaction-specific information for accounting and record-keeping purposes. Therefore, we believe the burden imposed will relate primarily to the required format for submitting that information. In addition, we believe that the amount of burden created by requiring non-public utilities to file EQRs will depend on how many transactions the non-public utility makes. Accordingly, entities with a relatively small number of wholesale sales will face less of a burden.

57. Cities/M–S–R contend that the data collected under the natural gas market transparency provisions is less burdensome because it is collected annually, not quarterly, and contains less detail than the EQR data. We note that the Commission has promulgated two rules under the natural gas market transparency provisions in section 23 of the NGA,[71] Order Nos. 704 and 720. Order No. 704 requires certain purchasers and sellers of natural gas to file an annual report about specified physical natural gas transactions. Order No. 720 requires major non-interstate pipelines to file certain receipt and delivery information on a daily basis. Therefore, Order No. 720 requires data to be provided more frequently than the EQR. In addition, Order No. 720 requires non-interstate pipelines to post detailed information, including the transportation service provider's name, posting data, posting time, nomination cycle, location name, additional locational information if needed to distinguish between points, location purpose description, posted capacity, scheduled volume, available capacity, and measurement unit for each receipt or delivery point that meets certain criteria.[72] Although the level of detail in the EQR may be greater than that required under Order Nos. 704 and 720, this difference reflects variations between transactions made in the natural gas and electricity markets.

58. We disagree with Cities/M–S–R's suggestion that the Commission seeks to obtain EQR information from non-public utilities solely to improve the Commission's DPT. As discussed above, the Commission proposes to require non-public utilities to file EQRs to fulfill Congress's directive in FPA section 220 to facilitate price transparency in markets for the sale and transmission of electric energy in interstate commerce. The information in these EQRs will provide valuable information that serves a number of purposes. This information will provide a more complete picture of price formation in wholesale electricity markets for the Commission and the public. In addition, obtaining sales price and volume information in EQRs from non-public utilities will increase the Commission's ability to monitor utilities' power sales for indications of market power and manipulation. Also, as explained in the Transparency NOI,[73] and discussed above, collecting EQR information from non-public utilities would improve the quality of the DPT results and assist the Commission in determinations concerning a seller's ability to exercise market power and provide a better basis for considering whether to approve merger/acquisition proposals under FPA section 203.

59. We believe that the EQR compliance burden on non-public utilities above the *de minimis* threshold would be greatest during the initial set-up phase, when data is mapped into the new required format. However, to the extent a filer uses the same format for each EQR, once the filer's system is mapped to the interim and final formats, the burden will be significantly reduced. The Commission invites comment from non-public utilities and public utilities on how their existing data capture processes have been or can be mapped to facilitate EQR filing in its current and proposed formats.

60. We recognize that the initial implementation and ongoing reporting associated with the proposed EQR filing requirements will result in additional costs and burden on non-public utilities. However, the Commission has tried to balance the need for data with efforts to minimize the burden on filers. To help alleviate the burden of filing EQRs, the Commission has designed a system that allows EQRs to be filed using the Internet so that all filers submit EQRs to the Commission electronically. In addition, the Commission is only requiring those non-public utilities that fall above the *de minimis* threshold test to file EQRs. We also agree with Salt River that workshops or training sessions to provide guidance may be helpful and we will make every effort to provide technical assistance prior to the implementation of the EQR filing requirements for non-public utilities.

d. De Minimis Threshold

i. Comments

61. Commenters propose a wide range of *de minimis* market presence thresholds for non-public utility exemptions from the EQR filing requirements, from 8 million MWh to 100 MWh of annual sales. In favor of the 8 million MWh threshold, two commenters[74] point to FPA section 206(e), which gives the Commission refund authority over certain sales made by non-jurisdictional entities except for an entity that sells less than 8 million MWh of electricity per year.[75] Cities/M–S–R also argue that a threshold of at least 8 million MWh per year is appropriate because of the growth in the electricity market, as evidenced by the

[70] BPA notes that direct services industries are generally a defined set of aluminum companies and large industries in the Pacific Northwest. BPA at 1.

[71] 15 U.S.C. 717t–2.

[72] *See* 18 CFR 284.14.

[73] *See* Transparency NOI, FERC Stats. & Regs. ¶ 35,565 at P 9–12.

[74] Cities/M–S–R at 14; Imperial at 6.

[75] 16 U.S.C. 206(e).

reported wholesale sales, which have nearly tripled between 1997 and 2008.[76]

62. Other commenters recommend a threshold level of 4 million MWh, based on either annual wholesale sales [77] or annual total sales.[78] In support of a 4 million MWh threshold, many commenters refer to section 201(f) of the FPA, which specifically excludes from the Commission's jurisdiction electric cooperatives that sell less than 4 million MWh of electricity per year.[79] They also cite to the definition of a small utility under the Regulatory Flexibility Act and Small Business Act, which define a utility as small if its total annual output (*i.e.,* wholesale and/or retail) does not exceed 4 million MWh.[80] APPA states that a threshold of 4 million MWh annual wholesale sales would capture approximately 70 percent of public power utilities' wholesale sales, and 82 percent of wholesale sales made by cooperative, Federal, and public power utilities combined. APPA argues that using annual wholesale sales will eliminate the potential for double-counting some public power wholesale sales in RTO regions, such as joint action agency sales to their members. APPA also argues that the use of EIA data to determine which utilities are above the *de minimis* threshold for reporting purposes will eliminate the potential for double-counting some public power wholesale sales in RTO regions. For example, notes APPA, joint action agencies situated in RTO regions are often required to sell their wholesale power into their RTO's market at the point of generation, buy it back at their members' load nodes, and then sell the same energy to their members. Using EIA data would eliminate potential double-counting of these joint action agency sales to members as sales to an RTO as well. Additionally, the City of Fayetteville argues that, in promoting wholesale market transparency, retail sales to ultimate consumers should not be counted toward the cutoff, because such sales do not bear on whether a section 201(f) entity's wholesale market presence is *de minimis.*

63. EMCOS believes that 4 million MWh based on total annual sales is appropriate, but that both inter-affiliate sales by consumer-owned utilities and must-offer sales into Day 2 markets should be excluded to avoid over-reporting. NRECA and Allegheny argue that the Commission also should not consider sales by G&T cooperatives to their members as wholesale sales for purposes of the *de minimis* 4 million MWh sales threshold. NRECA states that when a G&T cooperative makes sales to its member cooperatives under long-term wholesale power contracts, it is essentially acting as the functional equivalent of a generation division of a vertically integrated public utility. NRECA also argues that if the Commission does not exclude sales by G&T cooperatives to their member cooperatives, then it should establish a rebuttable presumption that non-public utility cooperatives that sell less than 4 million MWh of power to third parties other than their member cooperatives are exempt from the filing requirement as having a *de minimis* impact on wholesale markets if such sales constitute less than 2 percent of wholesale sales in the region.

64. LPPC asks the Commission to exempt non-jurisdictional entities from having to report long-term sales agreements (of greater than one year) between non-jurisdictional entities. LPPC also asks the Commission to provide a mechanism for requests for waiver sought by parties on the ground that specific transactions or categories of transactions are not of a nature that their reporting is relevant to the Commission's oversight of the wholesale marketplace. LPPC states that examples of typical long-term agreements between non-jurisdictional entities are the thirty-year sales agreements between municipal utilities and MEAG Power, which was formed by the Georgia Assembly for the purpose of generating power to be sold under long-term agreements to municipal utility participants. LPPC states that the power sold under these agreements does not factor into the market over which the Commission has oversight.

65. Some commenters further note that the Commission has used a 4 million MWh of total sales threshold in several contexts. For instance, TANC states that the Commission has used this threshold in granting waivers of standards of conduct for transmission providers under Order Nos. 888,[81] 889,[82] and 890,[83] and with respect to the requirement that RTOs/ISOs accept demand response bids by aggregators of retail customers.[84] Furthermore, some commenters, such as LPPC, argue that a utility that sells 4 million MWh or less of energy per year is too small to affect the electricity markets, so excluding it from the EQR requirements would still provide the Commission with information on the large majority of wholesale transactions by non-jurisdictional entities.

66. By contrast, EEI and DC Energy recommend adopting relatively low thresholds. EEI states that the Commission could apply one of the following thresholds: (1) 100 MWh of sales for resale per year used by the Commission in the context of FERC Forms 1 and 1–F between major and non-major utilities; or (2) 114,000 MWh of sales per year, based on what a qualifying facility (QF) exempted from FPA section 205 (20 MW or smaller) could produce in a year.[85]

67. Sam Rayburn Municipal believes that a threshold exemption should exist where there is no retail competition or the relative size or amount of power transactions is insignificant by size or substance.

ii. Discussion

68. FPA section 220(c)(2)(d) specifies that the Commission shall not require entities with a *de minimis* market presence to comply with the reporting requirements of FPA section 220. At present, the Commission collects data regarding cost-based sales, market-based rate sales, transmission service, and transmission capacity reassignments from entities subject to section 205 of the FPA. Data regarding sales,

[76] Cities/M–S–R at 14.

[77] *See, e.g.,* APPA at 9; NRECA at 26; New York Public Power at 6; Delaware Municipal at 5; City of Fayetteville at 7; Southwest Transmission at 3; Alaska Power at 2.

[78] *See, e.g.,* City of Dover at 2; Northwest Utility at 2; TANC at 20.

[79] In particular, FPA section 201(f) provides, in part, that "[n]o provision in this subchapter shall apply to, or be deemed to include * * * an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 *et seq.*) or that sells less than 4,000,000 megawatt hours of electricity per year." 16 U.S.C. 824(f).

[80] The Regulatory Flexibility Act (RFA) definition of a "small entity" refers to a definition provided in the Small Business Act, which defines a "small business concern" as a business that is independently owned and operated and that is not dominant in its field of operation. *See* 15 U.S.C. 632. According to the Small Business Act, a small electric utility is one that has a total electric output of less than 4 million MWh in the preceding year. 15 U.S.C. 631.

[81] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,* Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g,* Order No. 888–A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048, *order on reh'g,* Order No. 888–B, 62 FR 64688 (Dec. 9, 1997), 81 FERC ¶ 61,248 (1997), *order on reh'g,* Order No. 888–C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group* v. *FERC,* 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York* v. *FERC,* 535 U.S. 1 (2002).

[82] *Open Access Same-Time Information System and Standards of Conduct,* Order No. 889, 61 FR 21737 (May 10, 1996), FERC Stats. & Regs. ¶ 31,035 (1996), *order on reh'g,* Order No. 889–A, 62 FR 12484 (March 14, 1997), FERC Stats & Regs. ¶ 31,049, *reh'g denied,* Order No. 889–B, 81 FERC ¶ 61,253 (1997).

[83] Order No. 890, FERC Stats. & Regs. ¶ 31,241.

[84] TANC at 19–20 (citing *Wolverine Power Supply Coop., Inc.,* 127 FERC ¶ 61,159, at P 15 (2009); Order No. 719, FERC Stats. & Regs. ¶ 31,218).

[85] EEI at 4.

transmission service, and transmission capacity reassignments provided by non-public utilities is not readily available. Without this data, the public is unable to observe a significant number of trades and is unable to develop a more complete view of wholesale power and transmission markets. As discussed above, a more complete view of price formation in the markets will provide the public with greater price transparency to evaluate the concentration of market participants in a market and the market participant's ability to unduly influence the market, and will assist the public and the Commission in detecting and addressing the potential exercise of market power and manipulation.

69. The Commission proposes that a non-public utility would be exempt under the *de minimis* market presence threshold from filing EQRs if it makes 4 million MWh or less of annual wholesale sales (based on an average of the wholesale sales it made in the preceding three years), unless the non-public utility is a Balancing Authority [86] that makes 1 million MWh or more of annual wholesale sales (based on an average of wholesale sales it made in the preceding three years). As requested by some commenters, the Commission proposes to calculate the *de minimis* market presence threshold on the amount of annual wholesale sales made by the non-public utility rather than total (i.e. wholesale and retail) sales. The transparency provisions in FPA section 220 focus on the Commission requiring information concerning the availability and prices of "wholesale electric energy and transmission service." [87] Therefore, the Commission proposes to use only the wholesale electricity sales made by non-public utilities for purposes of calculating the *de minimis* market presence threshold.

70. To reduce the filing burden and promote clear compliance requirements, the Commission proposes that non-public utilities use the annual wholesale sales volumes they currently report to EIA to calculate whether they meet the *de minimis* threshold.[88] The Commission proposes that the threshold be calculated using the "Sales for Resale" data published in EIA Form 861.[89] "Sales for Resale" as reported in EIA Form 861 does not include retail sales, as addressed above.

71. The Commission believes that establishing a 4 million MWh annual wholesale sales threshold for non-public utilities that are not Balancing Authorities will allow the Commission and the public to access information from market participants whose transactions could have an impact on wholesale market prices and thereby increase price transparency for the markets and aid in the Commission's oversight of wholesale electricity markets,[90] while alleviating the reporting burden for smaller entities.

72. With respect to non-public utilities that are Balancing Authorities, the Commission believes requiring them to file EQRs if they make 1 million MWh or more of annual wholesale sales will provide a more complete picture of prices within the balancing authority area markets that are operated by non-public utilities and thereby assist market participants and the Commission, particularly with respect to conducting market-based rate analyses for jurisdictional market-based rate sellers. For traditional (non-RTO/ISO) markets, the Commission uses the balancing authority area as the default relevant geographic market for its market-based rate analysis.[91] For example, Order No. 697 noted that if a transmission-owning Federal power marketing agency is the home or first-tier market to a seller located outside of an RTO/ISO, then that seller must treat that Federal power marketing agency's balancing authority area as a relevant geographic market and file a market power analysis on it just as it would any other relevant market.[92] Obtaining sales information from non-public utility Balancing Authorities that operate that balancing authority area would greatly assist the Commission in determining whether to grant a seller market-based rate authority (*ex ante* analysis) and allow a more effective after-the-fact examination of market-based rate authorizations (*ex post* analysis). The Ninth Circuit Court of Appeals upheld the Commission's market-based rate program based on the dual requirement of an *ex ante* finding of the absence of market power and post-approval reporting requirements through the EQR. Specifically, the Ninth Circuit held that "FERC's system consists of a finding that the applicant lacks market power (or has taken sufficient steps to mitigate market power), coupled with strict reporting requirements to ensure that the rate is 'just and reasonable' and that markets are not subject to manipulation." [93]

73. APPA expresses concern about double counting of wholesale sales by joint action agencies situated in RTO/ISO markets. APPA notes that joint action agencies in RTO/ISO regions are often required to sell their wholesale power into the RTO/ISO market at the point of generation, buy it back at their members' load nodes and then sell the same energy to their members. APPA suggests that using EIA data would eliminate double counting of these joint action agency-to-member transactions as sales to an RTO/ISO. As noted above, the Commission proposes that non-public utilities use EIA data to determine whether they meet the *de minimis* threshold. However, the Commission is concerned with capturing all wholesale power sales as they occur (no matter how many times the power changes hands). Therefore, in the example provided by APPA, the Commission agrees that EIA data should be used by the joint action agency to determine whether it meets the *de minimis* threshold for filing EQRs. However, if the joint action agency, or other non-public utility, determines that it falls above the *de minimis* threshold based on the EIA data, then the Commission would expect the joint action agency or other non-public utility to report all wholesale sales in a manner that is consistent with existing EQR reporting standards.

74. Some commenters argue that the Commission should not consider sales such as inter-affiliate sales by consumer-owned utilities or sales by G&T cooperatives to their members for purposes of the *de minimis* threshold. For ease of reference, we shall refer to the transactions raised by NRECA, and others as "inter-familial transactions". We disagree with commenters' assertions that wholesale inter-familial transactions should not be considered sales for purposes of the *de minimis* annual wholesale sales threshold. Rather, the Commission believes that

[86] As defined in the North American Electric Reliability Corporation's (NERC) Glossary of Terms Used in Reliability Standards, a Balancing Authority is the "responsible entity that integrates resource plans ahead of time, maintains load-interchange-generation balancing within a Balancing Authority Area, and supports Interconnection frequency in real time." *See http://www.nerc.com/files/Glossary_of_Terms_2011Mar15.pdf.*

[87] *See* 16 U.S.C. 824t(a)(2).

[88] This proposal is consistent with APPA's suggestion to use EIA data when calculating the *de minimis* threshold. *See* APPA at 9–10.

[89] "Sales for Resale" figures can be found on Line 12 in "Schedule 2, Part B. Energy Sources and Disposition." *See http://www.eia.doe.gov/cneaf/electricity/forms/eia861/eia861instr.pdf.*

[90] It is important to note that electricity markets can be comprised of markets that are regional, local, and even nodal. For example, exerting market power does not necessarily involve a large volume of physical sales. In fact, small volumes of power sales can influence market pricing, particularly when transmission limitations and other dynamics exist.

[91] *See* Order No. 697, FERC Stats. & Regs ¶ 31,252 at P 232.

[92] *See id.*

[93] *Lockyer,* 383 F.3d 1013.

any sale of wholesale electricity should count towards the threshold, regardless of the type of transaction from which the sale originated (*e.g.,* G&T cooperative sales to its members captured under long-term wholesale power agreements). Moreover, reporting of wholesale inter-familial transactions will assist the Commission and the public in monitoring price formation and understanding electricity prices, quantities, and market trends, particularly in bilateral markets.

75. We further note that the Commission will not propose the rebuttable presumption suggested by NRECA that non-public utility cooperatives that sell less than 4 million MWh of power to third parties other than their member cooperatives are exempt from the EQR filing requirements as having a *de minimis* impact on wholesale markets if such sales constitute less than 2 percent of wholesale sales in the region. We also do not propose a mechanism for requesting waiver of the EQR reporting requirements on the basis that the nature of specific transactions or categories of transactions are not relevant to the Commission's oversight of wholesale markets. Under the proposed *de minimis* threshold, a non-public utility that makes 4 million MWh or less of annual wholesale sales would be exempt from filing EQRs unless the non-public utility is a Balancing Authority making 1 million MWh or more of annual wholesale sales. Because entities with a *de minimis* market presence are thereby exempted from the EQR filing requirement, the Commission does not believe it is necessary to establish a rebuttable presumption or waiver procedures. In addition, as explained above, we believe that it is necessary to capture a G&T cooperative's sales to its members for transparency purposes, and therefore will not propose the rebuttable presumption approach as suggested by NRECA.

76. Sam Rayburn Municipal believes that a threshold exemption should exist where there is no retail competition or the relative size or amount of power transactions is insignificant by size or substance under this effort. We agree with Sam Rayburn Municipal's comments about a threshold exemption, but we disagree with its comment on an exemption where retail competition does not exist. In states where retail competition is not present there are still wholesale transactions that are of interest to the Commission and public. These transactions are part of wholesale electricity price formation even in regions where retail competition does not exist. Additionally, it is the Commission's duty to ensure market transparency and obtain reporting from a sufficient number of market participants to accurately understand the physical electricity market as a whole.

77. EMCOS believes that must-offer sales into a "Day-2" RTO/ISO market should be excluded because they involve output committed under contracts.[94] In particular, EMCOS commented that must-offer sales into "Day-2" central security-constrained dispatch/central unit commitment markets should be excluded from the calculation of the *de minimis* threshold, because such sales reflect only the application of a tariff requirement for bidding both load and the output of resources already contractually committed to serving that load in order to facilitate bid-based pricing, and do not provide useful information about the exchange of commercial consideration leading to price formation. The Commission believes that resources committed under contract do impact price formation and should be included in the *de minimis* threshold calculation. Must-offer provisions often do not dictate the price at which a unit may offer its supply into the market. Even if a must-offer unit is a price taker through self-scheduling, the unit is impacting price formation through its supply into RTO/ISO markets.

B. Refinements to the Existing EQR Requirements

1. Background

78. In addition to seeking comments on whether the Commission should extend the EQR reporting requirements to non-public utilities, the Commission also sought comments regarding certain refinements to the EQR reporting requirements. Specifically, the Commission sought guidance on whether to: (1) Require the reporting of the trade date, type of rate, and resales of financial transmission rights in secondary markets; (2) use a standard unit for reporting energy and capacity transactions; and (3) omit the time zone from the contract section.

79. As discussed above, the Commission has determined that it should consider whether substantial reforms to the EQR reporting requirements are needed. After considering comments received in response to the Transparency NOI, the Commission is proposing in this NOPR to make the following refinements to the EQR: (1) Reporting of the transaction date; (2) reporting of the type of rate by which the price was set (*i.e.,* fixed price, formula, index, or RTO/ISO price); (3) standardizing the unit for reporting energy and capacity transactions (*i.e.,* $/MWh, $/MW-month); and (4) omitting the time zone from the contract section. The Commission is also proposing not to require the reporting of resales of financial transmission rights in secondary markets.

80. In addition, the Commission proposes other refinements that were not included in the Transparency NOI. In particular, the Commission proposes to require EQR filers to: (1) Report the time that the transaction took place; (2) identify the broker or exchange used for a sales transaction, if applicable; (3) indicate whether the transaction was reported to an index publisher; and (4) report certain e-Tag data. The Commission also proposes to eliminate the DUNS number requirement.

2. General Refinements

81. In combination with the broader effort to improve the Commission's access to information about the availability and prices of wholesale sales of electricity, the Transparency NOI considered other refinements to the existing EQR filing requirements. As discussed above, these refinements included: (1) Reporting the trade date (*i.e.,* the date on which a transaction price is set) and the type of rate (*i.e.,* fixed price, a formula, an index, or an RTO/ISO price); (2) reporting resales of financial transmission rights in secondary markets; (3) standardizing the unit for reporting energy and capacity transactions (*i.e.,* $/MWh and $/MW-month); and (4) omitting the time zone from the contract section of the EQR. The proposals described above are detailed in Appendix B.

a. Trade Date & Time and Type of Rate

i. Comments

82. DC Energy agrees that the EQR reporting requirement should include the contract date, and states that master agreements or evergreen contracts do not preclude an entity from specifying when the agreement to transact was executed.[95] California PUC also supports the addition of requirements to report the trading date information and to specify whether the reported rate is a fixed price, a formula, or an index. It states that prices without trading dates are less informative because prices change over time.[96]

83. EEI, EPSA, and Duke Energy argue that the burden of collecting the trade

[94] EMCOS at 12.

[95] DC Energy at 10.

[96] California PUC at 3–4.

date and type of rate from all filers likely will require system changes and thus outweighs the value of such information.[97] In addition, EPSA suggests that there are several problems with adding the trade date, such as it being subject to multiple interpretations and creating major software problems in the Commission's EQR program.[98]

84. EPSA's other major concern with this reporting requirement is timing. Any reporting requirement would have to be prospective only, as "trade date" is not currently a reporting requirement. Thus, there may be major software problems created with the Commission's EQR program. EPSA states that, if implemented by the Commission without grandfathering preexisting transactions, there would be no way for reporting entities to differentiate new deals from old, and the old deals will not have a reported trade date. Thus, any analysis done with this newly reported data would have a field precluded from historical data. Any adjustments made to prior quarters' data presumably would need to include this information, which may be impossible to gather for preexisting transactions. EPSA is concerned that the Commission's EQR software would generate error messages for leaving the field blank. The Transparency NOI provides no discussion of these problems and EPSA states that the Commission should seriously consider these concerns before requiring that transaction dates be reported.

85. In addition, EPSA states there is an overlap issue. If a deal is concluded in one quarter but goes to delivery in another quarter (or quarters), will it have to be reported in the quarter the transaction was concluded as well as the quarter(s) of delivery? What about any intervening quarters—will the entity have to report deals in some form of abeyance between conclusion and delivery?

86. Also, EPSA states that some of its member companies have reported that they do not track how the price was set and therefore could not currently comply with a requirement to report the type of rate. Thus, if this proposal is adopted, market participants would need to make major system changes to be able to capture and report this data. If the Commission proceeds down this route, EPSA contends that the Commission should allow a significant period of time for implementation before this aspect of a rule change became mandatory so that reporting parties could hire the necessary contractors, and have time to reconfigure data capture and reporting systems to collect this new data.

87. However, if the Commission decides to require filers to include the trade date and type of rate, then EEI and EPSA propose several revisions. EEI suggests that the Commission clarify that "trade date" includes only the date and not the time of day when a transaction price was set and only include it in the transactions section, not the contract section.[99] Also, EEI proposes that "the date the price was agreed to" should refer to the date the trade was finally executed.[100] According to EPSA, its members have reported that through custom and usage in the trading industry, the term "Trade Date" has developed the broadly understood meaning of "the date upon which the parties agree upon the terms of, and enter, a transaction." EPSA argues that the Commission should give the term "Trade Date" the same meaning it generally has in the industry.[101] In addition, EEI suggests that if the Commission decides to include the type of rate, then the options should be modified to "fixed," "formula without index," and "formula with index." EEI also requests that the Commission clearly define these rate types and give examples to ensure that industry applies the terms consistently.[102]

88. FirstEnergy asserts that the EQR Contract Data already captures the trade date via the Contract Execution Date in Field 21, which provides for the date the contract was signed. According to FirstEnergy, typically the rate for the transaction will be agreed upon on this date. FirstEnergy also states that the Commencement Date is reported in the Contract Terms in Field 22, which provides for the date that the terms in the contract are effective. Further, FirstEnergy explains that Fields 43 and 44 provide the first and last dates for the sale of the product at the specified rate. In addition, FirstEnergy states that the Commission's proposed field to describe the type of rate for each transaction is already reported under field 37, Rate Description. According to FirstEnergy, this field currently requires that the filing company either cite the FERC accession number for the relevant FERC tariff or provide the entire rate algorithm.[103] Similarly, EPSA argues that the "type of rate" information is already captured in the "contract" field and that creating a new field would be a significant burden.[104]

ii. Discussion

89. The current Commission EQR reporting requirements include, among other things, the Contract Execution Date (Field Number 21), the Contract Commencement Date (Field Number 22), Rate Description (Field Number 37), Begin Date (Field Number 43), and End Date (Field Number 44).[105] These contract fields were not intended to capture trade-specific details related to each specific transaction, but rather to capture contractual terms and conditions under which two entities transact for all jurisdictional services.

90. We agree with the points made by DC Energy and the California PUC. Master agreements and evergreen contracts do not preclude an entity from specifying when an agreement to transact was executed. Prices without trading dates are less informative because prices change over time.

91. Presently, the trade date and type of rate by which the price was set are not provided or collected publicly. The trade date is essential to assessing the significance of prices in relation to market conditions in effect at that time.[106] Many of the prices reported in the EQR are the result of confirmation made under master agreements. Because the prices are not set in the contracts themselves, the Commission is unable to determine from EQR data when the price was set. Additionally, the Commission is unable to conclude whether the price was based on a fixed price, a formula, an index, or an RTO/ISO price.

92. Therefore, to improve market transparency, the Commission proposes to require market participants to report the date on which parties to a reported transaction agreed upon a price (trade date) and, additionally, require the type of rate by which the price was set (i.e., fixed price, formula, index, or RTO/ISO price) in its respective EQR filings. The date and type of rate are to accompany each specific sales transaction and be reported in the EQR transaction section only in the quarter the sale occurs.

93. We propose to clarify the term "trade date" as "the date upon which the

[97] EEI at 6–7; EPSA at 2–3; Duke Energy supports the comments filed by EEI at 2.

[98] EPSA at 4.

[99] EEI at 6–7.

[100] *Id.* at 6.

[101] EPSA at 4.

[102] EEI at 7.

[103] FirstEnergy at 2–3.

[104] EPSA at 5.

[105] These fields are outlined in more detail in the *Electronic Quarterly Report Data Dictionary,* Version 1.1, available at *http://www.ferc.gov/docs-filing/eqr/soft-tools/eqrdatadictionary.pdf.*

[106] Currently, the EQR collects only the start and end date of physical transactions. Trades entered into months before the transaction dates are reported in the same manner as trades entered into minutes before the transaction occurs, making it difficult to differentiate between trades made under different circumstances.

parties agree upon the price of a transaction." As discussed below, we also propose tracking the time of the transaction. Further, EEI suggests that the Commission clarify how to specify the type of rate and provide examples to ensure that industry applies the terms consistently. As a result, the options for the type of rate that the Commission is proposing will be "fixed," "formula," "index," and "RTO/ISO price." A "fixed" rate will be defined as a fixed charge per unit of consumption. An example is an agreement for the sale of 30 MWh during every on-peak hour during 2012 for an agreed upon rate in advance of delivery. A "formula" rate will be defined as a calculation of a rate based upon a formula that does not contain an index component. An example is a cost-of-service rate. An "index" rate will be defined as a calculation of a rate based upon an index or a formula that contains an index component. An example is an options agreement where power is sold at a published index price (or at a percentage of that published index price). An "RTO/ISO price" will be defined as a rate that is based on an RTO/ISO published price or a formula that contains an RTO/ISO price component. An example is a generator's sale to into a RTO/ISO day-ahead market.

94. This proposal would impose additional reporting requirements on any market participant that is required to file an EQR with the Commission. The Commission will ensure its EQR software can accommodate such requirements before the first EQR filings containing the trade date and type of rate must be submitted. Reporting of the trade date and type of rate would occur prospectively from the time the requirements are implemented. Accordingly, market participants would not have to re-file prior EQR filings with the proposed time and date information and would not have to adjust a prior quarter's information on already executed transactions. However, if the Final Rule requires EQR filers to report the trade date and type of rate of their transactions, we would expect market participants to include the trade date and type of rate for transactions taking place from the date of the Final Rule's implementation. Any re-filings and adjustments to EQR filings made prior to the date of effectiveness of such a rule would follow the EQR filing requirements imposed at the time of the original filing.

95. Although not raised in the Transparency NOI, the Commission now proposes to require market participants to also report the time of trade. We propose to clarify the term "time of trade" as "the time upon which the parties agree upon the price of a transaction." The Commission recognizes that not only the date, but also the time of trade, is essential in identifying some forms of market manipulation that may be designed to target daily index price creation for the purpose of benefiting financial swap settlements. Without knowing what time a trade occurred, customers and the Commission would have difficulty identifying these out-of-market, or anti-competitive, transactions from those that followed the ebbs and flows of the daily market. This is due to the fact that competitive market pricing is often fluid to reflect changes in supply and demand fundamentals. For example, market pricing for next-day power on the morning before delivery may be entirely different than pricing that afternoon as outage, forecast and other information continually changes. It is possible for market participants to attempt to "direct" physical market pricing throughout the day in an effort to impact settlement pricing for other positions. This behavior may involve trading large volumes at the beginning of the trading day in order to "direct" pricing in subsequent hours or other strategies that concentrate trading in a narrow time window.

b. Resales of Financial Transmission Rights in Secondary Markets

96. In the Transparency NOI, staff sought comments as to whether the Commission should collect information about the resale of financial transmission rights in secondary markets through reporting to the EQR. Specifically, the Transparency NOI asked whether market participants perceive that collecting this information would enhance market transparency and, if so, to designate what current EQR filing requirements should be imposed on resales of financial transmission rights in secondary markets. In addition, comments were sought to identify other filing requirements that may be applicable to the resale of financial transmission rights in secondary markets that are not current EQR filing requirements and explain whether and, if so, how collection of the information would improve market transparency.

i. Comments

97. California PUC and SDG&E support reporting sales of financial transmission rights to increase transparency of financial transmission right trading by both transmission and non-transmission owners and to reveal whether sales in the secondary market result in market concentration or increased liquidity. SDG&E also supports requiring transaction-specific information for financial transmission right secondary transactions as is required for all other transactions. APPA, Duke Energy, EEI and Morgan Stanley question the need for information concerning resale of financial transmission rights and assert that the burden of collecting financial transmission right resale information may outweigh the minimal value of such information. EPSA believes that the Commission should not collect financial transmission right data as part of this transparency effort because it would be unnecessary, duplicative and not provide any useful information.[107] APPA and EPSA state that secondary financial transmission right markets are relatively illiquid and Morgan Stanley states that the Commission has recognized that financial transmission right markets are thinly traded at this time.[108] FirstEnergy argues that this filing requirement would be duplicative because RTO market monitors may have the responsibility for reviewing the secondary bilateral financial transmission right markets.[109] DC Energy also believes that reporting requirements for secondary market financial transmission right sales should be the province of the ISOs/RTOs.[110] APPA also sees the task of assuring transparency of financial transmission right transactions as a responsibility of the RTOs.[111] Morgan Stanley similarly recommends that the Commission monitor secondary market financial transmission right transactions by requesting each RTO to provide quarterly or annual data on such transactions arising in their markets.[112] In addition, PJM observes that, as a threshold question, the Commission should first determine whether it has any jurisdiction over this type of transaction before deciding whether to compel participant reporting.[113] PJM also states that its bulletin board on the PJM eFTR system may provide a means to access secondary market financial transmission right transaction information, making increased participant reporting unnecessary.[114]

[107] EPSA at 5–6.

[108] Morgan Stanley at 2.

[109] FirstEnergy at 3–4.

[110] DC Energy at 10–11.

[111] APPA at 13.

[112] Morgan Stanley at 2–3.

[113] PJM at 4–5.

[114] *Id.* at 2–4.

ii. Discussion

98. We agree with certain commenters that RTOs/ISOs collect and publish some financial transmission right data and that RTOs/ISOs are the proper entities for reporting information about financial transmission rights. We believe that requiring financial transmission right data to be reported by market participants in the EQR, in addition to the information already provided by RTOs/ISOs, would not significantly improve price transparency in these markets. Therefore, we do not propose to require entities to report information about financial transmission rights in the EQR at this time.

c. Standardizing the Unit for Reporting Energy and Capacity Transactions

i. Comments

99. California PUC, DC Energy, and PG&E support standardizing EQR data on capacity and energy across all filers to help the Commission and other market participants compare prices.[115] PG&E further states that $/MWh is an appropriate unit for energy transactions and $/MW is an appropriate unit for capacity transactions because these units are commonly used in organized electricity markets, including the markets operated by CAISO.[116]

100. EEI states that having common units for reporting energy and capacity transactions (*i.e.,* $/MWh and $ per MW-month) would simplify interpretation of the data, but that the Commission should clarify that this change requires the conversion only of KWh to MWh and KW to MW (*i.e.,* utilities can still report transactions in MW/Month, MW/Day, KVA, MVAR, *etc.*). In addition, EEI notes that if the Commission makes this change, then it will likely have to increase the number of digits allowed in the Rate field—particularly if the units being reported are MWhs.[117]

101. EPSA does not advocate standardizing units for reporting transactions. EPSA states that capacity may be sold on a $/MW–Day, $/MW–Week, $/KW–Day, $/KW–Week, $/KW–Month, or $/KW–Year basis, and argues that the parties should report those trades in accordance with the way the products were measured, priced and sold under each transaction. According to EPSA, this will reduce the possibility of errors in translating one unit to another.[118]

ii. Discussion

102. We propose to insert an additional field to the EQR transaction section to standardize the units for reporting energy and capacity within the EQR. We agree with several commenters that the usefulness of the additional field will simplify interpretation of the data and aid the Commission and other market participants in comparing prices. The additional field will provide a consistent rate for comparison purposes and allow the Commission to develop internal checks in the EQR software on the accuracy of a filing.

103. Today, the EQR filing requirements include, among other things, the Transaction Rate Units (Field Number 65). This field requires a market participant to report the measure for the appropriate price of the product sold.[119] To avoid possible confusion, we clarify that the additional field we are proposing to add would not remove or replace any current EQR filing requirement. It would simply add a new field to capture a common unit for reporting energy and capacity transactions.

104. To ensure that similar sales can be easily compared, the Commission is proposing to standardize the units in which energy and capacity sales may be filed in the EQR. Therefore, energy transactions will be required to be reported as $/MWh and capacity transactions will be required to be reported as $/MW-month. Each filing entity will be required to make the conversion for any measurement that is not in this denomination. Several commenters suggested that requiring transactions to be reported using a standardized unit would introduce conversion errors into EQR. Converting the quantity and price for energy and capacity sales to $/MWh and $/MW-month generally requires routine, commonly-used calculations. Commission staff is available to assist filers with any filing-related questions, including conversion questions. Additionally, the Commission will ensure the appropriate number of digits in the EQR software to accommodate the conversion.

d. Omitting the Time Zone From the Contract Section of the EQR

i. Comments

105. DC Energy and EPSA support eliminating from the contract section of the EQR the requirement to report the time zone, so long as the Commission maintains the requirement to report the time zone in the transaction report.[120] EEI states that the time zone information in the contract section of the EQR is simply unnecessary and that deleting this requirement would help to reduce burden.[121]

ii. Discussion

106. We propose eliminating the Contract Time Zone (Field Number 45) as currently required in EQR filings. We agree with EEI that time zone information in the contract section of the EQR is unnecessary and that eliminating it would reduce the burden of filing the EQR. However, we clarify that, although we propose to eliminate time zone information from the contract section, we will continue to require EQR filers to report the time zone where the transaction took place in the transaction section (Field Number 55).

3. Additional EQR Enhancements

107. In the almost nine years since the Commission established EQRs under Order No. 2001, large financial markets have emerged and become increasingly intertwined with physical wholesale power markets. Further, the diversity and complexity of derivatives instruments that are linked to physical power prices have grown exponentially. EQR reporting requirements have not kept pace with these market evolutions. The refinements proposed in this NOPR are intended to allow the Commission and market participants to use the EQR to identify behavior in physical power markets that may be designed to influence a market participant's financial positions linked to physical market pricing fundamentals.

108. The Commission recognizes that there is an incentive to manipulate bilateral wholesale spot markets for the purpose of influencing financial swap settlements. Although leveraged financial positions can provide legitimate hedging capabilities, they can also create incentives for companies to alter physical market prices. Incentives to manipulate can be especially strong outside of RTO/ISO markets, where bilateral transactions are used to determine swap settlement values.

[115] California PUC at 4; DC Energy at 11; and PG&E at 3.

[116] PG&E at 3.

[117] EEI at 8.

[118] EPSA at 6.

[119] Valid values include: $/KVA, $/KW, $/KW–DAY, $/KW–MO, $/KW–WK, $/KW–YR, $/KWH, $/MVAR–YR, $/MW, $/MW–DAY, $/MW–MO, $/MW–WK, $/MW–YR, $/MWH, $/RKVA, CENTS, CENTS/KVR, CENTS/KWH, and FLAT RATE. Rate units should match product names.

[120] DC Energy at 11; EPSA at 6–7.

[121] EEI at 8.

109. For these reasons, the Commission proposes to require several new data fields in the EQR that will enable market participants and the Commission to identify physical wholesale transactions that could contribute to pricing designed to influence financial swap settlements. These additional enhancements were not raised for comment in the Transparency NOI, but rather are being proposed in this NOPR as the Commission continues to weigh appropriate measures to help facilitate greater price transparency and help ensure that a market participant does not manipulate wholesale electricity markets for the purpose of benefiting its financial positions. Thus, the Commission proposes to require EQR filers to report in the transaction section of the EQR the following information: (1) The index publisher(s) to which the transaction was reported; (2) the exchange on which the transaction was consummated or the brokerage firm that arranged the transaction; and (3) the time the transaction occurred.

a. Identify Transactions Reported to Index Publishers

110. The Commission proposes to require all market participants to report in the transaction section of EQR the index price publisher to which they have reported their sales transactions. The Commission has recognized the importance of price indices in energy markets, noting in its *Policy Statement on Natural Gas and Electric Price Indices:*

> Price indices are widely used in bilateral natural gas and electric commodity markets to track spot and forward prices. They are often referenced in contracts as a price term; they are related to futures markets and used when futures contracts go to delivery; * * * and state commissions use indices as benchmarks in reviewing the prudence of gas or electricity purchases. Since index dependencies permeate the energy industry, the indices must be robust and accurate and have the confidence of market participants for such markets to function property and efficiently.[122]

111. The Commission believes that requiring in the EQR the names of index price publishers to which wholesale power sale transactions are reported would allow the Commission, market participants and other interested parties greater transparency to see how market forces are affecting those index prices and the market concentration of the companies' sales used to calculate the index prices.

112. In addition to market participants' significant use of index prices with respect to tracking electric spot and forward prices, the use of index prices has expanded to form settlement prices for financial products. Because bilateral physical spot markets are used to settle financial swaps, there is an incentive to manipulate the physical markets to benefit larger financial positions. For example, linked financial-swap contracts at several hubs traded at volumes many times larger than bilateral spot trading at that particular hub. The multiple of financial-swaps at such hubs in relation to physical transactions indicates that opportunities to profit from physical market manipulation strategies involving financial positions already exist. For instance, a market participant with fixed price financial-swap contracts could manipulate the physical index price by transacting power at a loss for transactions that contribute to the index price. However, the market participant could still profit from such activity because any loss from selling power that contributes to the index price could be more than offset by financial-swap gains resulting from moving the index price. Thus, greater transparency could further our understanding of how index prices are formed. This, in turn, could lead to more robust indices, enhance public confidence in their accuracy and reliability, and improve the Commission's ability to monitor prices for exercises of market power and manipulation.

113. Section 35.41(c) of the Commission's regulations [123] requires market-based rate power sellers to submit a notification to the Commission if they report transactions to electric or natural gas price index publishers. However, this regulation does not require market-based rate sellers to specify the price index publishers to which they report their transactions and it applies only to one subset of market participants whose transactions are used to form index prices, *i.e.,* jurisdictional power sellers with market-based rate authorization from the Commission. Obtaining information from all market participants about which transactions are reported to which index publishers will strengthen the Commission's and interested observers' ability to determine whether these index prices reflect market forces and provide market participants with greater confidence in the accuracy of index prices. Therefore, we propose to require each EQR filer to report in the transactions section the particular electric or natural gas index publisher to which they report transactions, if applicable. To eliminate redundancy between the EQR filings and the notification required under 18 CFR 35.41(c) from market-based rate sellers, we propose to amend that provision to no longer require notifications from these sellers to the Commission stating whether they are reporting transactions to electricity or natural gas index publishers, or updates of such notifications.

b. Identify the Exchange/Broker Used To Consummate a Transaction

114. Exchanges and brokers routinely publish index prices composed of wholesale transactions that were consummated on their exchange or through their brokerage services. Such index prices are used to track electric spot and forward prices and, increasingly, to form settlement prices for financial products. We believe that requiring information regarding whether exchanges or brokers were used to consummate a transaction will promote visibility into index prices and bolster the Commission's market monitoring efforts.

c. Collection of e-Tag ID Data

115. To schedule physical interchange transactions,[124] market participants submit e-Tags to transmission system operators. Generally, e-Tags track energy transfers, including where the power is sourced and delivered; the responsible parties in the receipt, delivery and movement of the power; the timing; and the volumes and specific details regarding which transmission paths are used. An e-Tag is reported to NERC or WECC, but is not presently reported to the Commission.

116. The Commission proposes to require EQR filers to submit e-Tag IDs for each transaction reported in the EQR in the event an e-Tag is used to schedule the transaction. The e-Tag ID is a subset of information associated with a full e-Tag and consists of four components: (1) Source Balancing Authority Entity Code; [125] (2) Purchasing-Selling Entity Code; [126] (3) e-Tag Code or Unique

[122] *See Price Discovery in Natural Gas and Electric Markets,* Policy Statement on Natural Gas and Electric Price Indices, 104 FERC ¶ 61,121, at P 6, *clarified,* 105 FERC ¶ 61,282 (2003).

[123] 18 CFR 35.41(c). *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, see* Order Amending Market-Based Rate Tariffs and Authorizations, 105 FERC ¶ 61,218, at P 116–119 (2003).

[124] An interchange transaction involves a transfer of energy from a seller to a buyer that crosses one or more balancing authority area boundaries.

[125] The Source Balancing Authority is defined as the host Balancing Authority in which the generation is located.

[126] The Purchasing-Selling Entity is the entity creating and submitting the e-Tag request to the

Transaction Identifier;[127] and (4) Sink Balancing Authority Entity Code.[128] Requiring e-Tag IDs as part of EQR filings would address a major gap in EQR information as it is currently reported: the source location of wholesale sales transactions. E–Tag IDs would assist market participants and the Commission in identifying chains of transactions and transaction paths. Using the information currently reported in the EQR, it is difficult to identify linked re-sales or chains of transactions between filers. EQRs currently require reporting of the Point of Receipt Balancing Authority (Field Number 39) for power sales contracts if that information is specified in the contract. In practice, however, many EQRs do not contain information related to the Point of Receipt Balancing Authority because many contracts do not specify source information.

117. Accessing e-Tag IDs through the EQR would facilitate price transparency by enabling all market participants to "follow" transactions across markets. In other words, market participants would be able to identify that an energy trade from Company A to Company B and an energy trade reported by Company B to Company C are, in fact, a re-sale of power from Company A to Company C because both sales would reflect the same e-Tag ID. Also, the markups observed for these "arbitrage" transactions are a valuable indicator of competitiveness in the wholesale market. Specifically, one would expect the arbitrage value between differently-priced markets to be closely associated with the cost to secure transmission between those markets. Persistent price differences between markets that are not consistent with transmission costs could indicate that the ability to arbitrage market price differences is not fully competitive.

118. In addition, the Source Balancing Authority information contained in the e-Tag ID would provide additional detail on the contract path used to schedule a transaction. In analyzing EQR filings, the Commission has found that source information related to a power sale is a vital component in analyzing transactions for anti-competitive behavior. Specifically, without some general knowledge of where power is being generated, it would be difficult to determine whether an interchange transaction is competitively arbitraging price separations between markets or behaving anti-competitively. Furthermore, the e-Tag IDs will allow the Commission and market participants to better monitor interchange transactions and detect potential abuses.

119. In a NOPR in Docket No. RM11–12–000 (e-Tag NOPR), to be issued concurrently with this NOPR, the Commission proposes to require the Commission-certified Electric Reliability Organization, *i.e.,* NERC, to provide Commission staff with non-public access to complete e-Tag data. This data will, among other things, help the Commission to monitor wholesale markets and prevent market manipulation. In the e-Tag NOPR, the Commission explains that accessing e-Tag data through NERC, rather than requiring individual market participants to provide such data to the Commission, would avoid burdening market participants with submitting the complete e-Tags with both NERC and the Commission. In addition, it would avoid burdening the Commission with developing and maintaining a new system to capture such data from market participants. In this NOPR, the Commission is proposing to require individual market participants to file, if applicable, a sub-set of e-Tag information, specifically e-Tag IDs, as part of the EQR because market participants are able to match their e-Tag IDs with the transactions they are required to report in the EQR. As explained above, access to this information in the EQR will allow the public and the Commission to "follow" transactions across markets.

d. Eliminating the DUNS Number Requirement

i. Comments

120. Under existing requirements, filers must identify all customers and sellers reported in the EQRs using DUNS numbers, a numeric identifier assigned by Dun & Bradstreet, Inc. The Commission required DUNS numbers in order to distinguish among similarly named, but different, service providers.[129] Although the Transparency NOI did not seek comment on whether to continue requiring DUNS numbers in EQRs, several commenters urged the Commission to eliminate this requirement. EEI argues that DUNS numbers have proven not to be a unique way to identify entities and have become a waste of time, resources, and money. In addition, EEI and Wisconsin Electric state that some market participants have multiple DUNS numbers, while others have only one or none at all.[130] Wisconsin Electric notes that DUNS numbers listed in the EQR are often incorrect, and that not all market participants subscribe to the proprietary cross-referencing service.[131] EPSA asserts that its members view DUNS numbers as more of an administrative burden than a help and that an error message occurs even though the Commission has instructed a party to input zero when a counterparty does not have a DUNS number. As an alternative to DUNS numbers, Wisconsin Electric proposes that the Commission adopt a more widely used identification system, such as federal tax IDs. EEI proposes using a company's legal name or a new ID developed through the FERC eTariff program. EPSA does not advocate a specific identification method but did recognize that a uniform nomenclature should be adopted.

ii. Proposal

121. The Commission proposes to eliminate the DUNS number requirement from EQR filings. Customer/counterparty identification through unique identifier numbers is a significant component of EQRs, particularly when identifying sales to individual companies. In the EQR, the customer company names are reflected in Field Numbers 16 and 48 as unrestricted, or free-form, text fields. As a result, the customer company names inserted in Field Numbers 16 and 48 are not always uniformly reported by different sellers. To help ensure more precise identification of counterparties, however, EQRs use DUNS numbers in Field Numbers 17 and 49. However, DUNS numbers have proven to be an imprecise identification system. As noted by commenters, EQR filers can have multiple DUNS numbers, only one DUNS number, or no DUNS number at all.

122. In considering alternatives to the use of DUNS numbers, the Commission finds that none of the suggested approaches would provide a viable replacement to the current approach and requiring a different numbering system would create legacy issues. Therefore, the Commission will not

authority service, which authorizes implementation of interchange schedules between balancing authority areas. The Purchasing-Selling Entity also is the entity that purchases or sells, and takes title to, energy, capacity and interconnected operations services.

[127] The e-Tag Code is a unique seven-character transaction identifier for each bilateral energy transaction scheduled on the transmission network. It is assigned by the e-Tag system when transmission service to accommodate the transaction is reserved.

[128] The Sink Balancing Authority is defined as the host Balancing Authority in which load is located.

[129] *See* Order No. 2001, FERC Stats. & Regs. ¶ 31,127 at P 90.

[130] Wisconsin Electric at 2.

[131] *Id.*

replace the DUNS number requirement with another approach at this time, but rather will continue to rely on the insertion of customer company names in the free-form fields, Field Numbers 16 and 48.

III. Information Collection Statement

123. The Office of Management and Budget (OMB) regulations require approval of certain information collection requirements imposed by agency rules.[132] Upon approval of a collection(s) of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of an agency rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number. The Paperwork Reduction Act (PRA)[133] requires each federal agency to seek and obtain OMB approval before undertaking a collection of information directed to ten or more persons or contained in a rule of general applicability.[134]

124. The Commission is submitting these reporting and recordkeeping requirements to OMB for its review and approval under section 3507(d) of the PRA. Comments are solicited on the Commission's need for this information, whether the information will have practical utility, the accuracy of provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing the respondent's burden, including the use of automated information techniques.

125. The Commission's estimate of the additional average annual Public Reporting Burden and cost[135] related to the proposed rule in Docket RM10–12–000 follow.

	No. of respondents per year	No. of responses per respondent per year	Implementing Burden		Recurring Operating Burden		Average Annual Burden (implementation cost averaged over the 3 yrs.)	
			Burden hrs. per respondent	Cost per respondent	Burden hrs. per response	Cost per response	Burden Hours	Cost
Public Utility Filers								
Current filers	831	4	160	$15,659	8	$783	70,912	$6,940,157
Non-Public Utilities								
Non-BA, with >4 mill. MWH wholesale sales/yr.	53	4	400	$39,148	24	$2,349	12,155	$1,189,577
BA, with >4 mill. MWH wholesale and retail sales/yr.	3	4	400	$39,148	24	$2,349	688	$67,335
BA, small with >=1mill. MWH wholesale and retail sales/yr. & <=4 million MWh	5	4	400	$39,148	24	$2,349	1,147	$112,224
Sub-Total for Non-Public Utilities	61						13,989	$1,369,136
GRAND TOTAL, AVERAGE ANNUAL ESTIMATES	**892**	**4**					**84,901**	**$8,309,293**

126. In calculating the number of current respondents filing EQRs, the Commission looked at the number of agents responsible for submitting the filings of the EQR, which came to 1,291 filers. Out of those 1,291 filers, only 831 reported transactions during 2009. Therefore, the Commission proposes to use 831 as the number of respondents.[136] Although the Commission estimates the total number of current respondents to be 831, this figure overstates the number of corporate families filing the EQR because some of the filings were made separately by affiliates from the same company. For instance, of the 831 filer names, 28 began with FPL, 24 began with NRG, 12 began with Wheelabrator, and 11 began with Dynegy. This trend was common among other filers.

127. For non-public utility filers, the Commission separately estimated the burden for non-balancing authorities with more than 4 million MWh of annual wholesale sales; balancing authorities with more than 4 million MWh of annual wholesale and retail sales; and balancing authorities with 1 million MWh or more of annual wholesale and retail sales. In the RFA Certification section below, the Commission uses the SBA definition of a small utility to determine how many small entities will be impacted by the proposed rule. The SBA defines a utility as small if, including its affiliates, it is primarily engaged in the transmission, generation and/or distribution of electric energy for sale and its total electric output for the preceding twelve months did not exceed four million MWh.[137] We also used the SBA definition to determine the burden on respondents in the table above.

128. The Commission recognizes that there will be an increased burden involved in the initial implementation

[132] 5 CFR 1320.8.

[133] 44 U.S.C. 3501–3520.

[134] OMB's regulations at 5 CFR 1320.3(c)(4)(i) require that "Any recordkeeping, reporting, or disclosure requirement contained in a rule of general applicability is deemed to involve ten or more persons."

[135] For purposes of calculating the annual averages, the implementation burden and cost have been averaged, spread over the 3-year period, and added to the recurring burden and cost.

[136] There were 1,435 unique respondents to the EQR reporting for 1,638 unique sellers during the third quarter of 2010. Neither the number of respondents nor the number of unique sellers accurately reflects the number of entities and affiliated entities that respond to the EQR. For instance, respondents will often report sales for unique sellers, either individual generation units or affiliated entities, separately in the EQR. Similarly, affiliate relationships exist for unique respondents. These respondents may share EQR filing software and techniques or may even be filed by the same staff.

[137] 13 CFR 121.101.

associated with filing EQRs. This burden includes the set-up software on a utility's computers, the initial entry of the contract data, and the mapping of the transaction data from the utility's internal computer systems into the format required by the Commission. For non-public utility filers, we estimate a burden of 400 hours per year for the initial implementation phase. For current EQR filers, we estimate that the additional data requirements will involve a burden of 160 hours. This burden is lower than that for non-public utility filers because of current filers' familiarity with EQR reporting.

129. For the recurring effort involved in filing the EQR each subsequent quarter, we anticipate that the burden will be minimal, particularly as filing transaction data will be automated for companies that have mapped their systems to the required format. Thus, we estimate a recurring burden of 24 hours per response (rather than per year) for all non-public filers if the requirements of this rulemaking are to be implemented. We have estimated that current filers spend about 16 hours to meet the existing recurring requirements of filing EQRs. With the additional data proposed to be required, we estimate that current filers' recurring burden will increase by 8 hours.

Information Collection Costs: The Commission seeks comments on the costs and burden to comply with these requirements.

Total average annual costs = $8,309,293 ($6,940,157 for public utilities plus $1,369,136 for non-public utilities). The Commission estimates that the hours to complete the EQR reporting requirements will be divided among an entity's accounting, legal and support staff. We estimate an average hourly cost of $97.87 (including a senior accountant at $50.22/hr., a financial analyst at $67.00/hr., legal services at $250/hr., and support staff at $24.25/hr.).[138]

Title: FERC–516, Electric Rate Schedules and Tariff Filings (which includes the Electric Quarterly Report [EQR]) [139]

Action: Proposed Revisions to the EQR.

OMB Control No: 1902–0096.

Respondents: Public and non-public utilities.

Frequency of Responses: Initial implementation and quarterly filings.

Necessity of the Information: The Commission is proposing to enact requirements that would facilitate price transparency in wholesale markets for the sale and transmission of electric energy in interstate commerce by requiring certain non-public utilities to file the EQR. This proposal would allow the Commission and the public to gain a more complete picture of wholesale power and transmission markets in interstate commerce by providing additional information concerning price formation and market concentration in these markets. Public access to additional sales and transmission-related information in the EQR would improve market participants' ability to assess supply and demand fundamentals and to price interstate wholesale market transactions. It also would strengthen the Commission's ability to identify potential exercises of market power or manipulation and to better evaluate the competitiveness of the interstate wholesale markets. In addition, the Commission proposes to make certain revisions to the existing EQR filing requirements and apply those revisions to all market participants filing EQRs. These refinements to the existing EQR filing requirements reflect the evolving nature of electricity markets, would increase market transparency for the Commission and the public, and would allow market participants to file the information in the most efficient manner possible.

Internal review: The Commission has reviewed the proposed changes and has determined that the changes are necessary. These requirements conform to the Commission's need for efficient information collection, communication, and management within the energy industry. The Commission has assured itself, by means of internal review, that there is specific, objective support for the burden estimates associated with the information collection requirements.

130. Interested persons may obtain information on the reporting requirements by contacting: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 [Attention: Ellen Brown, Office of the Executive Director, e-mail: *DataClearance@ferc.gov,* Phone: (202) 502–8663, fax: (202) 273–0873]. Comments on the requirements of this rule may also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission]. For security reasons, comments should be sent by e-mail to OMB at *oira_submission@omb.eop.gov.* Please reference OMB Control No. 1902–0096, FERC–516 and the docket number of this proposed rulemaking in your submission.

IV. Environmental Analysis

131. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[140] The actions taken here fall within categorical exclusions in the Commission's regulations for information gathering, analysis, and dissemination.[141] Therefore, an environmental assessment is unnecessary and has not been prepared in this rulemaking.

V. Regulatory Flexibility Act Certification

132. The RFA [142] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a proposed rule and that minimize any significant economic impact on a substantial number of small entities. The SBA's Office of Size Standards develops the numerical definition of a small business.[143] The SBA has established a size standard for electric utilities, stating that a firm is small if, including its affiliates, it is primarily engaged in the transmission, generation and/or distribution of electric energy for sale and its total electric output for the preceding twelve months did not exceed four million MWh.[144]

133. As discussed in Order No. 2000,[145] in making this determination,

[138] Hourly average wage is an average and was calculated using Bureau of Labor Statistics (BLS), Occupational Employment Statistics data for May, 2009 (at *http://www.bls.gov/oes/*) for the accounting, financial, and support staffs. The average hourly figure for legal support is a composite from BLS and other resources, taking into account the hourly cost for both in-house and contractor organizations.

[139] For administrative purposes, the Commission will consider whether to separate the EQR requirements from the remaining reporting requirements under FERC–516. If that is done, FERC would then request a separate OMB Control No. for EQR.

[140] *Regulations Implementing the National Environmental Policy Act,* Order No. 486, 486 FR 1750 (Jan. 22, 1988), FERC Stats. & Regs. ¶ 30,783 (1987).

[141] 18 CFR 380.4(a)(5).

[142] 5 U.S.C. 601–612.

[143] 13 CFR 121.101.

[144] 13 CFR 121.201, Sector 22, Utilities & n.1.

[145] *See Regional Transmission Organizations,* Order No. 2000, 65 FR 809 (January 6, 2000), FERC Stats. & Regs. ¶ 31,089, at 31,237 & n.754 (1999), *order on reh'g,* Order No. 2000–A, 65 FR 12,088 (Mar. 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish, County Washington* v. *FERC,* 272 F.3d 607, 348 U.S. App. D.C. 205 (D.C. Cir. 2001) (citing *Mid-Tex Elec. Coop.* v. *FERC,* 773 F.2d 327 (D.C. Cir. 1985) (Commission need only consider small entities "that

Continued

the Commission is required to examine only the direct compliance costs that a rulemaking imposes upon small businesses. It is not required to consider indirect economic consequences, nor is it required to consider costs that an entity incurs voluntarily.

134. Based on EIA Form 861, there are 372 non-public utilities that made wholesale sales in 2009.[146] As discussed above, the Commission is proposing to exempt from the EQR filing requirements non-public utilities with a *de minimis* market presence. The Commission estimates that 311 of the 372 non-public utilities will be exempt from this rulemaking because they make four million MWh or less of annual wholesale sales and are not Balancing Authorities. Of the 372, 309 are considered small entities because they make four million MWh or less of annual wholesale and retail sales. In balancing the need for information with the burden on small utilities, the Commission is proposing to base the *de minimis* threshold on wholesale sales and thus will exempt a majority of small non-public utilities from this proposed rulemaking. In fact, the Commission believes that the proposed rule, if finalized, would apply to only five non-public utilities (Balancing Authorities) that are considered small entities. The Commission believes that the direct, economic impact on these five small non-public utilities may be significant in terms of initial start-up costs (estimated to be $39,148), but that the recurring costs ($2,349 per quarterly filing, or $9,396 per year) will likely be small. However, the Commission does not consider five non-public utilities to be a substantial number of small entities. Using this *de minimis* threshold, the proposed rule will apply to approximately 16 percent of the 372 non-public utilities with wholesale sales, while capturing approximately 85 percent of the total volume of non-jurisdictional sales.

135. This rulemaking also proposes changes to the existing filing requirements and thus current EQR filers also will be impacted. Based on analysis of EIA Form 861, there are 186 public utilities and, of these, 51 make four million MWh or less of annual wholesale and retail sales. When considering annual wholesale and retail sales from these 51 entities together with sales by their affiliates, only 28 combined entities had annual wholesale and retail sales of or below four million MWh. The Commission does not consider this to be a substantial number of small entities. Furthermore, we note that public utilities may request, on an individual basis, waiver from the EQR reporting requirements.[147] In addition, the Commission expects that the direct, economic cost to comply will be less significant. While public utilities will need to modify their systems to capture and report the additional data, they already have the system in place. The estimated additional costs from the proposed rule are: (1) For implementation of the changes, $15,659, and (2) for each quarterly report, $783 (or $3,132 annually). Thus, the Commission certifies that this proposed rule will not have a significant impact on a substantial number of small entities.

VI. Comment Procedures

136. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due 60 days from publication in the **Federal Register**. Comments must refer to Docket No. RM10–12–000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

137. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov.* The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

138. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

139. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

VII. Document Availability

140. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (*http://www.ferc.gov*) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

141. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

User assistance is available for eLibrary and the FERC's Web site during normal business hours from FERC Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or e-mail at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. E-mail the Public Reference Room at *public.referenceroom@ferc.gov.*

List of Subjects in 18 CFR Part 35

Electric power rates; Electric utilities; Reporting and recordkeeping requirements.

By direction of the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

In consideration of the foregoing, the Commission proposes to amend 18 CFR Part 35, Chapter I, Title 18, *Code of Federal Regulations,* as follows.

PART 35—FILING OF RATE SCHEDULES AND TARIFFS

1. The authority citation for Part 35 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

2. Section 35.10b is revised to read as follows:

§ 35.10b Electric Quarterly Reports.

Each public utility as well as each non-public utility with more than a *de minimis* market presence shall file an updated Electric Quarterly Report with the Commission covering all services it provides pursuant to this part, for each of the four calendar quarters of each year, in accordance with the following

would be directly regulated"); *Colorado State Banking Bd.* v. *RTC,* 926 F.2d 931 (10th Cir. 1991) (Regulatory Flexibility Act not implicated where regulation simply added an option for affected entities and did not impose any costs)).

[146] We excluded non-public utilities that are located in Alaska, Hawaii, and Texas.

[147] The Commission has granted requests for waiver of the EQR filing requirements. *See Bridger Valley Elect. Assoc., Inc.,* 101 FERC ¶ 61,146 (2002). Entities with a waiver will continue to have a waiver and will not need to file a new request for waiver.

schedule: for the period from January 1 through March 31, file by April 30; for the period from April 1 through June 30, file by July 31; for the period July 1 through September 30, file by October 31; and for the period October 1 through December 31, file by January 31. Electric Quarterly Reports must be prepared in conformance with the Commission's software and guidance posted and available for downloading from the FERC Web site (*http://www.ferc.gov*).

(a) For purposes of this section, the term "non-public utility" means any market participant exempted from the Commission's jurisdiction by virtue of the Federal Power Act, 16 U.S.C. 824f. The term does not include an entity that engages in purchases or sales of wholesale electric energy or transmission services within the Electric Reliability Council of Texas or any entity that engages solely in sales of wholesale electric energy or transmission services in the states of Alaska or Hawaii.

(b) For purposes of this section, the term "de minimis market presence" means any non-public utility that makes 4,000,000 megawatt hours or less of annual wholesale sales, based on the average annual sales for resale over the preceding three years as published by the Energy Information Administration's Form 861 unless the non-public utility is a Balancing Authority that makes 1,000,000 megawatt hours or more of annual wholesale sales, as published by the Energy Information Administration's Form 861.

3. In § 35.41, paragraph (c) is revised to read as follows:

§ 35.41 Market behavior rules.

* * * * *

(c) *Price reporting.* To the extent a Seller engages in reporting of transactions to publishers of electric or natural gas price indices, Seller must provide accurate and factual information, and not knowingly submit false or misleading information or omit material information any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the *Policy Statement on Natural Gas and Electric Price Indices,* issued by the Commission in Docket No. PL03–3–000, and any clarifications thereto. Seller must notify the Commission as part of its Electric Quarterly Report filing requirement in § 35.10b of this chapter whether it reports its transactions to publishers of electricity and natural gas indices. In addition, Seller must adhere to any other standards and requirements for price reporting as the Commission may order.

* * * * *

Note: The following Appendixes will not appear in the Code of Federal Regulations.

Appendix A: List of Commenters

Short name or acronym	Commenter
Alaska Power	Alaska Power Association
Allegheny	Allegheny Electric Cooperative
APPA	American Public Power Association
BPA	Bonneville Power Administration
California DWR	California Department of Water Resources State Water Project
California PUC	Public Utilities Commission of the State of California
Cities/M–S–R	City of Redding, California, City of Santa Clara, California, and M–S–R Public Power Agency
City of Dover	City of Dover, Delaware
City of Fayetteville	Public Works Commission of the City of Fayetteville, North Carolina
Consolidated Edison Energy, Inc. and Consolidated Edison Solutions, Inc.	Consolidated Edison Energy, Inc. and Consolidated Edison Solutions, Inc
Delaware Municipal	Delaware Municipal Electric Corporation, Inc.
DC Energy	DC Energy, LLC
Duke Energy	Duke Energy Corporation
EEI	Edison Electric Institute
EPSA	Electric Power Supply Association
East Texas Cooperatives	East Texas Electric Cooperatives
ELCON	Electricity Consumers Resource Council
EMCOS	Eastern Massachusetts Consumer-Owned Systems
FirstEnergy	FirstEnergy Service Company
Imperial	Imperial Irrigation District
LPPC	Large Public Power Council
MID	Modesto Irrigation District
Morgan Stanley	Morgan Stanley Capital Group, Inc.
New York Public Power	New York Association of Public Power
Northwest Utility	Northwest Requirements Utility
NRECA	National Rural Electric Cooperative Association
NYMPA/MEUA	Northern California Power Agency; New York Municipal Power Agency and Municipal Electric Utilities Association of New York
PG&E	Pacific Gas and Electric Company
PJM	PJM Interconnection, LLC
Public Power Council	Public Power Council
Public Systems	Connecticut Municipal Electric Energy Cooperative, Massachusetts Municipal Wholesale Electric Company, and New Hampshire Electric Cooperative, Inc.
Salt River	Salt River Project
Sam Rayburn Municipal	Sam Rayburn Municipal Power Agency
SDG&E	San Diego Gas & Electric Company
Southwest Transmission	Southwest Transmission Dependent Utility Group
TANC	Transmission Agency of Northern California
TAPS	Transmission Access Policy Study Group
Utah Associated Municipal	Utah Associated Municipal Power Systems
Wisconsin Electric	Wisconsin Electric Power Company

Appendix B: Proposed Refinements to the Existing EQR

Fields Proposed to be Removed

Field #	Field	Required	Value	Definition
17	Customer DUNS Number	Yes	Nine digit number	The unique nine digit number assigned by Dun and Bradstreet to the company identified in Field Number 16.
45	Time Zone	Yes		The time zone in which the sales will be made under the contract.
49	Customer DUNS Number	Yes	Nine digit number	The unique nine digit number assigned by Dun and Bradstreet to the counterpart to the contract.

Fields Proposed to be Created

Section	Field	Required	Value	Definition
Transaction	Transaction Datetime	Yes	YYYYMMDDHHMM	The date and time when the price of this transaction was agreed upon.
Transaction	Standardized Transaction Price	Yes, for Energy and Capacity sales only	Number with up to 8 decimals.	Actual price charged for the product per unit. The price cannot be averaged or otherwise aggregated. For energy transactions, this price must be reported in $/MWh. For capacity transactions, this price must be reported in $/MW-Month.
Transaction	Type of Rate	Yes	---- Fixed Formula Index RTO/ISO Price	See definitions for each product type below. A rate determined by a fixed charge per unit of consumption. A rate determined using a formula that does not contain an index component. A rate determined using an index or using a formula that contains an index component. A rate determined using a RTO/ISO published price or using a formula that contains a RTO/ISO published price.
Transaction	Broker/Exchange Name	If a the transaction was conducted with the assistance of a broker or exchange	Unrestricted Text (60 Characters)	The name of the broker or exchange that was used to conduct the transaction

Transaction	Reported to Index Publisher	If the transaction was reported to an Index Publisher	Unrestricted Text (60 Characters)	The name of the index publisher(s) that the transaction terms were reported to.
Transaction	e-Tag ID	If the transaction was scheduled using an e-Tag	Unrestricted Text (30 Characters)	The e-Tag ID used to schedule the energy transaction. The e-Tag ID reported, must be identical in format to the e-Tag ID used to schedule the transaction.

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Part IV

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 412

Medicare Program; Inpatient Rehabilitation Facility Prospective Payment System for Federal Fiscal Year 2012; Changes in Size and Square Footage of Inpatient Rehabilitation Units and Inpatient Psychiatric Units; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 412

[CMS–1349–P]

RIN 0938–AQ28

Medicare Program; Inpatient Rehabilitation Facility Prospective Payment System for Federal Fiscal Year 2012; Changes in Size and Square Footage of Inpatient Rehabilitation Units and Inpatient Psychiatric Units

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement section 3004 of the Affordable Care Act, which establishes a new quality reporting program that provides for a 2 percent reduction in the annual increase factor beginning in 2014 for failure to report quality data to the Secretary of Health and Human Services. This proposed rule would also update the prospective payment rates for inpatient rehabilitation facilities (IRFs) for Federal fiscal year 2012 (for discharges occurring on or after October 1, 2011 and on or before September 30, 2012) as required by the Social Security Act (the Act). The Act requires the Secretary to publish in the **Federal Register** on or before the August 1 that precedes the start of each FY the classification and weighting factors for the IRF prospective payment system (PPS) case-mix groups and a description of the methodology and data used in computing the prospective payment rates for that fiscal year. We are also proposing to consolidate, clarify, and revise existing policies regarding IRF hospitals and IRF units of hospitals to eliminate unnecessary confusion and enhance consistency. Furthermore, in accordance with the general principles of the President's January 18, 2011 Executive Order entitled "Improving Regulation and Regulatory Review," we are proposing to amend existing regulatory provisions regarding "new" facilities and changes in the bed size and square footage of IRFs and inpatient psychiatric facilities (IPFs) to improve clarity and remove obsolete material.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on June 21, 2011.

ADDRESSES: In commenting, please refer to file code CMS–1349–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the "Submit a comment" instructions.

2. *By regular mail.* You may mail written comments to the following address only: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1349–P, P.O. Box 8016, Baltimore, MD 21244–8016.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address only: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1349–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to either of the following addresses: a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(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 CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786–7195 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

Submission of comments on paperwork requirements. You may submit comments on this document's paperwork requirements by following the instructions at the end of the "Collection of Information Requirements" section in this document.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT:
Gwendolyn Johnson, (410) 786–6954, for general information about the proposed rule.
Hillary Loeffler, (410) 786–0456, for information about the proposed payment rates.
Stella R. Mandl, (410) 786–2547, for information about the proposed quality reporting program.
Susanne Seagrave, (410) 786–0044, for information about the proposed payment policies.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

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Acronyms

To assist the reader, we are listing the acronyms used and their corresponding meaning in alphabetical order.

ADC Average Daily Census
AHA American Hospital Association
ASCA Administrative Simplification Compliance Act of 2002, Public Law 107–105
BBA Balanced Budget Act of 1997, Public Law 105–33
BBRA Medicare, Medicaid, and SCHIP [State Children's Health Insurance Program] Balanced Budget Refinement Act of 1999, Public Law 106–113
BEA Bureau of Economic Analysis
BIPA Medicare, Medicaid, and SCHIP [State Children's Health Insurance Program] Benefits Improvement and Protection Act of 2000, Public Law 106–554
BLS Bureau of Labor Statistics
CAH Critical Access Hospital
CAUTI Catheter-Associated Urinary Tract Infection
CDC Centers for Disease Control and Prevention
CBSA Core-Based Statistical Area
CCR Cost-to-Charge Ratio
CFR Code of Federal Regulations
CIPI Capital Input Price Index
CMG Case-Mix Group
CMS Centers for Medicare & Medicaid Services
CPI Consumer Price Index
DSH Disproportionate Share Hospital
ECI Employment Cost Index
EHR Electronic Health Record
FI Fiscal Intermediary
FR Federal Register
FTE Full-time Equivalent
FY Federal Fiscal Year
GDP Gross Domestic Product
GME Graduate Medical Education
HAI Healthcare Associated Infection
HHH Hubert H. Humphrey Building
HHS Department of Health Human Services
HIPAA Health Insurance Portability and Accountability Act of 1996, Public Law 104–191
HOMER Home Office Medicare Records
IGI IHS Global Insight
IME Indirect Medical Education
I–O Input-Output
IPF Inpatient Psychiatric Facility
IPPS Inpatient Prospective Payment System
IRF Inpatient Rehabilitation Facility
IRF–PAI Inpatient Rehabilitation Facility-Patient Assessment Instrument
IRF PPS Inpatient Rehabilitation Facility Prospective Payment System
IRVEN Inpatient Rehabilitation Validation and Entry
LTCH Long Term Care Hospital
LIP Low-Income Percentage
LOS Length of Stay
MA Medicare Advantage
MAC Medicare Administrative Contractor
MedPAR Medicare Provider Analysis and Review
MFP Multifactor Productivity
MMSEA Medicare, Medicaid, and SCHIP Extension Act of 2007, Public Law 110–173
MSA Metropolitan Statistical Area
NAICS North American Industry Classification System
NHSN National Healthcare Safety Network
NQF National Quality Forum
OMB Office of Management and Budget
PLI Professional Liability Insurance
PPI Producer Price Indexes
PPS Prospective Payment System
QM Quality Measure
RFA Regulatory Flexibility Act of 1980, Public Law 96–354
RIA Regulatory Impact Analysis
RIC Rehabilitation Impairment Category
RO Regional Office
RP Rehabilitation and Psychiatric
RPL Rehabilitation, Psychiatric, and Long-Term Care Hospital
SCHIP State Children's Health Insurance Program
SSI Supplemental Security Income
TEFRA Tax Equity and Fiscal Responsibility Act of 1982, Public Law 97–248

I. Background

A. Historical Overview of the Inpatient Rehabilitation Facility Prospective Payment System (IRF PPS)

Section 4421 of the Balanced Budget Act of 1997 (Pub. L. 105–33, enacted on August 5, 1997) (BBA), as amended by section 125 of the Medicare, Medicaid, State Children's Health Insurance Program (SCHIP) Balanced Budget Refinement Act of 1999 (Pub. L. 106–113, enacted on November 29, 1999) (BBRA) and by section 305 of the

Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (Pub. L. 106–554, enacted on December 21, 2000) (BIPA) provides for the implementation of a per discharge prospective payment system (PPS) under section 1886(j) of the Social Security Act (the Act) for inpatient rehabilitation hospitals and inpatient rehabilitation units of a hospital (hereinafter referred to as IRFs).

Payments under the IRF PPS encompass inpatient operating and capital costs of furnishing covered rehabilitation services (that is, routine, ancillary, and capital costs) but not direct graduate medical education costs, costs of approved nursing and allied health education activities, bad debts, and other services or items outside the scope of the IRF PPS. Although a complete discussion of the IRF PPS provisions appears in the original FY 2002 IRF PPS final rule (66 FR 41316) and the FY 2006 IRF PPS final rule (70 FR 47880), we are providing below a general description of the IRF PPS for fiscal years (FYs) 2002 through 2010.

Under the IRF PPS from FY 2002 through FY 2005, as described in the FY 2002 IRF PPS final rule (66 FR 41316), the Federal prospective payment rates were computed across 100 distinct case-mix groups (CMGs). We constructed 95 CMGs using rehabilitation impairment categories (RICs), functional status (both motor and cognitive), and age (in some cases, cognitive status and age may not be a factor in defining a CMG). In addition, we constructed five special CMGs to account for very short stays and for patients who expire in the IRF.

For each of the CMGs, we developed relative weighting factors to account for a patient's clinical characteristics and expected resource needs. Thus, the weighting factors accounted for the relative difference in resource use across all CMGs. Within each CMG, we created tiers based on the estimated effects that certain comorbidities would have on resource use.

We established the Federal PPS rates using a standardized payment conversion factor (formerly referred to as the budget neutral conversion factor). For a detailed discussion of the budget neutral conversion factor, please refer to our FY 2004 IRF PPS final rule (68 FR 45684 through 45685). In the FY 2006 IRF PPS final rule (70 FR 47880), we discussed in detail the methodology for determining the standard payment conversion factor.

We applied the relative weighting factors to the standard payment conversion factor to compute the unadjusted Federal prospective payment rates under the IRF PPS from FYs 2002 through 2005. Within the structure of the payment system, we then made adjustments to account for interrupted stays, transfers, short stays, and deaths. Finally, we applied the applicable adjustments to account for geographic variations in wages (wage index), the percentage of low-income patients, location in a rural area (if applicable), and outlier payments (if applicable) to the IRF's unadjusted Federal prospective payment rates.

For cost reporting periods that began on or after January 1, 2002 and before October 1, 2002, we determined the final prospective payment amounts using the transition methodology prescribed in section 1886(j)(1) of the Act. Under this provision, IRFs transitioning into the PPS were paid a blend of the Federal IRF PPS rate and the payment that the IRF would have received had the IRF PPS not been implemented. This provision also allowed IRFs to elect to bypass this blended payment and immediately be paid 100 percent of the Federal IRF PPS rate. The transition methodology expired as of cost reporting periods beginning on or after October 1, 2002 (FY 2003), and payments for all IRFs now consist of 100 percent of the Federal IRF PPS rate.

We established a CMS Website as a primary information resource for the IRF PPS. The Web site URL is *http://www.cms.gov/InpatientRehabFacPPS/* and may be accessed to download or view publications, software, data specifications, educational materials, and other information pertinent to the IRF PPS.

Section 1886(j) of the Act confers broad statutory authority upon the Secretary to propose refinements to the IRF PPS. In the FY 2006 IRF PPS final rule (70 FR 47880) and in correcting amendments to the FY 2006 IRF PPS final rule (70 FR 57166) that we published on September 30, 2005, we finalized a number of refinements to the IRF PPS case-mix classification system (the CMGs and the corresponding relative weights) and the case-level and facility-level adjustments. These refinements included the adoption of the Office of Management and Budget's (OMB) Core-Based Statistical Area (CBSA) market definitions, modifications to the CMGs, tier comorbidities, and CMG relative weights, implementation of a new teaching status adjustment for IRFs, revision and rebasing of the market basket index used to update IRF payments, and updates to the rural, low-income percentage (LIP), and high-cost outlier adjustments. Beginning with the FY 2006 IRF PPS final rule (70 FR 47908 through 47917), the market basket index used to update IRF payments is a market basket reflecting the operating and capital cost structures for freestanding IRFs, freestanding inpatient psychiatric facilities (IPFs), and long-term care hospitals (LTCHs) (hereafter referred to as the rehabilitation, psychiatric, and long-term care (RPL) market basket). Any reference to the FY 2006 IRF PPS final rule in this proposed rule also includes the provisions effective in the correcting amendments. For a detailed discussion of the final key policy changes for FY 2006, please refer to the FY 2006 IRF PPS final rule (70 FR 47880 and 70 FR 57166).

In the FY 2007 IRF PPS final rule (71 FR 48354), we further refined the IRF PPS case-mix classification system (the CMG relative weights) and the case-level adjustments, to ensure that IRF PPS payments would continue to reflect as accurately as possible the costs of care. For a detailed discussion of the FY 2007 policy revisions, please refer to the FY 2007 IRF PPS final rule (71 FR 48354).

In the FY 2008 IRF PPS final rule (72 FR 44284), we updated the Federal prospective payment rates and the outlier threshold, revised the IRF wage index policy, and clarified how we determine high-cost outlier payments for transfer cases. For more information on the policy changes implemented for FY 2008, please refer to the FY 2008 IRF PPS final rule (72 FR 44284), in which we published the final FY 2008 IRF Federal prospective payment rates.

After publication of the FY 2008 IRF PPS final rule (72 FR 44284), section 115 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (Pub. L. 110–173, enacted on December 29, 2007) (MMSEA), amended section 1886(j)(3)(C) of the Act to apply a zero percent increase factor for FYs 2008 and 2009, effective for IRF discharges occurring on or after April 1, 2008. Section 1886(j)(3)(C) of the Act required the Secretary to develop an increase factor to update the IRF Federal prospective payment rates for each FY. Based on the legislative change to the increase factor, we revised the FY 2008 Federal prospective payment rates for IRF discharges occurring on or after April 1, 2008. Thus, the final FY 2008 IRF Federal prospective payment rates that were published in the FY 2008 IRF PPS final rule (72 FR 44284) were effective for discharges occurring on or after October 1, 2007 and on or before March 31, 2008; and the revised FY 2008 IRF Federal prospective payment rates were effective for discharges occurring on or after April 1, 2008 and on or before September 30, 2008. The

revised FY 2008 Federal prospective payment rates are available on the CMS Web site at *http://www.cms.gov/InpatientRehabFacPPS/07_DataFiles.asp#TopOfPage*.

In the FY 2009 IRF PPS final rule (73 FR 46370), we updated the CMG relative weights, the average length of stay values, and the outlier threshold; clarified IRF wage index policies regarding the treatment of "New England deemed" counties and multi-campus hospitals; and revised the regulation text in response to section 115 of the MMSEA to set the IRF compliance percentage at 60 percent ("the 60 percent rule") and continue the practice of including comorbidities in the calculation of compliance percentages. We also applied a zero percent market basket increase factor for FY 2009 in accordance with section 115 of the MMSEA. For more information on the policy changes implemented for FY 2009, please refer to the FY 2009 IRF PPS final rule (73 FR 46370), in which we published the final FY 2009 IRF Federal prospective payment rates.

In the FY 2010 IRF PPS final rule (74 FR 39762) and in correcting amendments to the FY 2010 IRF PPS final rule (74 FR 50712) that we published on October 1, 2009, we updated the Federal prospective payment rates, the CMG relative weights, the average length of stay values, the rural, LIP, and teaching status adjustment factors, and the outlier threshold; implemented new IRF coverage requirements for determining whether an IRF claim is reasonable and necessary; and revised the regulation text to require IRFs to submit patient assessments on Medicare Advantage (MA) (Medicare Part C) patients for use in the 60 percent rule calculations. Any reference to the FY 2010 IRF PPS final rule in this proposed rule also includes the provisions effective in the correcting amendments. For more information on the policy changes implemented for FY 2010, please refer to the FY 2010 IRF PPS final rule (74 FR 39762 and 74 FR 50712), in which we published the final FY 2010 IRF Federal prospective payment rates.

After publication of the FY 2010 IRF PPS final rule (74 FR 39762), section 3401(d) of the Patient Protection and Affordable Care Act (Pub. L. 111–148, enacted on March 23, 2010) as amended by section 10319 of the same Act and by section 1105 of the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152, enacted on March 30, 2010) (collectively, hereafter referred to as "The Affordable Care Act"), amended section 1886(j)(3)(C) of the Act and added section 1886(j)(3)(D) of the Act. Section 1886(j)(3)(C) of the Act requires the Secretary to estimate a multi-factor productivity adjustment to the market basket increase factor, and to apply other adjustments as defined by the Act. The productivity adjustment applies to FYs from 2012 forward. The other adjustments apply to FYs 2010–2019.

Sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(i) of the Act defined the adjustments that were to be applied to the market basket increase factors in FYs 2010 and 2011. Under these provisions, the Secretary was required to reduce the market basket increase factor in FY 2010 by a 0.25 percentage point adjustment. Notwithstanding this provision, in accordance with section 3401(p) of the Affordable Care Act, the adjusted FY 2010 rate was only to be applied to discharges occurring on or after April 1, 2010. Based on the self-implementing legislative changes to section 1886(j)(3) of the Act, we adjusted the FY 2010 Federal prospective payment rates as required, and applied these rates to IRF discharges occurring on or after April 1, 2010 and on or before September 30, 2010. Thus, the final FY 2010 IRF Federal prospective payment rates that were published in the FY 2010 IRF PPS final rule (74 FR 39762) were used for discharges occurring on or after October 1, 2009 and on or before March 31, 2010; and the adjusted FY 2010 IRF Federal prospective payment rates applied to discharges occurring on or after April 1, 2010 and on or before September 30, 2010. The adjusted FY 2010 Federal prospective payment rates are available on the CMS Web site at *http://www.cms.gov/InpatientRehabFacPPS/07_DataFiles.asp#TopOfPage*.

In addition, sections 1886(j)(3)(C) and (D) of the Act also affected the FY 2010 IRF outlier threshold amount because they required an adjustment to the FY 2010 RPL market basket increase factor, which changed the standard payment conversion factor for FY 2010. Specifically, the original FY 2010 IRF outlier threshold amount was determined based on the original estimated FY 2010 RPL market basket increase factor of 2.5 percent and the standard payment conversion factor of $13,661. However, as adjusted, the IRF prospective payments are based on the adjusted RPL market basket increase factor of 2.25 percent and the revised standard payment conversion factor of $13,627. To maintain estimated outlier payments for FY 2010 equal to the established standard of 3 percent of total estimated IRF PPS payments for FY 2010, we revised the IRF outlier threshold amount for FY 2010 for discharges occurring on or after April 1, 2010 and on or before September 30, 2010. The revised IRF outlier threshold amount for FY 2010 was $10,721.

Sections 1886(j)(3)(ii)(II) and 1886(j)(3)(D)(i) also required the Secretary to reduce the market basket increase factor in FY 2011 by a 0.25 percentage point adjustment. The FY 2011 IRF PPS notice (75 FR 42836) and the correcting amendments to the FY 2011 IRF PPS notice (75 FR 70013, November 16, 2010) described the required adjustments to the FY 2011 and FY 2010 IRF PPS Federal prospective payment rates and outlier threshold amount for IRF discharges occurring on or after April 1, 2010 and on or before September 30, 2011. It also updated the FY 2011 Federal prospective payment rates, the CMG relative weights, and the average length of stay values. Any reference to the FY 2011 IRF PPS notice in this proposed rule also includes the provisions effective in the correcting amendments. For more information on the FY 2010 and FY 2011 adjustments or the updates for FY 2011, please refer to the FY 2011 IRF PPS notice (75 FR 42836 and 75 FR 70013).

B. Provisions of the Affordable Care Act Affecting the IRF PPS in FY 2012 and Beyond

The Affordable Care Act included several provisions that affect IRF PPS in FYs 2012 and beyond. In addition to what was discussed above, section 3401(d) of the Affordable Care Act also added section 1886(j)(3)(C)(ii)(I) (providing for a "productivity" adjustment" for fiscal year 2012 and each subsequent fiscal year). The proposed productivity adjustment for FY 2012 is discussed in section V.A.6. of this proposed rule, and the 0.1 percentage point adjustment is discussed in section V.A of this proposed rule. Section 1886(j)(3)(C)(ii)(II) of the Act notes that the application of these adjustments to the market basket update may result in an update that is less than 0.0 for a fiscal year and in payment rates for a fiscal year being less than such payment rates for the preceding fiscal year.

Section 3004(b) of the Affordable Care Act also addressed the IRF PPS program. It reassigned the previously-designated section 1886(j)(7) of the Act to section 1886(j)(8) and inserted a new section 1886(j)(7), which contains new requirements for the Secretary to establish a quality reporting program for IRFs. Under that program, data must be submitted in a form and manner, and at a time specified by the Secretary. Beginning in FY 2014, section 1886(j)(7)(A)(i) will require application

of a 2 percentage point reduction of the applicable market basket increase factor for IRFs that fail to comply with the quality data submission requirements. Application of the 2 percentage point reduction may result in an update that is less than 0.0 for a fiscal year and in payment rates for a fiscal year being less than such payment rates for the preceding fiscal year. Reporting-based reductions to the market basket increase factor will not be cumulative; they will only apply for the FY involved.

Under section 1886(j)(7)(D)(i) and (ii) of the Act, the Secretary is generally required to select quality measures for the IRF quality reporting program from those that have been endorsed by the consensus-based entity which holds a performance measurement contract under section 1890(a) of the Act. This contract is currently held by the National Quality Forum (NQF). So long as due consideration is given to measures that have been endorsed or adopted by a consensus-based organization, section 1886(j)(7)(D)(ii) of the Act authorizes the Secretary to select non-endorsed measures for specified areas or medical topics when there are no feasible or practical endorsed measure(s). Under section 1886(j)(7)(D)(iii) of the Act, the Secretary is required to publish the measures that will be used in FY 2014 no later than October 1, 2012.

Section 1886(j)(7)(E) of the Act requires the Secretary to establish procedures for making the IRF PPS quality reporting data available to the public. In so doing, the Secretary must ensure that IRFs have the opportunity to review any such data prior to its release to the public. Future rulemaking will address these public reporting obligations.

The proposed quality reporting program for IRFs, in accordance with section 1886(j)(7) of the Act, is discussed in detail in section IX. of this proposed rule.

C. Operational Overview of the Current IRF PPS

As described in the FY 2002 IRF PPS final rule, upon the admission and discharge of a Medicare Part A fee-for-service patient, the IRF is required to complete the appropriate sections of a patient assessment instrument, designated as the Inpatient Rehabilitation Facility-Patient Assessment Instrument (IRF–PAI). In addition, beginning with IRF discharges occurring on or after October 1, 2009, the IRF is also required to complete the appropriate sections of the IRF–PAI upon the admission and discharge of each Medicare Part C (Medicare Advantage) patient, as described in the FY 2010 IRF PPS final rule. All required data must be electronically encoded into the IRF–PAI software product. Generally, the software product includes patient classification programming called the GROUPER software. The GROUPER software uses specific IRF–PAI data elements to classify (or group) patients into distinct CMGs and account for the existence of any relevant comorbidities.

The GROUPER software produces a 5-digit CMG number. The first digit is an alpha-character that indicates the comorbidity tier. The last 4 digits represent the distinct CMG number. Free downloads of the Inpatient Rehabilitation Validation and Entry (IRVEN) software product, including the GROUPER software, are available on the CMS Web site at *http://www.cms.gov/InpatientRehabFacPPS/06_Software.asp*.

Once a patient is discharged, the IRF submits a Medicare claim as a Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104–191, enacted on August 21, 1996) (HIPAA), compliant electronic claim or, if the Administrative Simplification Compliance Act of 2002 (Pub. L. 107–105, enacted on December 27, 2002) (ASCA) permits, a paper claim (a UB–04 or a CMS–1450 as appropriate) using the five-digit CMG number and sends it to the appropriate Medicare fiscal intermediary (FI) or Medicare Administrative Contractor (MAC). Claims submitted to Medicare must comply with both ASCA and HIPAA.

Section 3 of the ASCA amends section 1862(a) of the Act by adding paragraph (22) which requires the Medicare program, subject to section 1862(h) of the Act, to deny payment under Part A or Part B for any expenses for items or services "for which a claim is submitted other than in an electronic form specified by the Secretary." Section 1862(h) of the Act, in turn, provides that the Secretary shall waive such denial in situations in which there is no method available for the submission of claims in an electronic form or the entity submitting the claim is a small provider. In addition, the Secretary also has the authority to waive such denial "in such unusual cases as the Secretary finds appropriate." For more information, see the "Medicare Program; Electronic Submission of Medicare Claims" final rule (70 FR 71008, November 25, 2005). CMS instructions for the limited number of Medicare claims submitted on paper are available at *http://www.cms.gov/manuals/downloads/clm104c25.pdf*.

Section 3 of the ASCA operates in the context of the administrative simplification provisions of HIPAA, which include, among others, the requirements for transaction standards and code sets codified in 45 CFR, parts 160 and 162, subparts A and I through R (generally known as the Transactions Rule). The Transactions Rule requires covered entities, including covered healthcare providers, to conduct covered electronic transactions according to the applicable transaction standards. (See the CMS program claim memoranda at *http://www.cms.gov/ElectronicBillingEDITrans/* and listed in the addenda to the Medicare Intermediary Manual, Part 3, section 3600).

The Medicare FI or MAC processes the claim through its software system. This software system includes pricing programming called the "PRICER" software. The PRICER software uses the CMG number, along with other specific claim data elements and provider-specific data, to adjust the IRF's prospective payment for interrupted stays, transfers, short stays, and deaths, and then applies the applicable adjustments to account for the IRF's wage index, percentage of low-income patients, rural location, and outlier payments. For discharges occurring on or after October 1, 2005, the IRF PPS payment also reflects the new teaching status adjustment that became effective as of FY 2006, as discussed in the FY 2006 IRF PPS final rule (70 FR 47880).

II. Summary of Provisions of the Proposed Rule

In this proposed rule, we are proposing to update the IRF Federal prospective payment rates, to rebase and revise the RPL market basket, to implement refinements to the methodologies for calculating the LIP adjustment, and to establish a new quality reporting program for IRFs in accordance with section 1886(j)(7) of the Act. We are also proposing to revise existing regulations text for the purpose of updating and providing greater clarity. These proposals are as follows:

A. Proposed Updates to the IRF Federal Prospective Payment Rates for Federal Fiscal Year (FY) 2012

The proposed updates to the IRF Federal prospective payment rates for FY 2012 are as follows:

- Update the FY 2012 IRF PPS relative weights and average length of stay values using the most current and complete Medicare claims and cost report data in a budget neutral manner, as discussed in section III. of this proposed rule.

• Update the FY 2012 IRF facility-level adjustments (rural, LIP, and teaching status adjustments) in a budget neutral manner using the most current and complete Medicare claims and cost report data and by removing the weighting methodology previously used to analyze such data, and propose a temporary cap adjustment policy for the teaching status adjustment to reflect interns and residents displaced due to closure of IRFs or IRF residency training programs, as discussed in section IV. of this proposed rule.

• Update the FY 2012 IRF PPS payment rates by the proposed market basket increase factor, based upon the most current data available, with a 0.1 percentage point reduction as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act and a productivity adjustment required by section 1886(j)(3)(C)(ii)(I) of the Act, as described in section V. of this proposed rule.

• Update the wage index and the labor-related share of the FY 2012 IRF PPS payment rates in a budget neutral manner, as discussed in section V. of this proposed rule.

• Calculate the IRF Standard Payment Conversion Factor for FY 2012, as discussed in section V. of this proposed rule.

• Update the outlier threshold amount for FY 2012, as discussed in section VI. of this proposed rule.

• Update the cost-to-charge ratio (CCR) ceiling and urban/rural average CCRs for FY 2012, as discussed in section VI. of this proposed rule.

• Discuss the impact of the IPPS data matching process changes on the IRF PPS calculation of the Supplemental Security Income (SSI) ratios used to compute the IRF LIP adjustment factor, as discussed in section VII. of this proposed rule.

• Implement the IRF quality reporting program provisions of section 1886(j)(7) of the Act, as discussed in section IX. of this proposed rule.

B. Proposed Revisions to Existing Regulation Text

In this proposed rule, we are proposing to revise the existing requirements at § 412.25(b), § 412.25(b)(1), § 412.25(b)(2), § 412.25(b)(3), and § 412.25(e)(2)(ii)(A) that apply to all units that are excluded from the inpatient prospective payment system (IPPS), as described in section VIII. of this proposed rule. These proposed revisions would affect IRFs and inpatient psychiatric facilities (IPFs).

We are also proposing to relocate and revise the existing requirements at § 412.23(b), § 412.29, and § 412.30 that describe the requirements for facilities to qualify to receive payment under the IRF PPS, as described in section VIII. of this proposed rule.

Finally, we are proposing to re-designate the existing paragraph § 412.624(c)(4) as § 412.624(c)(5) and add a new paragraph § 412.624(c)(4) to implement the IRF quality reporting program.

III. Proposed Update to the Case-Mix Group (CMG) Relative Weights and Average Length of Stay Values for FY 2012

As specified in § 412.620(b)(1), we calculate a relative weight for each CMG that is proportional to the resources needed by an average inpatient rehabilitation case in that CMG. For example, cases in a CMG with a relative weight of 2, on average, will cost twice as much as cases in a CMG with a relative weight of 1. Relative weights account for the variance in cost per discharge due to the variance in resource utilization among the payment groups, and their use helps to ensure that IRF PPS payments support beneficiary access to care, as well as provider efficiency.

In this proposed rule, we propose to update the CMG relative weights and average length of stay values for FY 2012. As required by statute, we always use the most recent available data to update the CMG relative weights and average lengths of stay. This ensures that the CMG relative weights and average length of stay values reflect as accurately as possible the current costs of care in IRFs. For FY 2012, we are proposing to use the FY 2010 IRF claims and FY 2009 IRF cost report data. These data are the most current and complete data available at this time. Currently, only a small portion of the FY 2010 IRF cost report data are available for analysis, but the majority of the FY 2010 IRF claims data are available for analysis.

In this proposed rule, we propose to use the same methodology that we used to update the CMG relative weights and average length of stay values in the FY 2009 IRF PPS final rule (73 FR 46370), which we also used to update the CMG relative weights and average length of stay values in the FY 2010 IRF PPS final rule (74 FR 39762) and the FY 2011 notice (75 FR 42836).

In calculating the CMG relative weights, we use a hospital-specific relative value method to estimate operating (routine and ancillary services) and capital costs of IRFs. The process used to calculate the CMG relative weights for this proposed rule is as follows:

Step 1. We estimate the effects that comorbidities have on costs.

Step 2. We adjust the cost of each Medicare discharge (case) to reflect the effects found in the first step.

Step 3. We use the adjusted costs from the second step to calculate CMG relative weights, using the hospital-specific relative value method.

Step 4. We normalize the FY 2012 CMG relative weights to the same average CMG relative weight from the CMG relative weights implemented in the FY 2011 IRF PPS notice (75 FR 42836).

Consistent with the methodology that we have used to update the IRF classification system in each instance in the past, we are proposing to update the CMG relative weights for FY 2012 in such a way that total estimated aggregate payments to IRFs for FY 2012 are the same with or without the changes (that is, in a budget neutral manner) by applying a budget neutrality factor to the standard payment amount. To calculate the appropriate proposed budget neutrality factor for use in updating the FY 2012 CMG relative weights, we propose to use the following steps:

Step 1. Calculate the estimated total amount of IRF PPS payments for FY 2012 (with no proposed changes to the CMG relative weights).

Step 2. Calculate the estimated total amount of IRF PPS payments for FY 2012 by applying the proposed changes to the CMG relative weights (as discussed above).

Step 3. Divide the amount calculated in step 1 by the amount calculated in step 2 to determine the proposed budget neutrality factor (0.9989) that would maintain the same total estimated aggregate payments in FY 2012 with and without the proposed changes to the CMG relative weights.

Step 4. Apply the proposed budget neutrality factor (0.9989) to the FY 2011 IRF PPS standard payment amount after the application of the budget-neutral wage adjustment factor.

In section V.C. of this proposed rule, we discuss the proposed use of the existing methodology to calculate the standard payment conversion factor for FY 2012.

Table 1, "Proposed Relative Weights and Average Length of Stay Values for Case-Mix Groups," presents the CMGs, the comorbidity tiers, the proposed corresponding relative weights, and the proposed average length of stay values for each CMG and tier for FY 2012. The average length of stay for each CMG is used to determine when an IRF

discharge meets the definition of a short-stay transfer, which results in a per diem case level adjustment. The proposed relative weights and average length of stay values shown in Table 1 are subject to change for the final rule if more recent data become available for use in these analyses.

TABLE 1: Proposed Relative Weights and Average Length of Stay Values for Case-Mix Groups

CMG	CMG Description (M=motor, C=cognitive, A=age)	Relative weight				Average length of stay			
		Tier1	Tier2	Tier3	None	Tier1	Tier2	Tier3	None
0101	Stroke M>51.05	0.7654	0.7177	0.6447	0.6094	10	10	9	8
0102	Stroke M>44.45 and M<51.05 and C>18.5	0.9487	0.8896	0.7990	0.7553	12	13	10	10
0103	Stroke M>44.45 and M<51.05 and C<18.5	1.1340	1.0633	0.9551	0.9029	14	14	12	12
0104	Stroke M>38.85 and M<44.45	1.1790	1.1055	0.9930	0.9387	15	14	13	12
0105	Stroke M>34.25 and M<38.85	1.3705	1.2850	1.1543	1.0911	16	17	14	14
0106	Stroke M>30.05 and M<34.25	1.5762	1.4779	1.3275	1.2549	20	18	16	16
0107	Stroke M>26.15 and M<30.05	1.7841	1.6729	1.5026	1.4204	20	20	18	18
0108	Stroke M<26.15 and A>84.5	2.2109	2.0731	1.8621	1.7603	31	25	23	22
0109	Stroke M>22.35 and M<26.15 and A<84.5	2.0470	1.9193	1.7240	1.6297	24	23	20	20
0110	Stroke M<22.35 and A<84.5	2.6359	2.4715	2.2200	2.0986	33	29	26	25
0201	Traumatic brain injury M>53.35 and C>23.5	0.7564	0.6156	0.5707	0.5179	8	8	7	8
0202	Traumatic brain injury M>44.25 and M<53.35 and C>23.5	1.0716	0.8722	0.8085	0.7337	12	12	10	10
0203	Traumatic brain injury M>44.25 and C<23.5	1.2095	0.9844	0.9125	0.8282	16	11	13	12
0204	Traumatic brain injury M>40.65 and M<44.25	1.2732	1.0362	0.9605	0.8717	16	12	12	12
0205	Traumatic brain injury M>28.75 and M<40.65	1.6075	1.3083	1.2128	1.1007	18	18	15	14
0206	Traumatic brain injury M>22.05 and M<28.75	2.0038	1.6308	1.5117	1.3720	23	19	19	18
0207	Traumatic brain injury M<22.05	2.7072	2.2034	2.0425	1.8537	35	27	25	22
0301	Non-traumatic brain injury M>41.05	1.0552	0.9514	0.8433	0.7724	12	12	11	10
0302	Non-traumatic brain injury M>35.05 and M<41.05	1.3362	1.2049	1.0679	0.9781	12	15	13	13
0303	Non-traumatic brain injury M>26.15 and M<35.05	1.5891	1.4329	1.2701	1.1632	21	17	15	14
0304	Non-traumatic brain injury M<26.15	2.1985	1.9823	1.7570	1.6093	29	23	20	19
0401	Traumatic spinal cord injury M>48.45	1.0503	0.8733	0.7923	0.6999	15	14	11	10
0402	Traumatic spinal cord injury M>30.35 and M<48.45	1.3721	1.1408	1.0351	0.9143	17	14	13	12
0403	Traumatic spinal cord injury M>16.05 and M<30.35	2.4551	2.0411	1.8520	1.6359	29	26	23	20
0404	Traumatic spinal cord injury M<16.05 and A>63.5	4.3686	3.6321	3.2955	2.9110	53	39	38	35
0405	Traumatic spinal cord injury M<16.05 and A<63.5	3.8362	3.1894	2.8938	2.5562	52	38	36	29
0501	Non-traumatic spinal cord injury M>51.35	0.6606	0.6293	0.5616	0.4974	10	10	7	7

CMG	CMG Description (M=motor, C=cognitive, A=age)	Relative weight				Average length of stay			
		Tier1	Tier2	Tier3	None	Tier1	Tier2	Tier3	None
0502	Non-traumatic spinal cord injury M>40.15 and M<51.35	0.9871	0.9403	0.8391	0.7432	13	13	11	10
0503	Non-traumatic spinal cord injury M>31.25 and M<40.15	1.2549	1.1954	1.0668	0.9449	16	14	13	12
0504	Non-traumatic spinal cord injury M>29.25 and M<31.25	1.5175	1.4455	1.2901	1.1426	18	16	16	14
0505	Non-traumatic spinal cord injury M>23.75 and M<29.25	1.7660	1.6823	1.5013	1.3297	20	21	18	17
0506	Non-traumatic spinal cord injury M<23.75	2.4771	2.3597	2.1059	1.8651	33	28	24	23
0601	Neurological M>47.75	0.9418	0.7982	0.7277	0.6571	10	11	9	9
0602	Neurological M>37.35 and M<47.75	1.2488	1.0584	0.9649	0.8714	12	13	12	11
0603	Neurological M>25.85 and M<37.35	1.6123	1.3665	1.2458	1.1250	17	15	14	14
0604	Neurological M<25.85	2.1387	1.8126	1.6525	1.4923	23	21	19	18
0701	Fracture of lower extremity M>42.15	0.8008	0.7876	0.7576	0.6765	10	12	10	9
0702	Fracture of lower extremity M>34.15 and M<42.15	1.0476	1.0304	0.9912	0.8851	12	13	12	12
0703	Fracture of lower extremity M>28.15 and M<34.15	1.2605	1.2398	1.1926	1.0649	15	15	14	14
0704	Fracture of lower extremity M<28.15	1.6299	1.6031	1.5421	1.3770	18	19	18	17
0801	Replacement of lower extremity joint M>49.55	0.5585	0.5618	0.5618	0.4879	7	8	7	7
0802	Replacement of lower extremity joint M>37.05 and M<49.55	0.7514	0.7559	0.7559	0.6565	8	11	9	9

CMG	CMG Description (M=motor, C=cognitive, A=age)	Relative weight				Average length of stay			
		Tier1	Tier2	Tier3	None	Tier1	Tier2	Tier3	None
0803	Replacement of lower extremity joint M>28.65 and M<37.05 and A>83.5	1.0356	1.0417	1.0417	0.9048	11	14	13	12
0804	Replacement of lower extremity joint M>28.65 and M<37.05 and A<83.5	0.9151	0.9205	0.9205	0.7995	10	12	11	10
0805	Replacement of lower extremity joint M>22.05 and M<28.65	1.1274	1.1341	1.1341	0.9850	11	14	13	13
0806	Replacement of lower extremity joint M<22.05	1.3774	1.3856	1.3856	1.2034	13	18	16	15
0901	Other orthopedic M>44.75	0.8645	0.7442	0.6738	0.6105	10	10	9	8
0902	Other orthopedic M>34.35 and M<44.75	1.1584	0.9973	0.9029	0.8181	13	13	12	11
0903	Other orthopedic M>24.15 and M<34.35	1.4813	1.2752	1.1546	1.0461	16	16	14	13
0904	Other orthopedic M<24.15	1.9215	1.6542	1.4977	1.3569	21	20	18	17
1001	Amputation, lower extremity M>47.65	1.0282	0.9092	0.8110	0.7260	13	12	10	10
1002	Amputation, lower extremity M>36.25 and M<47.65	1.3476	1.1916	1.0630	0.9515	16	14	13	12
1003	Amputation, lower extremity M<36.25	1.9915	1.7611	1.5709	1.4063	21	21	18	17
1101	Amputation, non-lower extremity M>36.35	1.0359	1.0359	0.9879	0.9237	11	11	12	11
1102	Amputation, non-lower extremity M<36.35	1.5462	1.5462	1.4747	1.3787	14	18	16	16
1201	Osteoarthritis M>37.65	0.8086	0.8086	0.8068	0.7644	13	13	11	10
1202	Osteoarthritis M>30.75 and M<37.65	1.0576	1.0576	1.0553	0.9999	16	16	14	13

CMG	CMG Description (M=motor, C=cognitive, A=age)	Relative weight				Average length of stay			
		Tier1	Tier2	Tier3	None	Tier1	Tier2	Tier3	None
1203	Osteoarthritis M<30.75	1.2998	1.2998	1.2969	1.2288	13	19	15	15
1301	Rheumatoid, other arthritis M>36.35	0.8929	0.8929	0.8827	0.7872	11	10	11	10
1302	Rheumatoid, other arthritis M>26.15 and M<36.35	1.1777	1.1777	1.1643	1.0383	17	17	14	13
1303	Rheumatoid, other arthritis M<26.15	1.5197	1.5197	1.5025	1.3399	15	19	18	16
1401	Cardiac M>48.85	0.9414	0.7541	0.6671	0.6032	10	10	9	8
1402	Cardiac M>38.55 and M<48.85	1.2639	1.0125	0.8956	0.8098	13	12	11	10
1403	Cardiac M>31.15 and M<38.55	1.5236	1.2205	1.0796	0.9762	18	14	13	12
1404	Cardiac M<31.15	1.9752	1.5823	1.3996	1.2655	24	19	16	15
1501	Pulmonary M>49.25	0.9616	0.9031	0.7771	0.7334	10	11	8	9
1502	Pulmonary M>39.05 and M<49.25	1.2069	1.1334	0.9753	0.9205	13	13	11	11
1503	Pulmonary M>29.15 and M<39.05	1.4859	1.3954	1.2007	1.1333	16	16	13	13
1504	Pulmonary M<29.15	1.8826	1.7679	1.5212	1.4358	22	19	17	16
1601	Pain syndrome M>37.15	1.1157	0.8649	0.7697	0.7202	12	12	10	10
1602	Pain syndrome M>26.75 and M<37.15	1.4950	1.1589	1.0314	0.9650	19	13	13	13
1603	Pain syndrome M<26.75	1.9344	1.4996	1.3345	1.2486	22	18	16	15
1701	Major multiple trauma without brain or spinal cord injury M>39.25	1.0029	0.9213	0.8376	0.7323	10	11	11	10
1702	Major multiple trauma without brain or spinal cord injury M>31.05 and M<39.25	1.3284	1.2204	1.1094	0.9700	13	15	14	13
1703	Major multiple trauma without brain or spinal cord injury M>25.55 and M<31.05	1.5680	1.4405	1.3095	1.1449	15	16	15	15
1704	Major multiple trauma without brain or spinal cord injury M<25.55	2.0053	1.8423	1.6748	1.4642	26	22	20	18
1801	Major multiple trauma with brain or spinal cord injury M>40.85	1.1875	0.9426	0.9426	0.8659	14	14	12	11
1802	Major multiple trauma with brain or spinal cord injury M>23.05 and M<40.85	1.6397	1.3015	1.3015	1.1956	18	19	15	15
1803	Major multiple trauma with brain or spinal cord injury M<23.05	2.8012	2.2235	2.2235	2.0426	34	32	26	24
1901	Guillain Barre M>35.95	1.1421	0.9069	0.9069	0.8922	13	14	12	12
1902	Guillain Barre M>18.05 and M<35.95	2.1756	1.7276	1.7276	1.6996	22	22	21	21
1903	Guillain Barre M<18.05	3.6633	2.9089	2.9089	2.8618	48	29	35	33
2001	Miscellaneous M>49.15	0.8486	0.7527	0.6748	0.6064	9	10	9	8
2002	Miscellaneous M>38.75 and M<49.15	1.1378	1.0093	0.9048	0.8131	12	12	11	10
2003	Miscellaneous M>27.85 and M<38.75	1.4370	1.2747	1.1427	1.0269	15	15	13	13
2004	Miscellaneous M<27.85	1.9261	1.7085	1.5316	1.3764	24	20	18	16
2101	Burns M>0	3.0073	2.5965	2.0197	1.7146	34	23	19	18
5001	Short-stay cases, length of stay is 3 days or fewer				0.1476				3

CMG	CMG Description (M=motor, C=cognitive, A=age)	Relative weight				Average length of stay			
		Tier1	Tier2	Tier3	None	Tier1	Tier2	Tier3	None
5101	Expired, orthopedic, length of stay is 13 days or fewer				0.5867				7
5102	Expired, orthopedic, length of stay is 14 days or more				1.4693				18
5103	Expired, not orthopedic, length of stay is 15 days or fewer				0.6951				8
5104	Expired, not orthopedic, length of stay is 16 days or more				1.8788				23

Generally, updates to the CMG relative weights result in some increases and some decreases to the CMG relative weight values. Table 2 shows how the application of the proposed revisions for FY 2012 would affect particular CMG relative weight values, which affect the overall distribution of payments within CMGs and tiers. Note that, because we propose to implement the CMG relative weight revisions in a budget neutral manner (as described above), total estimated aggregate payments to IRFs for FY 2012 would not be affected as a result of the CMG relative weight revisions. However, the proposed revisions would affect the distribution of payments within CMGs and tiers.

TABLE 2: Distributional Affects of the Proposed Changes to the CMG Relative Weights (FY 2011 Values Compared With FY 2012 Values)

Percentage Change	Number of Cases Affected	Percentage of Cases Affected
Increased by 15% or more	431	0.1%
Increased by between 5% and 15%	7,807	2.0%
Changed by less than 5%	376,683	96.9%
Decreased by between 5% and 15%	3,612	0.9%
Decreased by 15% or more	58	0.1%

As Table 2 shows, 97 percent of all IRF cases are in CMGs and tiers that would experience less than a 5 percent change (either increase or decrease) in the CMG relative weight value as a result of the proposed revisions for FY 2012. The largest increase in the proposed CMG relative weight values that affects a particularly large number of IRF discharges is a 1.7 percent increase in the CMG relative weight value for CMG A0704—Fracture of Lower Extremity with a motor score of less than 28.15—in the "no comorbidity" tier. In the FY 2010 data, 24,162 IRF discharges were classified into this CMG and tier. The largest decrease in a CMG relative weight value that affects a particularly large number of IRF discharges is a 0.7 percent decrease in the CMG relative weight for CMG A0110—Stroke, with a motor score of less than 22.35 and a patient age of less than 84.5 years in the "no comorbidity" tier. In the FY 2010 IRF claims data, this change affects 16,975 cases.

Given the changes in IRFs' case mix over time, we believe that it is important to update the CMG relative weights and average length of stay (LOS) values periodically to continue to reflect the trends in IRF patient populations. As we have more recent data that better reflect IRFs' case mix at this time, we propose the updates described in this section.

IV. Proposed Updates to the Facility-Level Adjustment Factors for FY 2012

A. Proposed Updates to the IRF Facility-Level Adjustment Factors

Section 1886(j)(3)(A)(v) of the Act confers broad authority upon the Secretary to adjust the per unit payment rate "by such * * * factors as the Secretary determines are necessary to properly reflect variations in necessary costs of treatment among rehabilitation facilities." For example, we adjust the Federal prospective payment amount associated with a CMG to account for facility-level characteristics such as an IRF's LIP, teaching status, and location in a rural area, if applicable, as described in § 412.624(e).

In the FY 2010 IRF PPS final rule (74 FR 39762), we updated the adjustment factors for calculating the rural, LIP, and teaching status adjustments based on the most recent three consecutive years worth of IRF claims data (at that time, FY 2006, FY 2007, and FY 2008) and the most recent available corresponding IRF cost report data. As discussed in the FY 2010 IRF PPS proposed rule (74 FR 21060 through 21061), we observed relatively large year-to-year fluctuations in the underlying data used to compute the adjustment factors, especially the teaching status adjustment factor. Therefore, we implemented a three-year moving average approach to updating the facility-level adjustment factors in the FY 2010 IRF PPS final rule (74 FR 39762) to provide greater stability and predictability of Medicare payments for IRFs.

Though the 3-year moving average approach that we implemented in FY 2010 improves the year-to-year stability and predictability of the facility-level adjustment factors, we have continued to estimate unusually large year-to-year fluctuations in the teaching status adjustment factor. To determine the underlying reasons for these large year-to-year fluctuations in the teaching status adjustment factor, we analyzed the data and reviewed the methodology that we were using to estimate all three of the facility-level adjustment factors (that is, the rural, the LIP, and the teaching status adjustment factors). We found that the unusually large year-to-year fluctuations in the teaching status adjustment factors were the result of a weighting methodology that we have been applying to the regression analysis used to estimate the facility-level adjustment factors since the implementation of the IRF PPS. This weighted regression methodology assigns greater weight to some facilities than to others and, in effect, exaggerates the differences among different types of IRF facilities. While this weighted regression methodology was appropriate when the IRF PPS was first being developed because we had limited data on which to base the initial facility-level adjustment factors, we believe that a more appropriate and conservative approach for the current IRF PPS is to assign equal weight to all facilities in the regression analysis that is used to estimate all of the IRF facility-level adjustment factors (that is, the rural, LIP, and teaching status adjustment factors). Thus, we propose to remove the weighting methodology from our analysis of the facility-level adjustment factors and update the IRF facility-level adjustment factors for FY 2012 using an unweighted regression analysis. The primary effect of the proposed change in methodology is to stabilize all three of the facility-level adjustment factors (that is, the rural, the LIP, and the teaching status adjustment factor) over time. However, the proposed change in the methodology also has a relatively large effect on our estimate of the LIP adjustment factor that we discuss in this section.

To update the facility-level adjustment factors for FY 2012, we propose using updated data (FY 2008, FY 2009, and 2010 IRF claims data and the corresponding year's cost report data or, if unavailable, the most recent available cost report data). To analyze the updated data, we propose to use a revised methodology from the methodology that we used to update the facility-level adjustment factors in the FY 2010 IRF PPS final rule (74 FR 39762). The revised methodology would remove a weighting factor from the regression analysis and, instead, assign equal weight to all facilities in the regression analysis. Based on analysis of the updated data using the proposed unweighted regression analysis and the 3-year moving average approach, we estimate that IRF PPS payments to IRFs in rural areas would be increased by 18.7 percent for FY 2012. In addition, to account for the percentage of low-income patients that an IRF treats, we estimate that IRF PPS payments for FY 2012 would be adjusted using an updated LIP adjustment formula of (1 + disproportionate share hospital (DSH) patient percentage) raised to the power of (0.1897), where the—

$$\text{DSH patient percentage for each IRF} = \frac{\text{Medicare SSI Days}}{\text{Total Medicare Days}} + \frac{\text{Medicaid, Non-Medicare Days}}{\text{Total Days}}$$

Note that the proposed LIP adjustment factor of 0.1897 is substantially lower than the current LIP adjustment factor of 0.4613 due to the use of updated data and the proposed use of the unweighted regression methodology, which would give equal weight to all facilities in the regression. Finally, we estimate that IRF PPS payments to eligible IRFs that qualify for the teaching status adjustment will be adjusted by the following updated formula for FY 2012: (1 + full-time equivalent (FTE) interns and residents/average daily census) raised to the power of (0.4888). To calculate the proposed updates to the rural, LIP, and teaching status adjustment factors for FY 2012, we used the following steps:

[Steps 1 and 2 are performed independently for each of 3 years of IRF claims data: FY 2008, FY 2009, and FY 2010]

Step 1. Calculate the average cost per case for each IRF in the IRF claims data.

Step 2. Use logarithmic regression analysis on average cost per case to compute the coefficients for the rural, LIP, and teaching status adjustments. For FY 2012, we are proposing to update the logarithmic regression analysis so that we no longer apply weights to the analysis. The proposed unweighted regression analysis gives equal weight to all facilities in the regression analysis.

Step 3. Calculate a simple mean for each of the coefficients across the 3 years of data using logarithms for the LIP and teaching status adjustment coefficients (because they are continuous variables), but not for the rural adjustment coefficient (because the rural variable is either zero (if not rural) or 1 (if rural)). To compute the proposed

LIP and teaching status adjustment factors, we convert these factors back out of the logarithmic form.

The proposed adjustment factors are subject to change for the final rule if more recent data become available for use in these analyses.

B. Budget Neutrality Methodology for the Proposed Updates to the IRF Facility-Level Adjustment Factors

Consistent with the way that we implemented changes to the IRF facility-level adjustment factors (the rural, LIP, and teaching status adjustment factors) in the FY 2006 and FY 2010 IRF PPS final rules (70 FR 47880, 70 FR 57166, and 74 FR 39762), we propose to make changes to the rural, LIP, and teaching status adjustment factors for FY 2012 in such a way that total estimated aggregate payments to IRFs for FY 2012 would be the same with or without the proposed changes (that is, in a budget neutral manner) by applying budget neutrality factors for each of these three changes to the standard payment amount. To calculate the proposed budget neutrality factors used to update the rural, LIP, and teaching status adjustment factors, we propose to use the following steps:

Step 1. Using the most recent available data (currently FY 2010), calculate the estimated total amount of IRF PPS payments that would be made in FY 2012 (without applying the proposed changes to the rural, LIP, or teaching status adjustment factors).

Step 2. Calculate the estimated total amount of IRF PPS payments that would be made in FY 2012 if the proposed update to the rural adjustment factor were applied.

Step 3. Divide the amount calculated in step 1 by the amount calculated in step 2 to determine the proposed budget neutrality factor (0.9998) that would maintain the same total estimated aggregate payments in FY 2012 with and without the proposed change to the rural adjustment factor.

Step 4. Calculate the estimated total amount of IRF PPS payments that would be made in FY 2012 if the proposed update to the LIP adjustment factor were applied.

Step 5. Divide the amount calculated in step 1 by the amount calculated in step 4 to determine the proposed budget neutrality factor (1.0327) that would maintain the same total estimated aggregate payments in FY 2012 with and without the proposed change to the LIP adjustment factor.

Step 6. Calculate the estimated total amount of IRF PPS payments that would be made in FY 2012 if the proposed update to the teaching status adjustment factor were applied.

Step 7. Divide the amount calculated in step 1 by the amount calculated in step 6 to determine the proposed budget neutrality factor (1.0024) that would maintain the same total estimated aggregate payments in FY 2012 with and without the proposed change to the teaching status adjustment factor.

Step 8. Apply the proposed budget neutrality factors for the updates to the rural, LIP, and teaching status adjustment factors to the FY 2011 IRF PPS standard payment amount after the application of the proposed budget neutrality factors for the wage adjustment and the CMG relative weights.

The proposed budget neutrality factors for the proposed changes to the rural, LIP, and teaching status adjustment factors are subject to change for the final rule if more recent data become available for use in these analyses or if the proposed payment policies associated with the proposed budget neutrality factors change.

In section V.C. of this proposed rule, we discuss the proposed methodology for calculating the standard payment conversion factor for FY 2012.

C. Proposed Policy for Temporary Cap Adjustments To Reflect Interns and Residents Displaced Due to Closure of IRFs or IRF Residency Training Programs

1. Background

In the FY 2006 IRF PPS final rule (70 FR 47880 at 47928 through 47932), we implemented regulations at § 412.624(e)(4) to establish a facility-level adjustment for IRFs that are, or are part of, teaching hospitals. The teaching status adjustment accounts for the higher indirect operating costs experienced by hospitals that participate in graduate medical education (GME) programs. The payment adjustments are made based on the number of FTE interns and residents training in the IRF and the IRF's average daily census.

We established the IRF teaching status adjustment in a manner that limited the incentives for IRFs to add FTE interns and residents for the purpose of increasing their teaching status adjustment. We imposed a cap on the number of FTE interns and residents that may be counted for purposes of calculating the teaching status adjustment. The cap limits the number of FTE interns and residents that teaching IRFs may count for the purpose of calculating the IRF PPS teaching status adjustment, not the number of interns and residents teaching institutions can hire or train. We calculated the number of FTE interns and residents that trained in the IRF during a "base year" and used that FTE intern and resident number as the cap. An IRF's FTE intern and resident cap is ultimately determined based on the final settlement of the IRF's most recent cost reporting period ending on or before November 15, 2004. A complete discussion of how the IRF teaching status adjustment was calculated appears in the FY 2006 IRF PPS final rule (70 FR 47880, 47928 through 47932).

2. Proposed Temporary FTE Intern and Resident Cap Adjustment

Sometimes, interns and residents that are training in an IRF find themselves unable to complete their training in the IRF, either because the IRF closes or closes a residency training program (we refer to these interns and residents as "displaced"). Although we have not heard of any instances where IRFs did not accept displaced interns and residents because the additional interns and residents would put the facility over the facility's FTE intern and resident cap, we believe that it is important to maintain consistent policies with other Medicare PPS systems, to the extent feasible. The IPPS indirect medical education (IME) adjustment and the direct GME policies contain provisions that allow for temporary adjustments to the IME/GME caps for IPPS hospitals that train interns and residents that are displaced because a hospital closes or closes a medical residency training program. CMS has recently proposed to include a similar temporary cap adjustment policy for the inpatient psychiatric facility (IPF) PPS teaching status adjustment outlined in the rate year 2012 IPF PPS proposed rule (76 FR 4998 at 5018 through 5020). Consistent with the IPPS and the IPF PPS, in this proposed rule, we propose to permit a temporary increase in the FTE intern and resident cap when an IRF increases the number of FTE interns and residents it trains in order to accept displaced interns and residents because another IRF closes or closes a medical residency training program.

When an IRF temporarily takes on interns and residents that are displaced because another IRF closes or closes a residency training program, we believe that a temporary adjustment to the cap would be appropriate. In these situations, interns and residents may have partially completed a residency training program at the IRF that has closed or closed a training program and may be unable to complete their training

at another IRF that is already training interns and residents up to or in excess of its FTE intern and resident cap. We believe that it is appropriate to allow temporary adjustments to the FTE caps for an IRF that provides residency training to medical interns and residents who have partially completed a residency training program at an IRF that closes or at an IRF that discontinues training interns and residents in a residency training program(s). For this reason, we are proposing to adopt the following temporary intern and resident cap adjustment policies, similar to the temporary adjustments to the FTE cap used for acute care hospitals and the proposed temporary adjustments to the FTE caps for IPFs.

We are proposing that the cap adjustment would be temporary because it is intern and resident specific and would only apply to the displaced intern(s) or resident(s) until those intern(s) or resident(s) have completed their training in the program in which they were training at the time of the IRF closure or the closure of the program. We propose that, as under the IPPS policy for displaced interns and residents, the IRF PPS temporary cap adjustment would apply only to interns and residents that were still training at the IRF at the time the IRF closed or at the time the IRF ceased training interns and residents in the residency training program(s). Interns and residents who leave the IRF, for whatever reason, before the closure of the IRF or the closure of the residency training program would not be considered displaced interns and residents for purposes of the IRF temporary cap adjustment policy. We are proposing to adopt the same definition of "closure of a hospital residency training program" as it is currently defined at § 413.79(h)(1)(ii); that is, the hospital ceases to offer training for residents in a particular approved medical residency training program. Similarly, as under the IPPS policy, we are proposing that medical students who are accepted into a program at an IRF but the IRF or residency training program closes before the individual begins training at that IRF are also not considered displaced interns and residents for purposes of the IRF temporary cap adjustments. We note that although we are proposing to adopt a policy under the IRF PPS that is consistent with the policy applicable under the IPPS, the actual caps under the two payment systems are separate and distinct. This means, for example, if a program closes at an IPPS hospital that has an IRF unit, but the interns and residents from that closed program were not rotating into the IRF unit when the program closed, then there would be no temporary FTE cap adjustment under the IRF PPS, since the interns and residents were not displaced from the IRF. However, if an IPPS hospital that has an IRF unit closes a training program and interns and residents from that program were rotating into the IRF unit when the program closed, an IRF hospital or IRF unit may temporarily adjust their FTE intern and resident cap if they train the displaced interns and residents, but only for the portion of the training that has to be completed in the IRF setting and only if all of the requirements specified in section IV.C. of this proposed rule are met.

3. Proposed Temporary Adjustment to the FTE Cap To Reflect Interns and Residents Displaced Due to an IRF Closure

We are proposing to allow an IRF to receive a temporary adjustment to the FTE cap to reflect interns and residents added because of another IRF's closure. The temporary cap adjustment is intended to account for medical interns and residents who have partially completed a medical residency training program at the IRF that has closed and may be unable to complete their training at another IRF because that IRF is already training interns and residents up to or in excess of its cap. We are proposing this change because IRFs may be reluctant to accept additional interns and residents from a closed IRF without a temporary adjustment to their caps. For purposes of this policy, we are proposing to adopt the IPPS definition of "closure of a hospital" in § 413.79(h)(1)(i) to mean the IRF terminates its Medicare provider agreement as specified in § 489.52. Therefore, we are proposing to allow a temporary adjustment to an IRF's FTE cap to reflect interns and residents added because of an IRF's closure. The proposed policy would be effective for cost reporting periods beginning on or after October 1, 2011, when an IRF trains an intern or resident from an IRF that closed on or after October 1, 2011. We would allow an adjustment to an IRF's FTE cap if the IRF meets the following criteria:

(a) The IRF is training displaced interns and residents from an IRF that closed on or after October 1, 2011.

(b) The IRF that is training the displaced interns and residents from the closed IRF submits a request for a temporary adjustment to its FTE cap to its Medicare contractor no later than 60 days after the hospital first begins training the displaced interns and residents, and documents that the IRF is eligible for this temporary adjustment to its FTE cap by identifying the interns and residents who have come from the closed IRF and have caused the IRF to exceed its cap, (or the IRF may already be over its cap), and specifies the length of time that the adjustment is needed.

After the displaced interns and residents leave the IRF's training program or complete their residency program, the IRF's cap would revert to its original level. This means that the temporary adjustment to the FTE cap would be available to the IRF only for the period of time necessary for the displaced interns and residents to complete their training. Further, as under the IPPS policy, we are also proposing that the total amount of temporary cap adjustment that can be allotted to all receiving IRFs cannot exceed the cap amount of the IRF that closed.

We also note that section 5506 of the Affordable Care Act, "Preservation of Resident Cap Positions from Closed Hospitals," does not apply to IRFs that closed. Section 5506 of the Affordable Care Act only amends sections 1886(d) and (h) of the Act for direct GME and IPPS IME payments. Therefore, the IME FTE cap redistributions under section 5506 of the Affordable Care Act only apply to "subsection (d)" IPPS hospitals. Section 5506 of the Affordable Care Act has no applicability to the teaching status adjustments under the IRF PPS (or the IPF PPS, for that matter).

4. Proposed Temporary Adjustment to FTE Cap To Reflect Interns and Residents Displaced Due to a Residency Program Closure

We are proposing that if an IRF ceases training interns and residents in a residency training program(s) and agrees to temporarily reduce its FTE cap, another IRF may receive a temporary adjustment to its FTE cap to reflect the addition of the displaced interns and residents. For purposes of this policy on closed residency programs, we are proposing to adopt the IPPS definition of "closure of a hospital residency training program" as specified in § 413.79(h)(1)(ii) which means that the hospital ceases to offer training for interns and residents in a particular approved medical residency training program. The methodology for adjusting the caps for the "receiving IRF" and the "IRF that closed its program" is described below.

a. Receiving IRF

We are proposing that an IRF may receive a temporary adjustment to its FTE cap to reflect interns and residents added because of the closure of another

IRF's residency training program for cost reporting periods beginning on or after October 1, 2011 if—

- The IRF is training additional interns and residents from the residency training program of an IRF that closed its program on or after October 1, 2011; and
- No later than 60 days after the IRF begins to train the interns and residents, the IRF submits to its Medicare contractor a request for a temporary adjustment to its FTE cap, documents that the IRF is eligible for this temporary adjustment by identifying the interns and residents who have come from another IRF's closed program and have caused the IRF to exceed its cap (or the IRF may already be in excess of its cap), specifies the length of time the adjustment is needed, and, as explained in more detail below, submits to its Medicare contractor a copy of the FTE cap reduction statement by the IRF closing the residency training program.

In general, the proposed temporary adjustment criteria established for closed medical residency training programs at IRFs is similar to the criteria established for closed IRFs. We are proposing that more than 1 IRF may be eligible to apply for the temporary adjustment because interns and residents from one closed program may rotate to different IRFs, or they may complete their training at more than one IRF. Also, only to the extent to which an IRF would exceed its FTE cap by training displaced interns and residents would it be eligible for the temporary adjustment. Thus, for example, if the IRF has room below its cap to take 1 additional displaced FTE intern or resident but taking a second displaced FTE intern or resident would cause the IRF to exceed its FTE intern and resident cap, then the IRF would potentially qualify for a temporary cap adjustment for 1 FTE intern or resident, not 2.

b. IRF That Closed Its Program(s)

We are proposing that an IRF that agrees to train interns and residents who have been displaced by the closure of another IRF's residency training program may receive a temporary FTE cap adjustment only if the IRF that closed its program meets the following criteria—

- Temporarily reduces its FTE cap by the number of FTE interns and residents in each program year training and in the program at the time of the program's closure. The yearly reduction would be determined by deducting the number of those interns and residents who would have been training in the program up to the IRF's cap during the year of the closure, had the program not closed; and
- No later than 60 days after the interns and residents who were in the closed program begin training at another IRF, submits to its Medicare contractor a statement signed and dated by its representative that specifies that it agrees to the temporary reduction in its FTE cap to allow the IRF training the displaced interns and residents to obtain a temporary adjustment to its cap; identifies the interns and residents who were training at the time of the program's closure; identifies the IRFs to which the interns and residents are transferring once the program closes; and specifies the reduction for the applicable program years.

In addition, we propose under this closed program policy that in order for the receiving IRF(s) to qualify for a temporary adjustment to their FTE cap, the IRFs that are closing their programs would need to reduce their FTE cap for the expected duration of time the displaced interns and residents would need to finish their training. We are proposing this because the IRF that closes the program still retains the FTE slots in its cap, even if the IRF chooses not to fill the slots with interns and residents. We believe that it is inappropriate to allow an increase to the receiving IRF's cap without an attendant decrease to the cap of the IRF with the closed program, because the IRF that ceased training the interns and residents could fill these slots with interns and residents from other programs even if the increase and related decrease is only temporary.

We are proposing that the cap reduction for the IRF with the closed program would be based on the number of FTE interns and residents in each program year that were in the program at the IRF at the time of the program's closure, and who begin training at another IRF.

In summary, we are proposing new IRF policies related to temporary adjustments to FTE caps to reflect interns and residents added due to closure of an IRF or closure of a residency training program. Finally, we are proposing that the IRFs that meet the proposed criteria would be eligible to receive temporary adjustments to their FTE caps for cost reporting periods beginning on or after October 1, 2011.

V. Proposed FY 2012 IRF PPS Federal Prospective Payment Rates

A. Proposed Market Basket Increase Factor, Productivity Adjustment, and Labor-Related Share for FY 2012

Section 1886(j)(3)(C) of the Act requires the Secretary to establish an increase factor that reflects changes over time in the prices of an appropriate mix of goods and services included in the covered IRF services, which is referred to as a market basket index. According to section 1886(j)(3)(A)(i) of the Act, the increase factor shall be used to update the IRF Federal prospective payment rates for each FY. Sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act require the application of a 0.1 percentage point reduction to the market basket increase factor for FYs 2012 and 2013. In addition, section 1886(j)(3)(C)(ii)(I) of the Act requires the application of a productivity adjustment, as described below. Thus, in this proposed rule, we are proposing to update the IRF PPS payments for FY 2012 by a market basket increase factor based upon the most current data available, with a productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act as described below and a 0.1 percentage point reduction as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act. Further, we are proposing to rebase the RPL market basket from a 2002-based market basket to a 2008-based market basket. We typically rebase the RPL market basket every 5 to 7 years to ensure that it continues to reflect the most accurate account of the cost of relevant goods and services.

Thus, in this proposed rule, we propose to start with a rebased RPL market basket (updated from a 2002 base year to a 2008 base year) and then apply a productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act and a 0.1 percentage point reduction as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act. In section V.A.1 of this proposed rule, we describe the proposed methodology for rebasing the RPL market basket from a 2002 base year to a 2008 base year, and then in section V.A.2 of this proposed rule, we describe the proposed methodology for calculating the productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act. Finally, in section V.A.3 of this proposed rule, we describe the proposed calculation of the market basket increase factor to be used to adjust IRF PPS payments for FY 2012.

1. Proposed Rebasing of the RPL Market Basket for FY 2012

a. Background

The input price index (that is, the market basket) that was used to develop the IRF PPS was the Excluded Hospital with Capital market basket. This market basket was based on 1997 Medicare cost report data and included data for Medicare participating IRFs, IPFs, LTCHs, cancer hospitals, and children's hospitals. Although "market basket" technically describes the mix of goods and services used in providing hospital care, this term is also commonly used to denote the input price index (that is, cost category weights and price proxies combined) derived from that market basket. Accordingly, the term "market basket", as used in this document, refers to an input price index.

Beginning with the FY 2006 IRF PPS final rule (70 FR 47908), IRF PPS payments were updated using a FY 2002-based RPL market basket reflecting the operating and capital cost structures for freestanding IRFs, freestanding IPFs, and LTCHs.

We excluded cancer and children's hospitals from the RPL market basket because their payments are based entirely on reasonable costs subject to rate-of-increase limits established under the authority of section 1886(b) of the Act, which is implemented at § 413.40. Cancer and children's hospitals are not reimbursed through a PPS. Also, the FY 2002 cost structures for cancer and children's hospitals are noticeably different than the cost structures of freestanding IRFs, freestanding IPFs, and LTCHs. See the FY 2006 IRF PPS final rule (70 FR 47908) for a complete discussion of the FY 2002-based RPL market basket.

In the FY 2010 IRF proposed rule (74 FR 21062), we expressed our interest in exploring the possibility of creating a stand-alone IRF market basket that reflects the cost structures of only IRF providers. We noted that, of the available options, one is to combine the Medicare cost report data from freestanding IRF providers (presently incorporated into the FY 2002-based RPL market basket) with data from hospital-based IRF providers. We indicated that an examination of the Medicare cost report data comparing freestanding and hospital-based IRFs revealed considerable differences between the two with respect to cost levels and cost structures. At that time, we were unable to fully understand the differences between these two types of IRF providers. As a result, we believed that further research was required and we solicited public comment for additional information that might help us to better understand the reasons for the variations in costs and cost structures, as indicated by the cost report data, between freestanding and hospital-based IRFs (74 FR 21062).

We summarized the public comments we received and our responses in the FY 2010 IRF PPS final rule (74 FR 39762, 39776 through 39777). Despite receiving comments from the public on this issue, we remain unable to sufficiently understand the observed differences in costs and cost structures between hospital-based and freestanding IRFs, and therefore we do not believe it is appropriate at this time to incorporate data from hospital-based IRFs with those of freestanding IRFs to create a stand-alone IRF market basket.

Although we do not believe it would be appropriate to propose a stand-alone IRF market basket, we are currently exploring the viability of creating two separate market baskets from the current RPL, one of which would include freestanding IRFs and freestanding IPFs and would be used to update payments under both the IPF and IRF payment systems. The other would be a stand-alone LTCH market basket. Depending on the outcome of our research, we anticipate the possibility of proposing a rehabilitation and psychiatric (RP) market basket in the next update cycle. We welcome public comment on the possibility of using this type of market basket to update IRF payments in the future.

For this update cycle, we are proposing to rebase and revise the FY 2002-based RPL market basket by creating a proposed FY 2008-based RPL market basket. In the following discussion, we provide an overview of the market basket and describe the methodologies we propose to use for purposes of determining the operating and capital portions of the proposed FY 2008-based RPL market basket.

b. Overview of the Proposed FY 2008-Based RPL Market Basket

The proposed FY 2008-based RPL market basket is a fixed-weight, Laspeyres-type price index. A Laspeyres price index measures the change in price, over time, of the same mix of goods and services purchased in the base period. Any changes in the quantity or mix of goods and services (that is, intensity) purchased over time relative to a base period are not measured.

The index itself is constructed in three steps. First, a base period is selected (in this proposed rule, the base period is FY 2008) and total base period expenditures are estimated for a set of mutually exclusive and exhaustive spending categories with the proportion of total costs that each category represents being calculated. These proportions are called cost or expenditure weights. Second, each expenditure category is matched to an appropriate price or wage variable, referred to as a price proxy. In nearly every instance, these price proxies are derived from publicly available statistical series that are published on a consistent schedule (preferably at least on a quarterly basis). Finally, the expenditure weight for each cost category is multiplied by the level of its respective price proxy. The sum of these products (that is, the expenditure weights multiplied by their price levels) for all cost categories yields the composite index level of the market basket in a given period. Repeating this step for other periods produces a series of market basket levels over time. Dividing an index level for a given period by an index level for an earlier period produces a rate of growth in the input price index over that timeframe.

As noted above, the market basket is described as a fixed-weight index because it represents the change in price over time of a constant mix (quantity and intensity) of goods and services needed to furnish hospital services. The effects on total expenditures resulting from changes in the mix of goods and services purchased subsequent to the base period are not measured. For example, a hospital hiring more nurses to accommodate the needs of patients would increase the volume of goods and services purchased by the hospital, but would not be factored into the price change measured by a fixed-weight hospital market basket. Only when the index is rebased would changes in the quantity and intensity be captured, with those changes being reflected in the cost weights. Therefore, we rebase the market basket periodically so the cost weights reflect recent changes in the mix of goods and services that hospitals purchase (hospital inputs) to furnish inpatient care between base periods.

c. Proposed Rebasing and Revising of the RPL Market Basket

We are inviting public comments on our proposed methodological changes to the RPL market basket. The terms "rebasing" and "revising," while often used interchangeably, actually denote different activities. "Rebasing" means moving the base year for the structure of costs of an input price index (for example, in this proposed rule, we are proposing to shift the base year cost structure for the RPL market basket from FY 2002 to FY 2008). "Revising" means

changing data sources, price proxies, or methods, used to derive the input price index. For FY 2012, we are proposing to rebase and revise the market basket used to update the IRF PPS.

(1) Development of Cost Categories and Weights

(a) Medicare Cost Reports

The proposed FY 2008-based RPL market basket consists of several major cost categories derived from the FY 2008 Medicare cost reports for freestanding IRFs, freestanding IPFs, and LTCHs including wages and salaries, pharmaceuticals, professional liability insurance (PLI), capital, and a residual. This residual reflects all remaining costs that are not captured in the four cost categories listed above. The FY 2008 cost reports include providers whose cost report begin date is on or between October 1, 2007, and September 30, 2008. We choose to use FY 2008 as the base year because we believe that the Medicare cost reports for this year represent the most recent, complete set of Medicare cost report data available for IRFs, IPFs, and LTCHs. However, there is an issue with obtaining data specifically for benefits and contract labor from this set of FY 2008 Medicare cost reports since IRFs, IPFs, and LTCHs were not required to complete the Medicare cost report worksheet from which these data were collected (Worksheet S–3, part II). As a result, only a small number of providers (less than 30 percent) reported data for these categories, and we do not expect these data to improve over time. Furthermore, since IRFs, IPFs, and LTCHs were not required to submit data for Worksheet S–3, part II in previous cost reporting years, we have always had this issue of incomplete Medicare cost report data for benefits and contract labor (including when we finalized the FY 2002-based RPL market basket). Due to the incomplete benefits and contract labor data for IRFs, IPFs, and LTCHs, we propose to develop these cost weights using FY 2008 Medicare cost report data for IPPS hospitals (similar to the method that was used for the FY 2002-based RPL market basket). Additional detail is provided later in this section.

Since our goal is to measure cost shares that are reflective of case mix and practice patterns associated with providing services to Medicare beneficiaries, we are proposing to limit our selection of Medicare cost reports to those from hospitals that have a Medicare average length of stay (LOS) that is within a comparable range of their total facility average LOS. We believe this provides a more accurate reflection of the structure of costs for Medicare covered days. We propose to use the cost reports of IRFs and LTCHs with Medicare average LOS within 15 percent (that is, 15 percent higher or lower) of the total facility average LOS for the hospital. This is the same edit applied to derive the FY 2002-based RPL market basket and generally includes those LTCHs and IRFs with Medicare LOS within approximately 5 days of the facility average LOS of the hospital.

We are proposing to use a less stringent measure of Medicare LOS for IPFs. For this provider-type, and in order to produce a robust sample size, we propose to use those facilities' Medicare cost reports whose average LOS is within 30 or 50 percent (depending on the total facility average LOS) of the total facility average LOS. This is the same edit applied to derive the FY 2002-based RPL market basket.

We applied these LOS edits to first obtain a set of cost reports for facilities that have a Medicare LOS within a comparable range of their total facility LOS. Using this set of Medicare cost reports, we then calculated cost weights for four cost categories and a residual as represented by all other costs directly from the FY 2008 Medicare cost reports for freestanding IRFs, freestanding IPFs, and LTCHs (see Table 3 for these four cost categories and their associated weights). These Medicare cost report cost weights were then supplemented with information obtained from other data sources (explained in more detail below) to derive the proposed FY 2008-based RPL market basket cost weights.

TABLE 3: Major Cost Categories and Their Respective Cost Weights as Calculated Directly from FY 2008 Medicare Cost Reports

Major Cost Categories	Proposed FY 2008-Based RPL Market Basket (Percent)
Wages and salaries	47.371
Professional Liability Insurance (Malpractice)	0.764
Pharmaceuticals	6.514
Capital	8.392
All other	36.959

(b) Other Data Sources

In addition to the IRF, IPF and LTCH Medicare cost reports for freestanding IRFs and freestanding IPFs, and LTCHs, the other data sources we used to develop the proposed FY 2008-based RPL market basket cost weights were the FY 2008 IPPS Medicare cost reports and the Benchmark Input-Output (I–O) Tables created by the Bureau of Economic Analysis (BEA), U.S. Department of Commerce. The FY 2008 Medicare cost reports include providers whose cost report begin date is on or between October 1, 2007 and September 30, 2008.

As noted above, the proposed FY 2008-based RPL cost weights for benefits and contract labor were derived using FY 2008-based IPPS Medicare cost reports. We used these Medicare cost reports to calculate cost weights for Wages and Salaries, Benefits, and Contract Labor for IPPS hospitals for FY 2008. For the proposed Benefits cost weight for the FY 2008-based RPL market basket, the ratio of the FY 2008 IPPS Benefits cost weight to the FY 2008 IPPS Wages and Salaries cost weight was applied to the RPL Wages and Salaries cost weight. Similarly, the ratio of the FY 2008 IPPS Contract Labor cost weight to the FY 2008 IPPS Wages and Salaries cost weight was applied to the RPL Wages and Salaries cost weight to derive a Contract Labor cost weight for the proposed FY 2008-based RPL market basket.

The All Other cost category is divided into other hospital expenditure category shares using the 2002 BEA Benchmark I–O data following the removal of the portions of the All Other cost category provided in Table 3 that are attributable to Benefits and Contract Labor. The BEA Benchmark I–O data are scheduled for publication every 5 years. The most recent data available are for 2002. BEA also produces Annual I–O estimates; however, the 2002 Benchmark I–O data represent a much more comprehensive and complete set of data that are derived from the 2002 Economic Census. The Annual I–O is simply an update of the Benchmark I–O tables. For the FY 2002-based RPL market basket, we used the 1997 Benchmark I–O data. We are proposing to use the 2002 Benchmark I–O data in the FY 2008-based RPL market basket. Instead of using the less detailed Annual I–O data, we inflated the 2002 Benchmark I–O data forward to 2008. The methodology we used to inflate the data forward involves applying the annual price changes from the respective price proxies to the appropriate cost categories. We repeat this practice for each year.

The "All Other" cost category expenditure shares are determined as being equal to each category's proportion to total "all other" based on the inflated 2002 Benchmark I–O data. For instance, if the cost for telephone services represented 10 percent of the sum of the "all other" Benchmark I–O hospital expenditures, then telephone services would represent 10 percent of the RPL market basket's All Other cost category.

(2) Final Cost Category Computation

As stated previously, for this rebasing we are proposing to use the Medicare cost reports for IRFs, IPFs, and LTCHs to derive four major cost categories. The proposed FY 2008-based RPL market basket includes two additional cost categories that were not broken out separately in the FY 2002-based RPL market basket: "Administrative and Business Support Services" and "Financial Services". The inclusion of these two additional cost categories, which are derived using the Benchmark I–O data, is consistent with the addition of these two cost categories to the FY 2006-based IPPS market basket (74 FR 43845). We are proposing to break out both categories so we can better match their respective expenses with more appropriate price proxies. A thorough discussion of our rationale for each of these cost categories is provided in the section V.A.1.c.(3) of this proposed rule. Also, the proposed FY 2008-based RPL market basket excludes 1 cost category: Photo Supplies. The 2002 Benchmark I–O weight for this category is considerably smaller than the 1997 Benchmark I–O weight, presently accounting for less than one-tenth of one percentage point of the RPL market basket. Therefore, we are proposing to include the photo supplies costs in the Chemical cost category weight with other similar chemical products.

We are not proposing to change our definition of the labor-related share. However, we are proposing to rename our aggregate cost categories from "labor-intensive" and "nonlabor-intensive" services to "labor-related" and "nonlabor-related" services. This is consistent with the FY 2006-based IPPS market basket (74 FR 43845). As discussed in more detail below and similar to the FY 2002-based RPL market basket, we classify a cost category as labor-related and include it in the labor-related share if the cost category is defined as being labor-intensive and its cost varies with the local labor market. In previous regulations, we grouped cost categories that met both of these criteria into labor-intensive services. We believe the proposed new labels more accurately reflect the concepts that they are intended to convey. We are not proposing to change our definition of the labor-related share because we continue to classify a cost category as labor-related if the costs are labor-intensive and vary with the local labor market.

(3) Selection of Price Proxies

After computing the FY 2008 cost weights for the proposed rebased RPL market basket, it was necessary to select appropriate wage and price proxies to reflect the rate of price change for each expenditure category. With the exception of the proxy for PLI, all of the proxies for the operating portion of the proposed FY 2008-based RPL market basket are based on Bureau of Labor Statistics (BLS) data and are grouped into one of the following BLS categories:

(a) Producer Price Indexes—Producer Price Indexes (PPIs) measure price changes for goods sold in markets other than the retail market. PPIs are preferable price proxies for goods and services that hospitals purchase as inputs because these PPIs better reflect the actual price changes faced by hospitals. For example, we use a special PPI for prescription drugs, rather than the Consumer Price Index (CPI) for prescription drugs, because hospitals generally purchase drugs directly from a wholesaler. The PPIs that we use measure price changes at the final stage of production.

(b) Consumer Price Indexes—CPIs measure change in the prices of final goods and services bought by the typical consumer. Because they may not represent the price faced by a producer, we used CPIs only if an appropriate PPI was not available, or if the expenditures were more similar to those faced by retail consumers in general rather than by purchasers of goods at the wholesale level. For example, the CPI for food purchased away from home is used as a proxy for contracted food services.

(c) Employment Cost Indexes—Employment Cost Indexes (ECIs) measure the rate of change in employee wage rates and employer costs for employee benefits per hour worked. These indexes are fixed-weight indexes and strictly measure the change in wage rates and employee benefits per hour. Appropriately, these indexes are not affected by shifts in employment mix.

We evaluated the price proxies using the criteria of reliability, timeliness, availability, and relevance. Reliability indicates that the index is based on valid statistical methods and has low sampling variability. Timeliness implies that the proxy is published regularly, preferably at least once a quarter. Availability means that the proxy is publicly available. Finally, relevance means that the proxy is applicable and representative of the cost category weight to which it is applied. The proposed CPIs, PPIs, and ECIs selected meet these criteria.

Table 4 sets forth the proposed FY 2008-based RPL market basket including cost categories, and their respective weights and price proxies. For comparison purposes, the corresponding FY 2002-based RPL market basket cost weights are listed, as well. For example, Wages and Salaries are 49.447 percent of total costs in the proposed FY 2008-based RPL market basket compared to 52.895 percent for the FY 2002-based RPL market basket. Employee Benefits are 12.831 percent in the proposed FY 2008-based RPL market basket compared to 12.982 percent for the FY 2002-based RPL market basket. As a result, compensation costs (Wages and Salaries plus Employee Benefits) for the proposed FY 2008-based RPL market basket are 62.278 percent of total costs compared to 65.877 percent for the FY 2002-based RPL market basket.

Following Table 4 is a summary outlining the choice of the proxies we propose to use for the operating portion of the FY 2008-based RPL market basket. The price proxies proposed for the capital portion are described in more detail in the capital methodology section (see section V.A.1.c.(4) of this proposed rule).

We note that the proxies for the operating portion of the FY 2008-based RPL market basket are the same as those used for the FY 2006-based IPPS operating market basket. Because these proxies meet our criteria of reliability, timeliness, availability, and relevance, we believe they are the best measures of price changes for the cost categories. For further discussion on the FY 2006-based IPPS market basket, see the IPPS final rule published in the August 27, 2009 **Federal Register** (74 FR 43843).

TABLE 4: Proposed FY 2008-Based RPL Market Basket Cost Categories, Weights, and Price Proxies with FY 2002-Based RPL Market Basket Cost Weights Included for Comparison

Cost Categories	Proposed FY 2008-Based RPL Market Basket Cost Weights	FY 2002-Based RPL Market Basket Cost Weights	Proposed FY 2008-Based RPL Market Basket Price Proxies
1. Compensation	62.278	65.877	--
A. Wages and Salaries[1]	49.447	52.895	ECI for Wages and Salaries, Civilian Hospital Workers
B. Employee Benefits[1]	12.831	12.982	ECI for Benefits, Civilian Hospital Workers
2. Utilities	1.578	0.656	--
A. Electricity	1.125	0.351	PPI for Commercial Electric Power
B. Fuel, Oil, and Gasoline	0.371	0.108	PPI for Petroleum Refineries
C. Water and Sewage	0.082	0.197	CPI-U for Water and Sewerage Maintenance
3. Professional Liability Insurance	0.764	1.161	CMS Hospital Professional Liability Insurance Premium Index
4. All Other Products and Services	26.988	22.158	--
A. All Other Products	15.574	13.325	--
(1.) Pharmaceuticals	6.514	5.103	PPI for Pharmaceutical Preparations for Human Use(Prescriptions)
(2.) Food: Direct Purchases	2.959	0.873	PPI for Processed Foods and Feeds
(3.) Food: Contract Services	0.392	0.620	CPI-U for Food Away From Home
(4.) Chemicals[2]	1.100	1.100	Blend of Chemical PPIs
(5.) Medical Instruments	1.795	1.014	PPI for Medical, Surgical, and Personal Aid Devices
(6.) Photographic Supplies	--	0.096	--
(7.) Rubber and Plastics	1.131	1.052	PPI for Rubber and Plastic Products
(8.) Paper and Printing Products	1.021	1.000	PPI for Converted Paper and Paperboard Products
(9.) Apparel	0.210	0.207	PPI for Apparel
(10.) Machinery and Equipment	0.106	0.297	PPI for Machinery and Equipment
(11.) Miscellaneous Products	0.346	1.963	PPI for Finished Goods less Food and Energy
B. All Other Services	11.414	8.833	--
(1.) Labor-related Services	4.681	5.111	--
(a.) Professional Fees: Labor-related[3]	2.114	2.892	ECI for Compensation for Professional and Related Occupations
(b.) Administrative and Business Support Services[4]	0.422	n/a	ECI for Compensation for Office and Administrative Services
(c.) All Other: Labor-Related Services[5]	2.145	2.219	ECI for Compensation for Private Service Occupations
(2.) Nonlabor-Related Services	6.733	3.722	--
(a.) Professional Fees: Nonlabor-Related[3]	4.211	n/a	ECI for Compensation for Professional and Related Occupations
(b.) Financial Services [5]	0.853	n/a	ECI for Compensation for Financial Activities
(c.) Telephone Services	0.416	0.240	CPI-U for Telephone Services
(d.) Postage	0.630	0.682	CPI-U for Postage
(e.) All Other: Nonlabor-Related Services[6]	0.623	2.800	CPI-U for All Items less Food and Energy
5. Capital-Related Costs	8.392	10.149	--
A. Depreciation	5.519	6.187	--
(1.) Fixed Assets	3.286	4.250	BEA chained price index for nonresidential construction for hospitals and special care facilities—vintage weighted (26 years)

Cost Categories	Proposed FY 2008-Based RPL Market Basket Cost Weights	FY 2002-Based RPL Market Basket Cost Weights	Proposed FY 2008-Based RPL Market Basket Price Proxies
(2.) Movable Equipment	2.233	1.937	PPI for Machinery and Equipment—vintage weighted (11 years).
B. Interest Costs	1.954	2.775	--
(1.) Government/Nonprofit	0.653	2.081	Average yield on domestic municipal bonds (Bond Buyer 20 bonds)—vintage-weighted (26 years)
(2.) For Profit	1.301	0.694	Average yield on Moody's Aaa bonds—vintage-weighted (26 years)
C. Other Capital-Related Costs	0.919	1.187	CPI–U for Residential Rent
Total	100.000	100.000	--

Note: Detail may not add to total due to rounding.

[1]Contract Labor is distributed to Wages and Salaries and Employee Benefits based on the share of total compensation that each category represents.

[2]To proxy the Chemicals cost category, we used a blended PPI composed of the PPI for Industrial Gases, the PPI for Other Basic Inorganic Chemical Manufacturing, the PPI for Other Basic Organic Chemical Manufacturing, and the PPI for Soap and Cleaning Compound Manufacturing. For more detail about this proxy, see section V.A.1.c.(3).(c).(x) of this proposed rule.

[3]The Professional Fees: Labor-related and Professional Fees: Nonlabor-related cost categories were included in one cost category called Professional Fees in the FY 2002-based RPL market basket. For more detail about how these new categories were derived, we refer readers to sections V.A.1.c.(3).(c).(xviii) and V.A.1.c.(3).(c).(xxi) of this proposed rule.

[4]The Administrative and Business Support Services cost category was contained within All Other: Labor-intensive Services cost category in the FY 2002-based RPL market basket. The All Other: Labor-intensive Services cost category is renamed the All Other: Labor-related Services cost category for the FY 2008-based RPL market basket.

[5]The Financial Services cost category was contained within the All Other: Non-labor Intensive Services cost category in the FY 2002-based RPL market basket. The All Other: Non-labor Intensive Services cost category is renamed the All Other: Nonlabor-related Services cost category for the FY 2008-based RPL market basket.

(i) Wages and Salaries

We are proposing to use the ECI for Wages and Salaries for Hospital Workers (All Civilian) (BLS series code CIU1026220000000I) to measure the price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(ii) Employee Benefits

We are proposing to use the ECI for Employee Benefits for Hospital Workers (All Civilian) to measure the price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(iii) Electricity

We are proposing to use the PPI for Commercial Electric Power (BLS series code WPU0542). This same proxy was used in the FY 2002-based RPL market basket.

(iv) Fuel, Oil, and Gasoline

For the FY 2002-based RPL market basket, this category only included expenses classified under North American Industry Classification System (NAICS) 21 (Mining). We proxied this category using the PPI for Commercial Natural Gas (BLS series code WPU0552). For the proposed FY 2008-based market basket, we are proposing to add costs to this category that had previously been grouped in other categories. The added costs include petroleum-related expenses under NAICS 324110 (previously captured in the miscellaneous category), as well as petrochemical manufacturing classified under NAICS 325110 (previously captured in the chemicals category). These added costs represent 80 percent of the hospital industry's fuel, oil, and gasoline expenses (or 80 percent of this category). Because the majority of the industry's fuel, oil, and gasoline expenses originate from petroleum refineries (NAICS 324110), we are proposing to use the PPI for Petroleum Refineries (BLS series code PCU324110324110) as the proxy for this cost category.

(v) Water and Sewage

We are proposing to use the CPI for Water and Sewerage Maintenance (All Urban Consumers) (BLS series code CUUR0000SEHG01) to measure the price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(vi) Professional Liability Insurance

We are proposing to proxy price changes in hospital PLI premiums using percentage changes as estimated by the CMS Hospital Professional Liability Index. To generate these estimates, we collect commercial insurance premiums for a fixed level of coverage while holding non-price factors constant (such as a change in the level of coverage). This method is also used to proxy PLI price changes in the Medicare Economic Index (75 FR 73268). This same proxy was used in the FY 2002-based RPL market basket.

(vii) Pharmaceuticals

We are proposing to use the PPI for Pharmaceuticals for Human Use, Prescription (BLS series code WPUSI07003) to measure the price growth of this cost category. We note that we are not making a change to the PPI that is used to proxy this cost category. There was a recent change to the BLS naming convention for this

series; however, this is the same proxy that was used in the FY 2002-based RPL market basket.

(viii) Food: Direct Purchases

We are proposing to use the PPI for Processed Foods and Feeds (BLS series code WPU02) to measure the price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(ix) Food: Contract Services

We are proposing to use the CPI for Food Away From Home (All Urban Consumers) (BLS series code CUUR0000SEFV) to measure the price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(x) Chemicals

We are proposing to use a blended PPI composed of the PPI for Industrial Gas Manufacturing (NAICS 325120) (BLS series code PCU325120325120P), the PPI for Other Basic Inorganic Chemical Manufacturing (NAICS 325180) (BLS series code PCU32518–32518–), the PPI for Other Basic Organic Chemical Manufacturing (NAICS 325190) (BLS series code PCU32519–32519–), and the PPI for Soap and Cleaning Compound Manufacturing (NAICS 325610) (BLS series code PCU32561–32561–). Using the 2002 Benchmark I–O data, we found that these NAICS industries accounted for approximately 90 percent of the hospital industry's chemical expenses.

Therefore, we are proposing to use this blended index because we believe its composition better reflects the composition of the purchasing patterns of hospitals than does the PPI for Industrial Chemicals (BLS series code WPU061), the proxy used in the FY 2002-based RPL market basket. Table 5 below shows the weights for each of the four PPIs used to create the blended PPI, which we determined using the 2002 Benchmark I–O data.

TABLE 5: Blended Chemical PPI Weights

Name	Weights (in percent)	NAICS
PPI for Industrial Gas Manufacturing	35%	325120
PPI for Other Basic Inorganic Chemical Manufacturing	25%	325180
PPI for Other Basic Organic Chemical Manufacturing	30%	325190
PPI for Soap and Cleaning Compound Manufacturing	10%	325610

(xi) Medical Instruments

We are proposing to use the PPI for Medical, Surgical, and Personal Aid Devices (BLS series code WPU156) to measure the price growth of this cost category. In the 1997 Benchmark I–O data, approximately half of the expenses classified in this category were for surgical and medical instruments. Therefore, we used the PPI for Surgical and Medical Instruments and Equipment (BLS series code WPU1562) to proxy this category in the FY 2002-based RPL market basket. The 2002 Benchmark I–O data show that surgical and medical instruments now represent only 33 percent of these expenses and that the largest expense category is surgical appliance and supplies manufacturing (corresponding to BLS series code WPU1563). Due to this reallocation of costs over time, we are proposing to change the price proxy for this cost category to the more aggregated PPI for Medical, Surgical, and Personal Aid Devices.

(xii) Photographic Supplies

We are proposing to eliminate the cost category specific to photographic supplies for the proposed FY 2008 based RPL market basket. These costs would now be included in the Chemicals cost category because the costs are presently reported as all other chemical products. Notably, although we would be eliminating the specific cost category, these costs would still be accounted for within the RPL market basket.

(xiii) Rubber and Plastics

We are proposing to use the PPI for Rubber and Plastic Products (BLS series code WPU07) to measure price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(xiv) Paper and Printing Products

We are proposing to use the PPI for Converted Paper and Paperboard Products (BLS series code WPU0915) to measure the price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(xv) Apparel

We are proposing to use the PPI for Apparel (BLS series code WPU0381) to measure the price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(xvi) Machinery and Equipment

We are proposing to use the PPI for Machinery and Equipment (BLS series code WPU11) to measure the price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(xvii) Miscellaneous Products

We are proposing to use the PPI for Finished Goods Less Food and Energy (BLS series code WPUSOP3500) to measure the price growth of this cost category. Using this index would remove the double-counting of food and energy prices, which would already be captured elsewhere in the market basket. This same proxy was used in the FY 2002-based RPL market basket.

(xviii) Professional Fees: Labor-Related

We are proposing to use the ECI for Compensation for Professional and Related Occupations (Private Industry) (BLS series code CIS2020000120000I) to measure the price growth of this category. It includes occupations such as legal, accounting, and engineering services. This same proxy was used in the FY 2002-based RPL market basket.

(xix) Administrative and Business Support Services

We are proposing to use the ECI for Compensation for Office and Administrative Support Services (Private Industry) (BLS series code CIU2010000220000I) to measure the price growth of this category. Previously these costs were included in the All Other: Labor-intensive category (now renamed the All Other: Labor-related Services category), and were proxied by the ECI for Compensation for Service

Occupations. We believe that this compensation index better reflects the changing price of labor associated with the provision of administrative services and its incorporation represents a technical improvement to the market basket.

(xx) All Other: Labor-Related Services

We are proposing to use the ECI for Compensation for Service Occupations (Private Industry) (BLS series code CIU2010000300000I) to measure the price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(xxi) Professional Fees: Nonlabor-Related

We are proposing to use the ECI for Compensation for Professional and Related Occupations (Private Industry) (BLS series code CIS2020000120000I) to measure the price growth of this category. This is the same price proxy that we are proposing to use for the Professional Fees: Labor-related cost category.

(xxii) Financial Services

We are proposing to use the ECI for Compensation for Financial Activities (Private Industry) (BLS series code CIU201520A000000I) to measure the price growth of this cost category. Previously these costs were included in the All Other: Nonlabor-intensive category (now renamed the All Other: Nonlabor-related Services category), and were proxied by the CPI for All Items. We believe that this compensation index better reflects the changing price of labor associated with the provision of financial services and its incorporation represents a technical improvement to the market basket.

(xxiii) Telephone Services

We are proposing to use the CPI for Telephone Services (BLS series code CUUR0000SEED) to measure the price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(xxiv) Postage

We are proposing to use the CPI for Postage (BLS series code CUUR0000SEEC01) to measure the price growth of this cost category. This same proxy was used in the FY 2002-based RPL market basket.

(xxv) All Other: Nonlabor-Related Services

We are proposing to use the CPI for All Items Less Food and Energy (BLS series code CUUR0000SA0L1E) to measure the price growth of this cost category. Previously these costs were proxied by the CPI for All Items in the FY 2002-based RPL market basket. We believe that using the CPI for All Items Less Food and Energy would remove the double counting of changes in food and energy prices, as they are already captured elsewhere in the market basket. Consequently, we believe that the incorporation of this proxy would represent a technical improvement to the market basket.

(4) Proposed Methodology for Capital Portion of the RPL Market Basket

In the FY 2002-based RPL market basket, we did not have freestanding IRF, freestanding IPF, and LTCH 2002 Medicare cost report data for the capital cost weights, due to a change in the 2002 reporting requirements. Therefore, we used these hospitals' 2001 expenditure data for the capital cost categories of depreciation, interest, and other capital expenses, and inflated the data to a 2002 base year using relevant price proxies.

For the proposed FY 2008-based RPL market basket, we are proposing to calculate weights for the proposed RPL market basket capital costs using the same set of FY 2008 Medicare cost reports used to develop the operating share for IRFs, IPFs, and LTCHs. To calculate the proposed total capital cost weight, we first apply the same LOS edits as applied when calculating the operating cost weights as described above in section V.A.1.c.(1)(a) of this proposed rule. The resulting proposed capital weight for the FY 2008 base year is 8.392 percent.

Lease expenses are unique in that they are not broken out as a separate cost category in the RPL market basket, but rather are proportionally distributed amongst the cost categories of Depreciation, Interest, and Other, reflecting the assumption that the underlying cost structure of leases is similar to that of capital costs in general. As was done in the FY 2002-based RPL market basket, we first assumed 10 percent of lease expenses represents overhead and assigned those costs to the "Other Capital-Related Costs" category accordingly. The remaining lease expenses were distributed across the three cost categories based on the respective weights of depreciation, interest, and other capital not including lease expenses.

Depreciation contains two subcategories: (1) Building and Fixed Equipment; and (2) Movable Equipment. The apportionment between building and fixed equipment and movable equipment was determined using the FY 2008 Medicare cost reports for freestanding IRFs, freestanding IPFs, and LTCHs. This methodology was also used to compute the apportionment used in the FY 2002-based RPL market basket (70 FR 47912).

The total Interest expense cost category is split between government/nonprofit interest and for-profit interest. The FY 2002-based RPL market basket allocated 75 percent of the total Interest cost weight to government/nonprofit interest and proxied that category by the average yield on domestic municipal bonds. The remaining 25 percent of the Interest cost weight was allocated to for-profit interest and was proxied by the average yield on Moody's Aaa bonds (70 FR 47912). This was based on the FY 2002-based IPPS Capital input price index (CIPI) (70 FR 23406) due to insufficient Medicare cost report data for freestanding IRFs, freestanding IPFs, and LTCHs. For the proposed FY 2008-based RPL market basket, we are proposing to derive the split using the FY 2008 Medicare cost report data on interest expenses for government/nonprofit and for-profit freestanding IRFs, freestanding IPFs, and LTCHs. Based on these data, we calculated a proposed 33/67 split between government/nonprofit and for-profit interest. We believe it is important that this split reflects the latest relative cost structure of interest expenses for RPL providers. As stated above, we first apply the LOS edits (as described in section V.A.1.c.(1)(a) of this proposed rule) prior to calculating this split. Therefore, we are using cost reports that are reflective of case mix and practice patterns associated with providing services to Medicare beneficiaries. Using data specific to government/nonprofit and for-profit freestanding IRFs, freestanding IPFs, and LTCHs as well as the application of these LOS edits are the primary reasons for the difference in this split relative to the FY 2002-based RPL market basket.

Because capital is acquired and paid for over time, capital expenses in any given year are determined by both past and present purchases of physical and financial capital. The vintage-weighted capital portion of the FY 2008-based RPL market basket is intended to capture the long-term consumption of capital, using vintage weights for depreciation (physical capital) and interest (financial capital). These vintage weights reflect the proportion of capital purchases attributable to each year of the expected life of building and fixed equipment, movable equipment, and interest. We are proposing to use the vintage weights to compute vintage-weighted price changes associated with depreciation and interest expense.

Vintage weights are an integral part of the proposed FY 2008-based RPL market basket. Capital costs are inherently complicated and are determined by complex capital purchasing decisions, over time, based on such factors as interest rates and debt financing. In addition, capital is depreciated over time instead of being consumed in the same period it is purchased. The capital portion of the proposed FY 2008-based RPL market basket would reflect the annual price changes associated with capital costs, and would be a useful simplification of the actual capital investment process. By accounting for the vintage nature of capital, we are able to provide an accurate and stable annual measure of price changes. Annual nonvintage price changes for capital are unstable due to the volatility of interest rate changes and, therefore, do not reflect the actual annual price changes for Medicare capital-related costs. The capital component of the proposed FY 2008-based RPL market basket would reflect the underlying stability of the capital acquisition process and provides hospitals with the ability to plan for changes in capital payments.

To calculate the vintage weights for depreciation and interest expenses, we needed a time series of capital purchases for building and fixed equipment and movable equipment. We found no single source that provides an appropriate time series of capital purchases by hospitals for all of the above components of capital purchases. The early Medicare cost reports did not have sufficient capital data to meet this need. Data we obtained from the American Hospital Association (AHA) do not include annual capital purchases. However, AHA does provide a consistent database back to 1963. We used data from the AHA Panel Survey and the AHA Annual Survey to obtain a time series of total expenses for hospitals. We then used data from the AHA Panel Survey supplemented with the ratio of depreciation to total hospital expenses obtained from the Medicare cost reports to derive a trend of annual depreciation expenses for 1963 through 2008.

To estimate capital purchases using data on depreciation expenses, the expected life for each cost category (building and fixed equipment, movable equipment, and interest) is needed to calculate vintage weights. For the FY 2002-based RPL market basket, due to insufficient Medicare cost report data for freestanding IRFs, freestanding IPFs, and LTCHs, we used 2001 Medicare Cost Reports for IPPS hospitals to determine the expected life of building and fixed equipment and movable equipment (70 FR 47913). The FY 2002-based RPL market basket was based on an expected life of building and fixed equipment of 23 years. It used 11 years as the expected life for movable equipment. We believed that this data source reflected the latest relative cost structure of depreciation expenses for hospitals at the time and was analogous to freestanding IRFs, freestanding IPFs, and LTCHs.

The expected life of any piece of equipment can be determined by dividing the value of the asset (excluding fully depreciated assets) by its current year depreciation amount. This calculation yields the estimated useful life of an asset if depreciation were to continue at current year levels, assuming straight-line depreciation. Following a similar method to what was applied for the FY 2002-based RPL market basket, we are proposing to use the expected life of building and fixed equipment to be equal to 26 years, and the expected life of movable equipment to be 11 years. These expected lives are calculated using FY 2008 Medicare cost reports for IPPS hospitals since we are currently unable to obtain robust measures of the expected lives for building and fixed equipment and movable equipment using the Medicare cost reports from freestanding IRFs, freestanding IPFs, and LTCHs.

We also propose to use the building and fixed equipment and movable equipment weights derived from FY 2008 Medicare cost reports for freestanding IRFs, freestanding IPFs, and LTCHs to separate the depreciation expenses into annual amounts of building and fixed equipment depreciation and movable equipment depreciation. Year-end asset costs for building and fixed equipment and movable equipment were determined by multiplying the annual depreciation amounts by the expected life calculations. We then calculated a time series, back to 1963, of annual capital purchases by subtracting the previous year asset costs from the current year asset costs. From this capital purchase time series, we were able to calculate the vintage weights for building and fixed equipment and for movable equipment. Each of these sets of vintage weights is explained in more detail below.

For the proposed building and fixed equipment vintage weights, we used the real annual capital purchase amounts for building and fixed equipment to capture the actual amount of the physical acquisition, net of the effect of price inflation. This real annual purchase amount for building and fixed equipment was produced by deflating the nominal annual purchase amount by the building and fixed equipment price proxy, BEA's chained price index for nonresidential construction for hospitals and special care facilities. Because building and fixed equipment have an expected life of 26 years, the vintage weights for building and fixed equipment are deemed to represent the average purchase pattern of building and fixed equipment over 26-year periods. With real building and fixed equipment purchase estimates available from 2008 back to 1963, we averaged twenty 26-year periods to determine the average vintage weights for building and fixed equipment that are representative of average building and fixed equipment purchase patterns over time. Vintage weights for each 26-year period are calculated by dividing the real building and fixed capital purchase amount in any given year by the total amount of purchases in the 26-year period. This calculation is done for each year in the 26-year period, and for each of the twenty 26-year periods. We used the average of each year across the twenty 26-year periods to determine the average building and fixed equipment vintage weights for the FY 2008-based RPL market basket.

For the proposed movable equipment vintage weights, the real annual capital purchase amounts for movable equipment were used to capture the actual amount of the physical acquisition, net of price inflation. This real annual purchase amount for movable equipment was calculated by deflating the nominal annual purchase amounts by the movable equipment price proxy, the PPI for Machinery and Equipment. This is the same proxy used for the FY 2002-based RPL market basket. Based on our determination that movable equipment has an expected life of 11 years, the vintage weights for movable equipment represent the average expenditure for movable equipment over an 11-year period. With real movable equipment purchase estimates available from 2008 back to 1963, thirty-five 11-year periods were averaged to determine the average vintage weights for movable equipment that are representative of average movable equipment purchase patterns over time. Vintage weights for each 11-year period are calculated by dividing the real movable capital purchase amount for any given year by the total amount of purchases in the 11-year period. This calculation was done for each year in the 11-year period and for each of the thirty-five 11-year periods. We used the average of each year across the thirty-five 11-year periods to

determine the average movable equipment vintage weights for the FY 2008-based RPL market basket.

For the proposed interest vintage weights, the nominal annual capital purchase amounts for total equipment (building and fixed, and movable) were used to capture the value of the debt instrument. Because we have determined that hospital debt instruments have an expected life of 26 years, the vintage weights for interest are deemed to represent the average purchase pattern of total equipment over 26-year periods. With nominal total equipment purchase estimates available from 2008 back to 1963, twenty 26-year periods were averaged to determine the average vintage weights for interest that are representative of average capital purchase patterns over time. Vintage weights for each 26-year period are calculated by dividing the nominal total capital purchase amount for any given year by the total amount of purchases in the 26-year period. This calculation is done for each year in the 26-year period and for each of the twenty 26-year periods. We used the average of each year across the twenty 26-year periods to determine the average interest vintage weights for the FY 2008-based RPL market basket. The vintage weights for the capital portion of the FY 2002-based RPL market basket and the FY 2008-based RPL market basket are presented in Table 6.

TABLE 6: FY 2002 and FY 2008 Vintage Weights for Capital-Related Price Proxies

Year	Building and Fixed Equipment		Movable Equipment		Interest	
	FY 2002 23 years	FY 2008 26 years	FY 2002 11 years	FY 2008 11 years	FY 2002 23 years	FY 2008 26 years
1	0.021	0.021	0.065	0.071	0.010	0.010
2	0.022	0.023	0.071	0.075	0.012	0.012
3	0.025	0.025	0.077	0.080	0.014	0.014
4	0.027	0.027	0.082	0.083	0.016	0.016
5	0.029	0.028	0.086	0.085	0.019	0.018
6	0.031	0.030	0.091	0.089	0.023	0.020
7	0.033	0.031	0.095	0.092	0.026	0.021
8	0.035	0.033	0.100	0.098	0.029	0.024
9	0.038	0.035	0.106	0.103	0.033	0.026
10	0.040	0.037	0.112	0.109	0.036	0.029
11	0.042	0.039	0.117	0.116	0.039	0.033
12	0.045	0.041	--	--	0.043	0.035
13	0.047	0.042	--	--	0.048	0.038
14	0.049	0.043	--	--	0.053	0.041
15	0.051	0.044	--	--	0.056	0.043
16	0.053	0.045	--	--	0.059	0.046
17	0.056	0.046	--	--	0.062	0.049
18	0.057	0.047	--	--	0.064	0.052
19	0.058	0.047	--	--	0.066	0.053
20	0.060	0.045	--	--	0.070	0.053
21	0.060	0.045	--	--	0.071	0.055
22	0.061	0.045	--	--	0.074	0.056
23	0.061	0.046	--	--	0.076	0.060
24	--	0.046	--	--	--	0.063
25	--	0.045	--	--	--	0.064
26	--	0.046	--	--	--	0.068
Total	1.000	1.000	1.000	1.000	1.000	1.000

Note: Numbers may not add to total due to rounding.

After the capital cost category weights were computed, it was necessary to select appropriate price proxies to reflect the rate-of-increase for each expenditure category. We are proposing to use the same price proxies for the capital portion of the proposed FY 2008-based RPL market basket that were used in the FY 2002-based RPL market basket with the exception of the Boeckh Construction Index. We replaced the Boeckh Construction Index with BEA's chained price index for nonresidential construction for hospitals and special care facilities. The BEA index represents construction of facilities such as hospitals, nursing homes, hospices, and rehabilitation centers. Although these price indices move similarly over time, we believe that it is more technically appropriate to use an index that is more specific to the hospital industry. We believe these are the most appropriate proxies for hospital capital costs that meet our selection criteria of relevance, timeliness, availability, and reliability.

The price proxies (prior to any vintage weighting) for each of the capital cost categories are the same as those used for the FY 2006-based CIPI as described in the IPPS FY 2010 final rule (74 FR at 43857).

(5) Proposed FY 2012 Market Basket Increase Factor

For FY 2012 (that is, beginning October 1, 2011 and ending September 30, 2012), we are proposing to use an estimate of the proposed FY 2008-based RPL market basket increase factor based on the best available data. Consistent with historical practice, we estimate the RPL market basket update for the IRF PPS based on IHS Global Insight's forecast using the most recent available data. IHS Global Insight (IGI), Inc. is a nationally recognized economic and financial forecasting firm that contracts with CMS to forecast the components of the market baskets.

Based on IGI's 1st quarter 2011 forecast with historical data through the 4th quarter of 2010, the projected market basket increase factor for FY 2012 is 2.8 percent. Therefore, consistent with our historical practice of estimating market basket increases based on the best available data, we are proposing a market basket increase factor of 2.8 percent for FY 2012. Furthermore, because the proposed FY 2012 update is based on the most recent market basket estimate for the 12-month period (currently 2.8 percent), we are also proposing that if more recent data are subsequently available (for example, a more recent estimate of the market basket), we would use such data, if appropriate, to determine the FY 2012 update in the final rule.

Using the current FY 2002-based RPL market basket and IGI's 1st quarter 2011 forecast for the market basket components, the FY 2012 update would be 2.8 percent. Table 7 compares the proposed FY 2008-based RPL market basket and the FY 2002-based RPL market basket percent changes.

TABLE 7: FY 2002-Based and Proposed FY 2008-Based RPL Market Basket Percent Changes, FY 2006 through FY 2014

Fiscal Year (FY)	FY 2002-Based RPL Market Basket Index Percent Change	FY 2008-Based Proposed RPL Market Basket Index Percent Change
Historical data:		
FY 2006	3.9	3.7
FY 2007	3.4	3.4
FY 2008	3.8	3.7
FY 2009	2.5	2.7
FY 2010	2.3	2.2
Average 2006-2010	3.2	3.1
Forecast:		
FY 2011	2.6	2.7
FY 2012	2.8	2.8
FY 2013	2.9	2.9
FY 2014	3.0	3.0
Average 2011-2014	2.8	2.9

Note that these market basket percent changes do not include any further adjustments as may be statutorily required.

Source: IHS Global Insight, Inc. 1st quarter 2011 forecast.

For FY 2012, the proposed FY 2008-based RPL market basket update is the same as the FY 2002-based RPL market basket (2.8 percent). The lower total compensation weight in the proposed FY 2008-based RPL market basket (62.278 percent) relative to the FY 2002-based RPL market basket (65.877 percent), absent other factors, would have resulted in a slightly lower market basket update using the FY 2008-based RPL market basket. This impact, however, is partially offset by the larger weight associated with the Professional Fees category. In both market baskets, these expenditures are proxied by the ECI for Compensation for Professional and Related Services. The weight for Professional Fees in the FY 2002-based RPL market basket is 2.892 percent compared to 6.325 percent in the proposed FY 2008-based RPL market basket. The net effect is that the updates are the same for FY 2012 based on the current 2002-based RPL market basket and the proposed FY 2008-based RPL market basket.

2. Proposed Productivity Adjustment

According to Section 1886(j)(3)(C)(i) of the Act, the Secretary shall establish an increase factor "based on an appropriate percentage increase in a market basket of goods and services." As described in section V.A.1 of this proposed rule, we are proposing to estimate the IRF PPS increase factor for FY 2012 based on the proposed FY

2008-based RPL market basket. Section 1886(j)(3)(C)(ii) of the Act then requires that, after establishing the increase factor for a FY, "the Secretary shall reduce such increase factor for FY 2012 and each subsequent FY, by the productivity adjustment described in section 1886(b)(3)(B)(xi)(II)" of the Act. Section 1886(b)(3)(B)(xi)(II) of the Act sets forth the definition of this productivity adjustment. The statute defines the productivity adjustment to be equal to the 10-year moving average of changes in annual economy-wide private nonfarm business multifactor productivity (MFP) (as projected by the Secretary for the 10-year period ending with the applicable FY, year, cost reporting period, or other annual period) (the "MFP adjustment"). The BLS is the agency that publishes the official measure of private nonfarm business MFP. Please see *http://www.bls.gov/mfp* to obtain the historical BLS-published MFP data.

The projection of MFP is currently produced by IGI, an economic forecasting firm. In order to generate a forecast of MFP, IGI replicated the MFP measure calculated by the BLS using a series of proxy variables derived from IGI's U.S. macroeconomic models. These models take into account a very broad range of factors that influence the total U.S. economy. IGI forecasts the underlying proxy components such as Gross Domestic Product (GDP), capital, and labor inputs required to estimate MFP and then combines those projections according to the BLS methodology. In Table 8, we identify each of the major MFP component series employed by the BLS to measure MFP. We also provide the corresponding concepts forecasted by IGI and determined to be the best available proxies for the BLS series.

TABLE 8: Multifactor Productivity Component Series Employed by the Bureau of Labor Statistics and IHS Global Insight

BLS series	IGI series
Real value-added output, constant 2005 dollars	Non-housing non-government non-farm real GDP, Billions of chained 2005 dollars – annual rate
Private non-farm business sector labor input; 2005=100.00	Hours of all persons in private nonfarm establishments, 2005=100.00, adjusted for labor composition effects.
Aggregate capital inputs; 2005=100.00	Real effective capital stock used for full employment GDP, Billions of chained 2005 dollars

IGI found that the historical growth rates of the BLS components used to calculate MFP and the IGI components identified are consistent across all series and therefore suitable proxies for calculating MFP. We have included below a more detailed description of the methodology used by IGI to construct a forecast of MFP, which is aligned closely with the methodology employed by the BLS. For more information regarding the BLS method for estimating productivity, see the BLS Web site at *http://www.bls.gov/mfp/mprtech.pdf*.

At the time of this proposed rule, the BLS has published a historical time series of private nonfarm business MFP for 1987 through 2009, with 2009 being a preliminary value. Using this historical MFP series and the IGI forecasted series, IGI has developed a forecast of MFP for 2010 through 2021, as described below.

To create a forecast of BLS' MFP index, the forecasted annual growth rates of the "non-housing, non-government, non-farm, real GDP", "hours of all persons in private nonfarm establishments adjusted for labor composition," and "real effective capital stock" series (ranging from 2010 to 2021) are used to "grow" the levels of the "real value-added output," "private non-farm business sector labor input," and "aggregate capital input" series published by the BLS. Projections of the "hours of all persons" measure are calculated using the difference between projections of the BLS index of output per hour and real GDP. This difference is then adjusted to account for changes in labor composition in the forecast interval.

Using these three key concepts, MFP is derived by subtracting the contribution of labor and capital inputs from output growth. However, in order to estimate MFP, we need to understand the relative contributions of labor and capital to total output growth. Therefore, two additional measures are needed to operationalize the estimation of the IGI MFP projection: Labor compensation and capital income. The sum of labor compensation and capital income represents total income. The BLS calculates labor compensation and capital income (in current dollar terms) to derive the nominal values of labor and capital inputs. IGI uses the "non-government total compensation" and "flow of capital services from the total private non-residential capital stock" series as proxies for the BLS' income measures. These two proxy measures for income are divided by total income to obtain the shares of labor compensation and capital income to total income. To estimate labor's contribution and capital's contribution to the growth in total output, the growth rates of the proxy variables for labor and capital inputs are multiplied by their respective shares of total income. These contributions of labor and capital to output growth are subtracted from total output growth to calculate the "change in the growth rates of multifactor productivity":

*MFP = Total output growth—((labor input growth * labor compensation share) + (capital input growth * capital income share))*

The change in the growth rates (also referred to as the compound growth rates) of the IGI MFP are multiplied by 100 in order to calculate the percent

change in growth rates (the percent change in growth rates are published by the BLS for its historical MFP measure). Finally, the growth rates of the IGI MFP are converted to index levels based to 2005 to be consistent with the BLS' methodology. For benchmarking purposes, the historical growth rates of IGI's proxy variables were used to estimate a historical measure of MFP, which was compared to the historical MFP estimate published by the BLS. The comparison revealed that the growth rates of the components were consistent across all series, and therefore validated the use of the proxy variables in generating the IGI MFP projections. The resulting MFP index was then interpolated to a quarterly frequency using the Bassie method for temporal disaggregation. The Bassie technique utilizes an indicator (pattern) series for its calculations. IGI uses the index of output per hour (published by the BLS) as an indicator when interpolating the MFP index.

3. Proposed Calculation of the IRF PPS Market Basket Increase Factor for FY 2012

To calculate the MFP-adjusted IRF PPS increase factor for FY 2012, in accordance with section 1886(j)(3)(C) of the Act, we propose to start with the FY 2008-based RPL market basket increase factor described above in section V.A.1. of this proposed rule and subtract from that the MFP percentage adjustment described in section V.A.2.of this proposed rule. Additionally, in accordance with sections 1886(j)(3)(C)(ii)(II) and (D)(ii) of the Act, we propose to further reduce the MFP-adjusted IRF PPS increase factor by 0.1 percentage point for FY 2012.

Specifically, in calculating the MFP percentage adjustment, we propose that the end of the 10-year moving average of changes in the MFP should coincide with the end of the appropriate FY update period. Since the market basket update is reduced by the MFP adjustment to determine the annual update for the IRF PPS, we believe it is appropriate for the numbers associated with both components of the calculation (the market basket and the productivity adjustment) to line up so that changes in market conditions are aligned. Therefore, for the FY 2012 update, the MFP adjustment is calculated as the 10-year moving average of changes in MFP for the period ending September 30, 2012. We propose to round the final annual adjustment to the one-tenth of 1 percentage point level up or down as applicable according to conventional rounding rules (that is, if the number we are rounding is followed by 5, 6, 7, 8, or 9, we will round the number up; if the number we are rounding is followed by 0, 1, 2, 3, or 4, we will round the number down).

Thus, in accordance with section 1886(j)(3)(C) of the Act, the proposed IRF PPS increase factor for FY 2012 is based on the 1st quarter 2011 forecast of the proposed FY 2008-based RPL market basket update, which is estimated to be 2.8 percent. This proposed increase factor is then reduced by the MFP adjustment (the 10-year moving average of MFP for the period ending FY 2012) of 1.2 percentage points, based on the proposed methodology described above and IHS Global Insight's 1st quarter 2011 forecast. The proposed increase factor for FY 2012 is then further reduced by 0.1 percentage point in accordance with sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act. The resulting proposed IRF PPS increase factor reduced by the productivity adjustment and the "other adjustment" for FY 2012 is equal to 1.5 percent, or 2.8 percent less 1.2 percentage points for the MFP less 0.1 percentage point in accordance with sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act. Consistent with historical practice, we propose to update the market basket increase factor estimate and the MFP adjustment in the final rule to reflect the most recent available data.

4. Proposed Calculation of the Labor-Related Share for FY 2012

Section 1886(j)(6) of the Act specifies that "[t]he Secretary shall adjust the proportion (as estimated by the Secretary from time to time) of rehabilitation facilities' costs which are attributable to wages and wage-related costs, of the prospective payment rates computed under paragraph (3) for area differences in wage levels by a factor (established by the Secretary) reflecting the relative hospital wage level in the geographic area of the rehabilitation facility compared to the national average wage level for such facilities. Not later than October 1, 2001 (and at least every 36 months thereafter), the Secretary shall update the factor under the preceding sentence on the basis of information available to the Secretary (and updated as appropriate) of the wages and wage-related costs incurred in furnishing rehabilitation services. Any adjustments or updates made under this paragraph for a fiscal year shall be made in a manner that assures that the aggregated payments under this subsection in the fiscal year are not greater or less than those that would have been made in the year without such adjustment."

The labor-related share is determined by identifying the national average proportion of total costs that are related to, influenced by, or vary with the local labor market. We continue to classify a cost category as labor-related if the costs are labor-intensive and vary with the local labor market. Given this, based on our definition of the labor-related share, we are proposing to include in the labor-related share the sum of the relative importance of Wages and Salaries, Employee Benefits, Professional Fees: Labor-related, Administrative and Business Support Services, All Other: Labor-related Services (previously referred to in the FY 2002-based RPL market basket as labor-intensive), and a portion of the Capital-Related cost weight.

Consistent with previous rebasings, the "All Other" Labor-related Services cost category is mostly comprised of building maintenance and security services (including, but not limited to, commercial and industrial machinery and equipment repair, nonresidential maintenance and repair, and investigation and security services). Because these services tend to be labor-intensive and are mostly performed at the hospital facility (and therefore, unlikely to be purchased in the national market), we believe that they meet our definition of labor-related services.

As stated in the FY 2006 IRF PPS final rule (70 FR 47880, 47915), the labor-related share was defined as the sum of the relative importance of Wages and Salaries, Fringe Benefits, Professional Fees, Labor-intensive Services, and a portion of the capital share from an appropriate market basket. Therefore, to determine the labor-related share for the IRF PPS for FY 2011, we used the FY 2002-based RPL market basket cost weights relative importance to determine the labor-related share for the IRF PPS.

For the proposed FY 2008-based RPL market basket rebasing, the proposed inclusion of the Administrative and Business Support Services cost category into the labor-related share remains consistent with the current labor-related share because this cost category was previously included in the Labor-intensive cost category. As previously stated, we are proposing to establish a separate Administrative and Business Support Service cost category so that we can use the ECI for Compensation for Office and Administrative Support Services to more precisely proxy these specific expenses.

For the FY 2002-based RPL market basket, we assumed that all nonmedical professional services (including accounting and auditing services,

engineering services, legal services, and management and consulting services) were purchased in the local labor market and, therefore, all of their associated fees varied with the local labor market. As a result, we previously included 100 percent of these costs in the labor-related share. In an effort to more accurately determine the share of professional fees that should be included in the labor-related share, we surveyed hospitals regarding the proportion of those fees that go to companies that are located beyond their own local labor market (the results are discussed below).

We continue to look for ways to refine our market basket approach to more accurately account for the proportion of costs influenced by the local labor market. To that end, we conducted a survey of hospitals to empirically determine the proportion of contracted professional services purchased by the industry that are attributable to local firms and the proportion that are purchased from national firms. We notified the public of our intent to conduct this survey on December 9, 2005 (70 FR 73250) and received no comments.

With approval from the OMB (Control Number 0938–1036), we contacted a sample of IPPS hospitals and received responses to our survey from 108 hospitals. We believe that these data serve as an appropriate proxy for the purchasing patterns of professional services for IRFs as they are also institutional providers of health care services. Using data on FTEs to allocate responding hospitals across strata (region of the country and urban/rural status), we calculated post-stratification weights. Based on these weighted results, we determined that hospitals purchase, on average, the following portions of contracted professional services outside of their local labor market:

- 34 percent of accounting and auditing services.
- 30 percent of engineering services.
- 33 percent of legal services.
- 42 percent of management consulting services.

We applied each of these percentages to its respective Benchmark I–O cost category underlying the professional fees cost category to determine the Professional Fees: Nonlabor-related costs. The Professional Fees: Labor-related costs were determined to be the difference between the total costs for each Benchmark I–O category and the Professional Fees: Nonlabor-related costs. This is the methodology that we used to separate the FY 2008-based RPL market basket professional fees category into Professional Fees: Labor-related and Professional Fees: Nonlabor-related cost categories. In addition to the professional services listed above, we also classified expenses under NAICS 55, Management of Companies and Enterprises, into the Professional Fees cost category as was done in previous rebasings. The NAICS 55 data are mostly comprised of corporate, subsidiary, and regional managing offices, or otherwise referred to as home offices. Formerly, all of the expenses within this category were considered to vary with, or be influenced by, the local labor market and were thus included in the labor-related share. Because many hospitals are not located in the same geographic area as their home office, we analyzed data from a variety of sources in order to determine what proportion of these costs should be appropriately included in the labor-related share.

Using data primarily from the Medicare cost reports and a CMS database of Home Office Medicare Records (HOMER) (a database that provides city and state information (addresses) for home offices), we were able to determine that 19 percent of the total number of freestanding IRFs, IPFs, and LTCHs that had home offices had those home offices located in their respective local labor markets—defined as being in the same Metropolitan Statistical Area (MSA).

The Medicare cost report requires hospitals to report their home office provider numbers. Using the HOMER database to determine the home office location for each home office provider number, we compared the location of the provider with the location of the hospital's home office. We then placed providers into one of the following three groups:

- Group 1—Provider and home office are located in different States.
- Group 2—Provider and home office are located in the same State and same city.
- Group 3—Provider and home office are located in the same State and different city.

We found that 63 percent of the providers with home offices were classified into Group 1 (that is, different State) and, thus, these providers were determined to not be located in the same local labor market as their home office. Although there were a very limited number of exceptions (that is, providers located in different States but the same MSA as their home office), the 63 percent estimate was unchanged.

We found that 9 percent of all providers with home offices were classified into Group 2 (that is, same State and same city and, therefore, the same MSA). Consequently, these providers were determined to be located in the same local labor market as their home offices.

We found that 27 percent of all providers with home offices were classified into Group 3 (that is, same State and different city). Using data from the Census Bureau to determine the specific MSA for both the provider and its home office, we found that 10 percent of all providers with home offices were identified as being in the same State, a different city, but the same MSA.

Pooling these results, we were able to determine that approximately 19 percent of providers with home offices had home offices located within their local labor market (that is, 9 percent of providers with home offices had their home offices in the same State and city (and, thus, the same MSA), and 10 percent of providers with home offices had their home offices in the same State, a different city, but the same MSA). We are proposing to apportion the NAICS 55 expense data by this percentage. Thus, we are proposing to classify 19 percent of these costs into the Professional Fees: Labor-related cost category and the remaining 81 percent into the Professional Fees: Nonlabor-related Services cost category.

Using this proposed method and the IHS Global Insight, Inc. forecast for the 1st quarter 2011 of the proposed FY 2008-based RPL market basket, the IRF labor-related share for FY 2012 is the sum of the FY 2012 relative importance of each labor-related cost category. Consistent with our proposal to update the labor-related share with the most recent available data, the labor-related share for this proposed rule reflects IHS Global Insight's 1st quarter 2011 forecast of the proposed FY 2008-based RPL market basket. Table 9 shows the proposed FY 2012 relative importance labor-related share using the proposed FY 2008-based RPL market basket and the FY 2002-based RPL market basket.

TABLE 9: Comparison of the FY 2011 Relative Importance Labor-Related Share based on the FY 2002-Based RPL Market Basket and the Proposed FY 2012 Relative Importance Labor-Related Share based on the Proposed FY 2008-Based RPL Market Basket

	FY 2011 Relative Importance Labor-Related Share	Proposed FY 2012 Relative Importance Labor-Related Share
Wages and Salaries	52.449	49.066
Employee Benefits	13.971	13.040
Professional Fees: Labor-Related	2.855	2.073
Administrative and Business Support Services	--	0.416
All Other: Labor-Related Services	2.109	2.094
Subtotal	71.384	66.689
Labor-Related Portion of Capital Costs (46%)	3.887	3.645
Total Labor-Related Share	**75.271**	**70.334**

Source: IHS Global Insight, Inc. 1st quarter 2011 forecast.

The proposed labor-related share for FY 2012 is the sum of the proposed FY 2012 relative importance of each labor-related cost category, and would reflect the different rates of price change for these cost categories between the base year (FY 2008) and FY 2012. The sum of the proposed relative importance for FY 2012 for operating costs (Wages and Salaries, Employee Benefits, Professional Fees: Labor-Related, Administrative and Business Support Services, and All Other: Labor-related Services) would be 66.689 percent, as shown in Table 9.

We are proposing that the portion of Capital that is influenced by the local labor market is estimated to be 46 percent, which is the same percentage applied to the FY 2002-based RPL market basket. Since the relative importance for Capital-Related Costs would be 7.923 percent of the proposed FY 2008-based RPL market basket in FY 2012, we are proposing to take 46 percent of 7.923 percent to determine the proposed labor-related share of Capital for FY 2012. The result would be 3.645 percent, which we propose to add to 66.689 percent for the operating cost amount to determine the total proposed labor-related share for FY 2012. Thus, the labor-related share that we propose to use for IRF PPS in FY 2012 would be 70.334 percent. This proposed labor-related share is determined using the same methodology as employed in calculating all previous IRF labor-related shares. The wage index and the labor-related share are adjusted for budget neutrality.

B. Proposed Area Wage Adjustment

Section 1886(j)(6) of the Act requires the Secretary to adjust the proportion of rehabilitation facilities' costs attributable to wages and wage related costs (as estimated by the Secretary from time to time) by a factor (established by the Secretary) reflecting the relative hospital wage level in the geographic area of the rehabilitation facility compared to the national average wage level for those facilities. The Secretary is required to update the IRF PPS wage index on the basis of information available to the Secretary on the wages and wage-related costs to furnish rehabilitation services. Any adjustment or updates made under section 1886(j)(6) of the Act for a FY are made in a budget neutral manner.

In the FY 2009 IRF PPS final rule (73 FR 46378), we maintained the methodology described in the FY 2006 IRF PPS final rule to determine the wage index, labor market area definitions and hold harmless policy consistent with the rationale outlined in the FY 2006 IRF PPS final rule (70 FR 47880, 47917 through 47926).

For FY 2012, we are maintaining the policies and methodologies described in the FY 2009 IRF PPS final rule (73 FR 46378) relating to the labor market area definitions and the wage index methodology for areas with wage data. Thus, we are using the CBSA labor market area definitions and the FY 2011 pre-reclassification and pre-floor hospital wage index data. In accordance with section 1886(d)(3)(E) of the Act, the FY 2011 pre-reclassification and pre-floor hospital wage index is based on data submitted for hospital cost reporting periods beginning on or after October 1, 2006, and ending September 30, 2007 (that is, FY 2007 cost report data).

The labor market designations made by the OMB include some geographic areas where there are no hospitals and, thus, no hospital wage index data on which to base the calculation of the IRF PPS wage index. We propose to continue to use the same methodology discussed in the FY 2008 IRF PPS final rule (72 FR 44299) to address those geographic areas where there are no hospitals and, thus, no hospital wage index data in which to base the calculation for the FY 2012 IRF PPS wage index.

Additionally, we propose to incorporate the CBSA changes published in the most recent OMB bulletin that applies to the hospital wage data used to determine the current IRF PPS wage index. The changes were nominal and did not represent substantive changes to the CBSA-based designations. Specifically, OMB added or deleted certain CBSA numbers and revised certain titles. The OMB bulletins are available at *http://www.whitehouse.gov/omb/bulletins/index.html*.

To calculate the wage-adjusted facility payment for the payment rates set forth in this proposed rule, we multiply the unadjusted Federal payment rate for IRFs by the proposed FY 2012 labor-related share based on the FY 2008-based RPL market basket (70.334 percent) to determine the labor-related portion of the standard payment amount. We then multiply the labor-related portion by the applicable IRF wage index from the tables in the addendum to this proposed rule. Table A is for urban areas and Table B is for rural areas.

Adjustments or updates to the IRF wage index made under section 1886(j)(6) of the Act must be made in a budget neutral manner. We calculate a proposed budget neutral wage adjustment factor as established in the FY 2004 IRF PPS final rule (68 FR 45689), codified at § 412.624(e)(1), as described in the steps below. We use the listed steps to ensure that the proposed FY 2012 IRF standard payment conversion factor reflects the update to the wage indexes (based on the FY 2007 hospital cost report data) and the proposed labor-related share in a budget neutral manner:

Step 1. Determine the total amount of the estimated FY 2011 IRF PPS rates, using the FY 2011 standard payment conversion factor and the labor-related share and the wage indexes from FY 2011 (as published in the FY 2011 IRF PPS final rule (75 FR 42836)).

Step 2. Calculate the total amount of estimated IRF PPS payments using the FY 2011 standard payment conversion factor and the proposed FY 2012 labor-related share and CBSA urban and rural wage indexes.

Step 3. Divide the amount calculated in step 1 by the amount calculated in step 2. The resulting quotient is the proposed FY 2012 budget neutral wage adjustment factor of 0.9989.

Step 4. Apply the proposed FY 2012 budget neutral wage adjustment factor from step 3 to the FY 2011 IRF PPS standard payment conversion factor after the application of the adjusted market basket update to determine the proposed FY 2012 standard payment conversion factor.

We discuss the calculation of the proposed standard payment conversion factor for FY 2012 in section V.C. of this proposed rule.

C. Description of the Proposed IRF Standard Conversion Factor and Payment Rates for FY 2012

To calculate the proposed standard payment conversion factor for FY 2012, as illustrated in Table 10, we begin by applying the proposed adjusted market basket increase factor for FY 2012 that was adjusted in accordance with sections 1886(j)(3)(C) and (D) of the Act (1.5 percent, or 2.8 percent less a cumulative total adjustment of 1.3 percentage points, as described in section V.A.3. of this proposed rule), to the standard payment conversion factor for FY 2011 ($13,860). Applying the proposed 1.5 percent adjusted market basket increase factor for FY 2012 to the standard payment conversion factor for FY 2011 of $13,860 yields a standard payment amount of $14,068. Then, we apply the proposed budget neutrality factor for the FY 2012 wage index and labor-related share of 0.9989, which results in a standard payment amount of $14,052. Then we apply the proposed budget neutrality factor for the revised CMG relative weights of 0.9989, which results in a proposed standard payment amount of $14,037. Finally, we apply the proposed budget neutrality factors for the updates to the rural, LIP and IRF teaching status adjustments of 0.9998, 1.0327, and 1.0024, respectively, which results in a proposed standard payment amount of $14,528 for FY 2012.

TABLE 10: Calculations to Determine the Proposed FY 2012 Standard Payment Conversion Factor

Explanation for Adjustment	Calculations	
Standard Payment Conversion Factor for FY 2011		$13,860
Payment Update Factor for FY 2012 (1.5 percent), which reflects a 2.8 percent market basket increase, reduced by a 1.2 percentage point productivity adjustment, and reduced by 0.1 percentage point in accordance with sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act	x	1.015
Budget Neutrality Factor for the Wage Index and Labor-Related Share	x	0.9989
Budget Neutrality Factor for the Revisions to the CMG Relative Weights	x	0.9989
Budget Neutrality Factor for the Update to the Rural Adjustment Factor	x	0.9998
Budget Neutrality Factor for the Update to the LIP Adjustment Factor	x	1.0327
Budget Neutrality Factor for the Update to the Teaching Status Adjustment Factor	x	1.0024
Proposed FY 2012 Standard Payment Conversion Factor	=	$14,528

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After the application of the CMG relative weights described in Section III of this proposed rule, to the proposed FY 2012 standard payment conversion factor ($14,528), the resulting proposed unadjusted IRF prospective payment rates for FY 2012 are shown in Table 11, "Proposed FY 2012 Payment Rates."

TABLE 11: Proposed FY 2012 Payment Rates

CMG	Payment Rate Tier 1	Payment Rate Tier 2	Payment Rate Tier 3	Payment Rate No Comorbidity
0101	$ 11,119.73	$ 10,426.75	$ 9,366.20	$ 8,853.36
0102	$ 13,782.71	$ 12,924.11	$ 11,607.87	$ 10,973.00
0103	$ 16,474.75	$ 15,447.62	$ 13,875.69	$ 13,117.33
0104	$ 17,128.51	$ 16,060.70	$ 14,426.30	$ 13,637.43
0105	$ 19,910.62	$ 18,668.48	$ 16,769.67	$ 15,851.50
0106	$ 22,899.03	$ 21,470.93	$ 19,285.92	$ 18,231.19
0107	$ 25,919.40	$ 24,303.89	$ 21,829.77	$ 20,635.57
0108	$ 32,119.96	$ 30,118.00	$ 27,052.59	$ 25,573.64
0109	$ 29,738.82	$ 27,883.59	$ 25,046.27	$ 23,676.28
0110	$ 38,294.36	$ 35,905.95	$ 32,252.16	$ 30,488.46
0201	$ 10,988.98	$ 8,943.44	$ 8,291.13	$ 7,524.05
0202	$ 15,568.20	$ 12,671.32	$ 11,745.89	$ 10,659.19
0203	$ 17,571.62	$ 14,301.36	$ 13,256.80	$ 12,032.09
0204	$ 18,497.05	$ 15,053.91	$ 13,954.14	$ 12,664.06
0205	$ 23,353.76	$ 19,006.98	$ 17,619.56	$ 15,990.97
0206	$ 29,111.21	$ 23,692.26	$ 21,961.98	$ 19,932.42
0207	$ 39,330.20	$ 32,011.00	$ 29,673.44	$ 26,930.55
0301	$ 15,329.95	$ 13,821.94	$ 12,251.46	$ 11,221.43
0302	$ 19,412.31	$ 17,504.79	$ 15,514.45	$ 14,209.84
0303	$ 23,086.44	$ 20,817.17	$ 18,452.01	$ 16,898.97
0304	$ 31,939.81	$ 28,798.85	$ 25,525.70	$ 23,379.91
0401	$ 15,258.76	$ 12,687.30	$ 11,510.53	$ 10,168.15
0402	$ 19,933.87	$ 16,573.54	$ 15,037.93	$ 13,282.95
0403	$ 35,667.69	$ 29,653.10	$ 26,905.86	$ 23,766.36
0404	$ 63,467.02	$ 52,767.15	$ 47,877.02	$ 42,291.01
0405	$ 55,732.31	$ 46,335.60	$ 42,041.13	$ 37,136.47
0501	$ 9,597.20	$ 9,142.47	$ 8,158.92	$ 7,226.23
0502	$ 14,340.59	$ 13,660.68	$ 12,190.44	$ 10,797.21
0503	$ 18,231.19	$ 17,366.77	$ 15,498.47	$ 13,727.51
0504	$ 22,046.24	$ 21,000.22	$ 18,742.57	$ 16,599.69
0505	$ 25,656.45	$ 24,440.45	$ 21,810.89	$ 19,317.88
0506	$ 35,987.31	$ 34,281.72	$ 30,594.52	$ 27,096.17
0601	$ 13,682.47	$ 11,596.25	$ 10,572.03	$ 9,546.35
0602	$ 18,142.57	$ 15,376.44	$ 14,018.07	$ 12,659.70
0603	$ 23,423.49	$ 19,852.51	$ 18,098.98	$ 16,344.00
0604	$ 31,071.03	$ 26,333.45	$ 24,007.52	$ 21,680.13
0701	$ 11,634.02	$ 11,442.25	$ 11,006.41	$ 9,828.19
0702	$ 15,219.53	$ 14,969.65	$ 14,400.15	$ 12,858.73
0703	$ 18,312.54	$ 18,011.81	$ 17,326.09	$ 15,470.87
0704	$ 23,679.19	$ 23,289.84	$ 22,403.63	$ 20,005.06
0801	$ 8,113.89	$ 8,161.83	$ 8,161.83	$ 7,088.21
0802	$ 10,916.34	$ 10,981.72	$ 10,981.72	$ 9,537.63
0803	$ 15,045.20	$ 15,133.82	$ 15,133.82	$ 13,144.93
0804	$ 13,294.57	$ 13,373.02	$ 13,373.02	$ 11,615.14
0805	$ 16,378.87	$ 16,476.20	$ 16,476.20	$ 14,310.08
0806	$ 20,010.87	$ 20,130.00	$ 20,130.00	$ 17,483.00

CMG	Payment Rate Tier 1	Payment Rate Tier 2	Payment Rate Tier 3	Payment Rate No Comorbidity
0901	$ 12,559.46	$ 10,811.74	$ 9,788.97	$ 8,869.34
0902	$ 16,829.24	$ 14,488.77	$ 13,117.33	$ 11,885.36
0903	$ 21,520.33	$ 18,526.11	$ 16,774.03	$ 15,197.74
0904	$ 27,915.55	$ 24,032.22	$ 21,758.59	$ 19,713.04
1001	$ 14,937.69	$ 13,208.86	$ 11,782.21	$ 10,547.33
1002	$ 19,577.93	$ 17,311.56	$ 15,443.26	$ 13,823.39
1003	$ 28,932.51	$ 25,585.26	$ 22,822.04	$ 20,430.73
1101	$ 15,049.56	$ 15,049.56	$ 14,352.21	$ 13,419.51
1102	$ 22,463.19	$ 22,463.19	$ 21,424.44	$ 20,029.75
1201	$ 11,747.34	$ 11,747.34	$ 11,721.19	$ 11,105.20
1202	$ 15,364.81	$ 15,364.81	$ 15,331.40	$ 14,526.55
1203	$ 18,883.49	$ 18,883.49	$ 18,841.36	$ 17,852.01
1301	$ 12,972.05	$ 12,972.05	$ 12,823.87	$ 11,436.44
1302	$ 17,109.63	$ 17,109.63	$ 16,914.95	$ 15,084.42
1303	$ 22,078.20	$ 22,078.20	$ 21,828.32	$ 19,466.07
1401	$ 13,676.66	$ 10,955.56	$ 9,691.63	$ 8,763.29
1402	$ 18,361.94	$ 14,709.60	$ 13,011.28	$ 11,764.77
1403	$ 22,134.86	$ 17,731.42	$ 15,684.43	$ 14,182.23
1404	$ 28,695.71	$ 22,987.65	$ 20,333.39	$ 18,385.18
1501	$ 13,970.12	$ 13,120.24	$ 11,289.71	$ 10,654.84
1502	$ 17,533.84	$ 16,466.04	$ 14,169.16	$ 13,373.02
1503	$ 21,587.16	$ 20,272.37	$ 17,443.77	$ 16,464.58
1504	$ 27,350.41	$ 25,684.05	$ 22,099.99	$ 20,859.30
1601	$ 16,208.89	$ 12,565.27	$ 11,182.20	$ 10,463.07
1602	$ 21,719.36	$ 16,836.50	$ 14,984.18	$ 14,019.52
1603	$ 28,102.96	$ 21,786.19	$ 19,387.62	$ 18,139.66
1701	$ 14,570.13	$ 13,384.65	$ 12,168.65	$ 10,638.85
1702	$ 19,299.00	$ 17,729.97	$ 16,117.36	$ 14,092.16
1703	$ 22,779.90	$ 20,927.58	$ 19,024.42	$ 16,633.11
1704	$ 29,133.00	$ 26,764.93	$ 24,331.49	$ 21,271.90
1801	$ 17,252.00	$ 13,694.09	$ 13,694.09	$ 12,579.80
1802	$ 23,821.56	$ 18,908.19	$ 18,908.19	$ 17,369.68
1803	$ 40,695.83	$ 32,303.01	$ 32,303.01	$ 29,674.89
1901	$ 16,592.43	$ 13,175.44	$ 13,175.44	$ 12,961.88
1902	$ 31,607.12	$ 25,098.57	$ 25,098.57	$ 24,691.79
1903	$ 53,220.42	$ 42,260.50	$ 42,260.50	$ 41,576.23
2001	$ 12,328.46	$ 10,935.23	$ 9,803.49	$ 8,809.78
2002	$ 16,529.96	$ 14,663.11	$ 13,144.93	$ 11,812.72
2003	$ 20,876.74	$ 18,518.84	$ 16,601.15	$ 14,918.80
2004	$ 27,982.38	$ 24,821.09	$ 22,251.08	$ 19,996.34
2101	$ 43,690.05	$ 37,721.95	$ 29,342.20	$ 24,909.71
5001	$ -	$ -	$ -	$ 2,144.33
5101	$ -	$ -	$ -	$ 8,523.58
5102	$ -	$ -	$ -	$ 21,345.99
5103	$ -	$ -	$ -	$ 10,098.41
5104	$ -	$ -	$ -	$ 27,295.21

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D. Example of the Methodology for Adjusting the Proposed Federal Prospective Payment Rates

Table 12 illustrates the methodology for adjusting the proposed Federal prospective payments (as described in sections V.A. through V.C. of this proposed rule). The following examples are based on two hypothetical Medicare beneficiaries, both classified into CMG 0110 (without comorbidities). The proposed unadjusted Federal prospective payment rate for CMG 0110 (without comorbidities) appears in Table 11.

Example: One beneficiary is in Facility A, an IRF located in rural Spencer County, Indiana, and another beneficiary is in Facility B, an IRF located in urban Harrison County, Indiana. Facility A, a rural non-teaching hospital has a DSH percentage of 5 percent (which would result in a LIP adjustment of 1.0093), a wage index of 0.8391, and a rural adjustment of 18.7 percent. Facility B, an urban teaching hospital, has a DSH percentage of 15 percent (which would result in a LIP adjustment of 1.0269 percent), a wage index of 0.8896, and a teaching status adjustment of 0.0610.

To calculate each IRF's labor and non-labor portion of the proposed Federal prospective payment, we begin by taking the proposed unadjusted Federal prospective payment rate for CMG 0110 (without comorbidities) from Table 11. Then, we multiply the proposed labor-related share for FY 2012 (70.334 percent) described in section V.A.4 of this proposed rule by the proposed unadjusted Federal prospective payment rate. To determine the non-labor portion of the proposed Federal prospective payment rate, we subtract the labor portion of the proposed Federal payment from the proposed unadjusted Federal prospective payment.

To compute the proposed wage-adjusted Federal prospective payment, we multiply the labor portion of the proposed Federal payment by the appropriate wage index found in the addendum in Tables A and B. The resulting figure is the wage-adjusted labor amount. Next, we compute the proposed wage-adjusted Federal payment by adding the wage-adjusted labor amount to the non-labor portion.

Adjusting the proposed wage-adjusted Federal payment by the facility-level adjustments involves several steps. First, we take the wage-adjusted Federal prospective payment and multiply it by the appropriate rural and LIP adjustments (if applicable). Second, to determine the appropriate amount of additional payment for the teaching status adjustment (if applicable), we multiply the teaching status adjustment (0.0610, in this example) by the wage-adjusted and rural-adjusted amount (if applicable). Finally, we add the additional teaching status payments (if applicable) to the wage, rural, and LIP-adjusted Federal prospective payment rates. Table 12 illustrates the components of the adjusted payment calculation.

TABLE 12: Example of Computing the Proposed IRF FY 2012 Federal Prospective Payment

Steps		Rural Facility A (Spencer Co., IN)		Urban Facility B (Harrison Co., IN)	
1	Unadjusted Federal Prospective Payment		$ 30,488.46		$ 30,488.46
2	Labor Share	X	0.70334	X	0.70334
3	Labor Portion of Federal Payment	=	$21,443.75	=	$21,443.75
4	CBSA Based Wage Index (shown in the Addendum , Tables 1 and 2)	X	0.8391	X	0.8896
5	Wage-Adjusted Amount	=	$17,993.45	=	$19,076.36
6	Nonlabor Amount	+	$9,004.71	+	$9,004.71
7	Wage-Adjusted Federal Payment	=	$27,038.16	=	$28,121.07
8	Rural Adjustment	X	1.187	X	1.000
9	Wage- and Rural- Adjusted Federal Payment	=	$32,094.30	=	$28,121.07
10	LIP Adjustment	X	1.0093	X	1.0269
11	FY 2012 Wage-, Rural- and LIP- Adjusted Federal Prospective Payment Rate	=	$32,392.77	=	$28,877.53
12	FY 2012 Wage- and Rural-Adjusted Federal Prospective Payment		$32,094.30		$28,121.07
13	Teaching Status Adjustment	X	0.0000	X	0.0610
14	Teaching Status Adjustment Amount	=	$0.00	=	$1,715.39
15	FY2012 Wage-, Rural-, and LIP-Adjusted Federal Prospective Payment Rate	+	$32,392.77	+	$28,877.53
16	Total FY 2012 Adjusted Federal Prospective Payment	=	$32,392.77	=	$30,592.91

Thus, the proposed adjusted payment for Facility A would be $32,392.77 and the proposed adjusted payment for Facility B would be $30,592.91.

VI. Proposed Update to Payments for High-Cost Outliers Under the IRF PPS

A. Proposed Update to the Outlier Threshold Amount for FY 2012

Section 1886(j)(4) of the Act provides the Secretary with the authority to make payments in addition to the basic IRF prospective payments for cases incurring extraordinarily high costs. A case qualifies for an outlier payment if the estimated cost of the case exceeds the adjusted outlier threshold. We calculate the adjusted outlier threshold by adding the IRF PPS payment for the case (that is, the CMG payment adjusted by all of the relevant facility-level adjustments) and the adjusted threshold amount (also adjusted by all of the relevant facility-level adjustments). Then, we calculate the estimated cost of a case by multiplying the IRF's overall CCR by the Medicare allowable covered charge. If the estimated cost of the case is higher than the adjusted outlier threshold, we make an outlier payment for the case equal to 80 percent of the difference between the estimated cost of the case and the outlier threshold.

In the FY 2002 IRF PPS final rule (66 FR 41362 through 41363), we discussed our rationale for setting the outlier threshold amount for the IRF PPS so that estimated outlier payments would equal 3 percent of total estimated payments. For the 2002 IRF PPS final rule, we analyzed various outlier policies using 3, 4, and 5 percent of the total estimated payments, and we concluded that an outlier policy set at 3 percent of total estimated payments would optimize the extent to which we could reduce the financial risk to IRFs of caring for high-cost patients, while

still providing for adequate payments for all other (non-high cost outlier) cases.

Subsequently, we updated the IRF outlier threshold amount in the FYs 2006 through 2010 IRF PPS final rules and the FY 2011 notice (70 FR 47880, 71 FR 48354, 72 FR 44284, 73 FR 46370, 74 FR 39762, and 75 FR 42836, respectively) to maintain estimated outlier payments at 3 percent of total estimated payments. We also stated in the FY 2009 final rule (73 FR 46370 at 46385) that we would continue to analyze the estimated outlier payments for subsequent years and adjust the outlier threshold amount as appropriate to maintain the 3 percent target.

To update the IRF outlier threshold amount for FY 2012, we propose to use FY 2010 claims data and the same methodology that we used to set the initial outlier threshold amount in the FY 2002 IRF PPS final rule (66 FR 41316 and 41362 through 41363), which is also the same methodology that we used to update the outlier threshold amounts for FYs 2006 through 2011. Based on an analysis of this updated data, we estimate that IRF outlier payments as a percentage of total estimated payments are approximately 2.7 percent in FY 2011. Based on the updated analysis, we propose to update the outlier threshold amount to $11,822 to maintain estimated outlier payments at approximately 3 percent of total estimated aggregate IRF payments for FY 2012.

The proposed outlier threshold amount of $11,822 for FY 2012 is subject to change in the final rule if more recent data become available for analysis or if any changes are made to any of the other proposed payment policies set forth in this proposed rule.

B. Proposed Update to the IRF Cost-to-Charge Ratio Ceilings

In accordance with the methodology stated in the FY 2004 IRF PPS final rule (68 FR 45674, 45692 through 45694), we apply a ceiling to IRFs' CCRs. Using the methodology described in that final rule, we propose to update the national urban and rural CCRs for IRFs, as well as the national CCR ceiling for FY 2012, based on analysis of the most recent data that is available. We apply the national urban and rural CCRs in the following situations:

- New IRFs that have not yet submitted their first Medicare cost report.
- IRFs whose overall CCR is in excess of the national CCR ceiling for FY 2012, as discussed below.
- Other IRFs for which accurate data to calculate an overall CCR are not available.

Specifically, for FY 2012, we estimate a proposed national average CCR of 0.669 for rural IRFs, which we calculate by taking an average of the CCRs for all rural IRFs using their most recently submitted cost report data. Similarly, we estimate a national average CCR of 0.520 for urban IRFs, which we calculate by taking an average of the CCRs for all urban IRFs using their most recently submitted cost report data. We apply weights to both of these averages using the IRFs' estimated costs, meaning that the CCRs of IRFs with higher costs factor more heavily into the averages than the CCRs of IRFs with lower costs. For this proposed rule, we have used the most recent available cost report data (FY 2009). This includes all IRFs whose cost reporting periods begin on or after October 1, 2008, and before October 1, 2009. If, for any IRF, the FY 2009 cost report was missing or had an "as submitted" status, we used data from a previous fiscal year's (that is, FY 2004 through FY 2008) settled cost report for that IRF. We do not use cost report data from before FY 2004 for any IRF because changes in IRF utilization since FY 2004 resulting from the 60 percent rule and IRF medical review activities suggest that these older data do not adequately reflect the current cost of care.

In addition, in accordance with past practice, we propose to set the national CCR ceiling at 3 standard deviations above the mean CCR. Using this method, the national CCR ceiling is set at 1.55 for FY 2012. This means that, if an individual IRF's CCR exceeds this ceiling of 1.55 for FY 2012, we would replace the IRF's CCR with the appropriate national average CCR (either rural or urban, depending on the geographic location of the IRF). We estimate the national CCR ceiling by:

Step 1. Taking the national average CCR (weighted by each IRF's total costs, as discussed above) of all IRFs for which we have sufficient cost report data (both rural and urban IRFs combined).

Step 2. Estimating the standard deviation of the national average CCR computed in step 1.

Step 3. Multiplying the standard deviation of the national average CCR computed in step 2 by a factor of 3 to compute a statistically significant reliable ceiling.

Step 4. Adding the result from step 3 to the national average CCR of all IRFs for which we have sufficient cost report data, from step 1.

We note that the proposed national average rural and urban CCRs and our estimate of the national CCR ceiling in this section are subject to change in the final rule if more recent data become available for use in these analyses.

VII. Impact of the IPPS Data Matching Process Changes on the IRF PPS Calculation of the Low-Income Percentage Adjustment Factor

Section 1886(j)(3)(A)(v) of the Act confers broad authority upon the Secretary to adjust the per unit payment rate "by such * * * factors as the Secretary determines are necessary to properly reflect variations in necessary costs of treatment among rehabilitation facilities." For example, we adjust the Federal prospective payment amount associated with a CMG to account for facility-level characteristics such as an IRF's LIP, teaching status, and location in a rural area, if applicable, as described in § 412.624(e).

In the FY 2002 IRF PPS final rule (66 FR 41359 through 41361) that implemented the IRF PPS, we established the IRF LIP adjustment. In that final rule, we said that we would calculate the LIP adjustment by using the same disproportionate share hospital (DSH) patient percentage used in the acute IPPS DSH adjustment.

The DSH patient percentage is equal to the sum of the "Supplemental Security Income (SSI) fraction" and the "Medicaid Fraction." We compute the SSI fraction (also known as the "SSI ratio" or the "Medicare fraction") by dividing the number of the facility's inpatient days that are furnished to patients who were entitled to both Medicare Part A (including patients who are enrolled in a Medicare Advantage (Part C) plan) and SSI benefits by the facility's total number of patient days furnished to patients entitled to benefits under Medicare Part A (including patients who are enrolled in a Medicare Advantage (Part C) plan). To determine the number of inpatient days for individuals entitled to both Medicare Part A and SSI, as required for calculation of the numerator of the SSI fraction, CMS matches the Medicare records and SSI eligibility records for each IRF's patients during the FY. The data underlying the match process are drawn from: (a) The Medicare Provider Analysis and Review (MedPAR) data file; and (b) SSI eligibility data provided by the Social Security Administration (SSA). CMS recently revised this data match. See the FY 2011 IPPS final rule (75 FR 50041, 50276).

As previously stated, it is our policy to calculate the LIP adjustment using the same DSH patient percentage used in the acute IPPS DSH adjustment. In keeping with this long-standing policy, we will use the same matching process

as IPPS for calculating the SSI fractions for FYs 2011 and beyond. This process is described in the FY 2011 IPPS final rule, and will be used to calculate IRFs' SSI fractions for FY 2011. The FY 2011 IPPS final rule (75 FR 50277 through 50286) gives information on this revised data matching process.

VIII. Proposed Updates to the Policies in 42 CFR Part 412

Prior to the implementation of the IRF PPS on January 1, 2002, IRFs were paid based on the costs that they reported on their Medicare cost reports, subject to some limits. To simplify the cost reporting process, both for providers and for CMS and the Medicare contractors that monitored the cost reports, regulations were put into place that carefully defined, for example, when and how providers could be considered "new" and when and how they could expand their bed size and square footage. Under the IRF PPS, however, Medicare pays IRFs according to Federal prospective payment rates that are no longer tied to an individual IRF's Medicare cost reports. This new payment methodology has made some of the requirements regarding new IRFs and IRF expansions obsolete.

In addition, prior to 2002, the regulations distinguished between freestanding rehabilitation hospitals and rehabilitation units of acute care hospitals, with separate regulatory sections for the two types of facilities even though many of the same requirements applied to both. Under the IRF PPS, the distinctions between freestanding IRFs and IRF units are no longer relevant because both types of facilities are paid the same and are subject to the same rules and requirements. The current separation of the regulatory sections results in unnecessary repetition and confusion about which regulations apply to which types of facilities.

In addition, we added new IRF coverage requirements to § 412.622(a)(3), (4), and (5) in the FY 2010 IRF PPS final rule (74 FR 39762 at 39811 through 39812) for IRF discharges occurring on or after January 1, 2010. Several of the IRF conditions of payment in the existing § 412.23(b) and § 412.29, including the requirements for preadmission screenings to be conducted on all prospective patients, the requirements for IRF patients to receive close medical supervision, the requirements for plans of care to be developed for all IRF patients, and the requirements for patients to receive an interdisciplinary approach to care in the IRF, mirror some of the IRF coverage requirements in § 412.622(a)(3), (4), and (5).

Finally, in recent years, we have observed an increase in the number and complexity of acquisitions and mergers occurring in this industry. In some cases, the current Medicare rules and requirements for IRFs do not adequately address the number and complexity of acquisitions and mergers because they simply did not occur when the regulations were written. In other cases, regulations were written to address issues that do not exist today.

For all of these reasons, in this proposed rule we propose to consolidate, clarify, and revise the regulations for inpatient rehabilitation facilities at § 412.23(b), § 412.25(b), § 412.29, and § 412.30 to update and simplify the policies, to eliminate unnecessary repetition and confusion, and to enhance the consistency with the IRF coverage requirements in § 412.622(a)(3), (4), and (5). Since the proposed modifications would eliminate regulations that may no longer be strictly necessary under the IRF PPS, they would enable IRFs to more easily adjust to beneficiary changes in demand for IRF services, which would improve beneficiary access to these services. The proposed modifications would also reduce costs for providers and for the government by reducing the amount of time and expenditures devoted to adhering to (for providers) and enforcing (for the government) regulations that may no longer be strictly necessary. Since we have no way of determining how many IRFs might take advantage of the added flexibility these regulations afford to expand or change their operations, we are not able to quantify the savings. However, for example, each time an IRF unit submits a request to add beds to its facility under the current regulations, the Medicare contractor must determine whether or not the added IRF beds will be considered "new." To be considered "new," the beds must be added at the start of a cost reporting period, and the hospital must have "obtained approval, under State licensure and Medicare certification, for an increase in its hospital bed capacity that is greater than 50 percent of the number of beds it seeks to add to the unit." We believe that the first requirement (that beds can only be added at the start of a cost reporting period) is difficult, and potentially costly, for IRFs that are expanding through new construction because the exact timing of the end of a construction project is often difficult to predict. Construction delays can hamper an IRF's ability to have the construction completed exactly at the start of a cost reporting period, which can lead to significant revenue loss for the facility if the IRF is unable to add beds until the next cost reporting period. We believe that it is no longer necessary to require IRF beds to be added at the start of a cost reporting period. Further, the current regulations require Medicare contractors to expend unnecessary resources determining whether the IRF has met the second criteria, which requires the hospital to have "obtained approval, under State licensure and Medicare certification, for an increase in its hospital bed capacity that is greater than 50 percent of the number of beds it seeks to add to the unit." The proposed modifications to the regulations are designed to simplify the regulations in order to minimize the amount of effort that Medicare contractors would need to spend enforcing them. Finally, the proposed modifications would enhance the consistency between the IRF coverage and payment requirements.

We note that § 412.25(b) applies to both IRFs and inpatient psychiatric facilities (IPFs), so the proposed revisions to § 412.25(b) would also affect IPFs in similar ways.

A. Proposed Consolidation of the Requirements for Rehabilitation Hospitals and Rehabilitation Units

Under the IRF PPS, rehabilitation hospitals and rehabilitation units of acute care hospitals (and critical access hospitals (CAHs)) are paid the same and, with very few exceptions, are subject to the same Medicare rules and requirements. For this reason, we believe that it is no longer necessary to have separate sections in 42 CFR part 412 that define the requirements for rehabilitation hospitals and rehabilitation units of acute care hospitals (and CAHs). This leads to excessive repetition and potential confusion about which rules apply to which types of facilities.

Thus, we propose to revise and consolidate the regulations for rehabilitation facilities that are currently in § 412.23(b) (for rehabilitation hospitals), § 412.29 (for rehabilitation units), and § 412.30 (for rehabilitation units) into a revised § 412.29 that would contain the requirements for all IRFs, whether they be freestanding rehabilitation hospitals or rehabilitation units of acute care hospitals (or CAHs). We believe that this would simplify the regulations by consolidating the majority of the requirements for IRFs into just one sub-section of part 412.

Although we are proposing slight modifications to the regulations in § 412.25(b), as discussed in section

VII.C. of this proposed rule, we are not proposing to move the IRF regulations in § 412.25 to § 412.29 in this proposed rule. The regulations in § 412.25, such as the requirement to have beds that are physically separate from the rest of the hospital, the requirement that the unit be serviced by the same Medicare contractor as the rest of the hospital, and the requirement that the unit be treated as a separate cost center for cost finding and apportionment purposes, by their nature apply uniquely to units that are part of another hospital. Since these requirements are not applicable to freestanding IRFs, we do not believe that it would be appropriate to include them with the rest of the IRF regulations in § 412.29 that are intended to apply to both freestanding IRF hospitals and to IRF units of hospitals. Further, we are not proposing modifications to § 412.25, other than the proposed changes to § 412.25(b) as discussed in section VII.C. of this proposed rule, because the regulations in § 412.25(a) through (g) (excluding (b)) remain relevant and important for defining IRF units of hospitals for payment purposes.

However, we propose to replace the text that is currently located at § 412.23(b) with text that simply refers the reader to the requirements in § 412.29, and move the rest of § 412.23(b) and all of § 412.30 to § 412.29. We propose to leave text in § 412.23(b) that refers IRFs to the requirements they must meet in § 412.29 only so that we do not disturb the ordering of the rest of § 412.23 that contain the Medicare regulations for inpatient psychiatric facilities, children's hospitals, and long-term care hospitals. Specifically, we propose to move all of the text in § 412.23(b) to § 412.29 except for a new paragraph that refers to the requirements in § 412.29, which would read as follows: "(b) Rehabilitation hospitals. A rehabilitation hospital must meet the requirements specified in § 412.29 to be excluded from the prospective payment systems specified in § 412.1(a)(1) and to be paid under the prospective payment system specified in § 412.1(a)(3) and in subpart P of this part."

B. Proposed Revisions to the Regulations at Proposed § 412.29

As described in section VIII.A. of this proposed rule, we propose to replace the text that is currently located at § 412.23(b) with text that simply refers the reader to the requirements in § 412.29, and move the rest of § 412.23(b) and all of § 412.30 to § 412.29. To eliminate any unnecessary repetition, and to update and clarify the regulations, we are also proposing revisions to the language from all three of the current sections, § 412.23(b), § 412.29, and § 412.30. As stated in current § 412.30, a rehabilitation unit can only be considered "new" if the hospital has never had a rehabilitation unit before. We have encountered circumstances in which a hospital closed a rehabilitation unit over 20 years ago and is now seeking to re-open the rehabilitation unit, and we believe that it would be reasonable to consider the rehabilitation unit to be "new." Thus, we are proposing to revise the requirements for an IRF to be considered "new" to indicate that an IRF can be considered "new" if it has not been paid under the IRF PPS in 42 CFR part 412, subpart P for at least 5 calendar years. These proposed requirements would now apply equally to both rehabilitation hospitals and rehabilitation units of acute care hospitals (or CAHs), and would be located in proposed § 412.29(c)(1). We believe that 5 calendar years would allow a sufficient amount of time between an IRF closing and an IRF reopening to prevent IRFs from closing and reopening annually to avoid meeting certain requirements, while allowing IRFs more flexibility to meet changing demand for IRF services.

In addition, we propose to clarify and simplify the rules regarding change of ownership (including mergers) or leasing, as defined in § 489.18. Changes of ownership or leasing, as defined in § 489.18, and mergers in which the new owner(s) accept assignment of the previous owner's provider agreements are transfers of the provider agreement. Therefore, we propose that IRFs in these situations would retain their excluded status and would continue to be paid under the IRF PPS before and after the change, as long as the IRF continues to meet all of the requirements specified in § 412.29. However, we propose to clarify that a change of ownership (including merger) or leasing in which the new owner(s) do not accept assignment of the previous owner's provider agreement would be considered a voluntary termination of the provider agreement, and the new owner(s) would need to reapply to the Medicare program as an initial applicant to operate a new IRF. In the case of changes of ownership (including mergers) or leasing, we propose that the new owner(s) would not be required to wait for 5 calendar years to reapply to operate a new IRF, but would be required to complete the initial hospital or critical access hospital certification process to participate in Medicare as a new IRF.

Further, we also propose to revise the regulations regarding new IRF beds. The regulations currently in § 412.30(d), which require an IRF to obtain "approval, under State licensure and Medicare certification, for an increase in its hospital bed capacity that is greater than 50 percent of the number of beds it seeks to add to the unit," have become less and less relevant under a prospective payment system in which payments are no longer based on IRFs' reported costs. Thus, we propose to eliminate these requirements and, instead, propose in § 412.29(c)(2) that IRF beds would be considered "new" if they meet all applicable State Certificate of Need and State licensure laws and if they get written approval from the appropriate CMS regional office (RO), as described below. We propose that new IRF beds can be added one time at any point during a cost reporting period (instead of at the start of a cost reporting period), but we propose to require that a full 12-month cost reporting period elapse before an IRF that has had beds delicensed or decertified can add new beds. The reason for this proposed requirement is to prevent IRFs from decreasing and increasing bed size every year to avoid having to meet certain requirements. We propose to require the IRF to obtain written approval from the appropriate CMS RO for the addition of the new beds in order to allow the CMS RO to verify that a full 12-month cost reporting period has elapsed before an IRF that has had beds delicensed or decertified can add new beds.

C. Proposed Revisions to the Requirements for Changes in Bed Size and Square Footage

Prior to the IRF PPS and the IPF PPS, excluded units (IRFs and IPFs) were paid based on their costs, as reported on their Medicare cost reports, subject to certain facility-specific cost limits. These cost-based payments were determined separately for operating and capital costs. Thus, under cost-based payments, the facilities' capital costs were determined, in part, by their bed size and square footage. Changes in the bed size and square footage would complicate the facilities' capital cost allocation. Thus, the Medicare regulations at § 412.25 limited the situations under which an IRF or IPF could change its bed size and square footage.

Under the IRF PPS and IPF PPS, however, a facility's bed size and square footage is not relevant for determining the individual facility's Medicare payment. Thus, we believe it is appropriate to modify some of the restrictions on a facility's ability to

change its bed size and square footage. We are therefore proposing in this proposed rule to relax the restrictions on a facility's ability to increase its bed size and square footage. Under the proposed requirements in § 412.25, an IRF or IPF could change (either increase or decrease) its bed size or square footage one time at any point in a given cost reporting period as long as it notifies the CMS RO within 30 days of the proposed change and maintains the required documentation. We note that any IRF beds that are added to an existing IRF during the IRF's cost reporting period would only be considered new through the end of that cost reporting period. Further, the new IRF beds would be included in the IRF's compliance review calculations under the 60 percent rule specified in § 412.29(b) beginning on the date that they are first added to the IRF.

D. Proposed Revisions To Enhance Consistency Between the IRF Coverage and Payment Requirements

In the FY 2010 IRF PPS final rule (74 FR 39762 at 39788 through 39798), CMS implemented new IRF coverage requirements in § 412.622(a)(3),(4), and (5). These new IRF coverage requirements replaced coverage requirements that were 25 years old and no longer reflected current medical practice. In updating these coverage requirements, we added further specificity to some of the terms that had been discussed in the old coverage requirements. For example, we more clearly defined in the new IRF coverage requirements what we mean by an IRF preadmission screening, care planning, and close medical supervision. In the proposed revisions to § 412.23(b) and § 412.29, we propose to enhance the consistency between the IRF coverage and payment requirements by incorporating some of the added specificity from the coverage requirements into the same requirements for payment. Specifically, we propose to clarify that, as in the IRF coverage requirements, IRF preadmission screenings must be reviewed and approved by a rehabilitation physician prior to each prospective patient's admission to an IRF. As we said in the FY 2010 IRF PPS final rule (74 FR 39791), we believe that it is important to require that a rehabilitation physician document the reasoning behind the decision to admit a patient to an IRF, to enable medical reviewers to understand the rationale for the decision.

Further, we propose to clarify, as we did in the coverage requirements at § 412.622(a)(3)(iv), that close medical supervision in an IRF means that the patient receives at least 3 face-to-face visits per week by a licensed physician with specialized training and experience in inpatient rehabilitation to assess the patient both medically and functionally, as well as to modify the course of treatment as needed to maximize the patient's capacity to benefit from the rehabilitation process. As we stated in the FY 2010 IRF PPS final rule (74 FR 39796), we believe that at least 3 face-to-face rehabilitation physician visits per week are necessary to coordinate the patient's medical needs with his or her functional rehabilitation needs while in the facility.

Finally, we propose to clarify that we believe that discharge planning, in addition to assessment of the patient's goals and progress toward those goals, is an integral part of the interdisciplinary team approach to care that is provided in IRFs.

The specific proposed changes to the regulations at part 412 are shown in the "Regulation Text" of this proposed rule of this proposed rule. We encourage stakeholder comment on these proposed changes.

IX. Quality Reporting for Inpatient Rehabilitation Hospitals

A. Background and Statutory Authority

CMS seeks to promote higher quality and more efficient health care for Medicare beneficiaries. Our efforts are, in part, effectuated by quality reporting programs coupled with the public reporting of data collected under those programs. The quality reporting programs exist for various settings such as hospital inpatient services (the Hospital Inpatient Quality Reporting (Hospital IQR) Program), hospital outpatient services (the Hospital Outpatient Quality Data Reporting Program (HOP QDRP)), and for physicians and other eligible professionals the Physician Quality Reporting System (formerly called the Physician Quality Reporting Initiative, or PQRI). We have also implemented quality reporting programs for home health agencies and skilled nursing facilities that are based on conditions of participation, and an end-stage renal disease quality incentive program (ESRD QIP) that links payment to performance.

Section 3004(b) of the Affordable Care Act added section 1886(j)(7) to the Act, which requires the Secretary to implement a quality reporting program for Inpatient Rehabilitation Facilities (IRFs), including freestanding IRF hospitals and IRF units within hospitals. Beginning in FY 2014, section 1886(j)(7)(A)(i) of the Act requires the Secretary to reduce the increase factor with respect to a fiscal year by 2 percentage points for any IRFs that do not submit data to the Secretary in accordance with requirements established by the Secretary for that fiscal year. Section 1886(j)(7)(A)(ii) of the Act notes that this reduction may result in the increase factor being less than 0.0 for a fiscal year, and in payment rates under this subsection for a fiscal year being less than the payment rates for the preceding fiscal year. Any reduction based on failure to comply with the reporting requirements is, in accordance with section 1886(j)(7)(B) of the Act, limited to the particular fiscal year involved. The reductions are not to be cumulative and will not be taken into account in computing the payment amount under subsection (j) for a subsequent fiscal year.

Section 1886(j)(7)(C) of the Act requires that each IRF submit data to the Secretary on quality measures specified by the Secretary. The data must be submitted in a form and manner, and at a time, specified by the Secretary. The Secretary is generally required to specify measures that have been endorsed by the entity with a contract under section 1890(a) of the Act. This contract is currently held by the National Quality Forum (NQF). The NQF is a voluntary consensus standard-setting organization with a diverse representation of consumer, purchaser, provider, academic, clinical, and other health care stakeholder organizations. The NQF was established to standardize health care quality measurement and reporting through its consensus development process. We have generally adopted NQF-endorsed measures in our reporting programs. However, section 1886(j)(7)(D)(ii)of the Act provides that "in the case of a specified area or medical topic determined appropriate by the Secretary for which a feasible and practical measure has not been endorsed by the entity with a contract under section 1890(a) of the Act, the Secretary may specify a measure that is not so endorsed as long as due consideration is given to measures that have been endorsed or adopted by a consensus-based organization identified by the Secretary." Under section 1886(j)(7)(D)(iii) of the Act, the Secretary must publish the selected measures that will be applicable with respect to FY 2014 no later than October 1, 2012.

Section 1886(j)(7)(E) of the Act requires the Secretary to establish procedures for making data submitted

under the IRF quality reporting program available to the public. The Secretary must ensure that an IRF is given the opportunity to review the data that is to be made public prior to the data being made public. The Secretary must report quality measures that relate to services furnished in inpatient settings in rehabilitation facilities on the CMS Web site.

B. Quality Measures for IRF Quality Reporting Program for FY 2014

1. General

We propose to adopt 2 quality measures for FY 2014. These quality measures are: (1) Urinary Catheter-Associated Urinary Tract Infections (CAUTI), and (2) Pressure Ulcers that are New or Have Worsened. We also discuss below a third measure that we are currently developing and intend to propose to adopt for FY 2014 in future rulemaking. That measure will be the 30-day Comprehensive All-Cause Risk-Standardized Readmission Measure.

2. Considerations in the Selection of the Proposed Quality Measures

In implementing the IRF Quality Reporting Program, we seek to collect data on measures that will provide information on the full spectrum of the quality of care being furnished by IRFs while imposing as little burden as possible on IRFs. We seek to collect data on valid, reliable, and relevant quality measures and to make that data available to the public in accordance with applicable law.

We also seek to align new Affordable Care Act reporting requirements for IRFs with HHS high priority conditions and topics, as reflected in the National Quality Strategy released by the Secretary (*http://www.healthcare.gov/center/reports/quality03212011a.html#es*) and to ultimately provide a comprehensive assessment of the quality of healthcare delivered. We note that adopting a comprehensive set of measures may take multiple years because of the time, effort and resources required by IRFs and CMS to develop and implement the data collection and reporting infrastructure needed to support an expanded quality reporting program. Current areas of high priority for HHS include patient safety, healthcare associated infections, and reduction of avoidable readmissions. These priorities are consistent with the aim of providing safe, sound care for all patients receiving services in any healthcare setting including IRFs.

In our consideration and selection of a comprehensive set of quality measures, we have several objectives. First, the measures should align with CMS' three-part aim for better care for individuals, better health for populations, and lower cost through improvement. Second, the measures should relate to specific priorities in the care setting for which they are adopted. For IRFs, these include improving patient safety (such as avoiding healthcare associated infections (HAI)), reducing adverse events, and encouraging better coordination of care and person-and-family-centered care. Third, the measures should address improved quality for the primary role of IRFs, which is to address the rehabilitation needs of the individual including improved functional status and achievement of successful return to the community post-discharge.

Other considerations in proposing quality measures include alignment with other Medicare quality reporting programs and other private sector initiatives; suggestions and input received from multiple stakeholders and national subject matter experts; seeking measures that have a low probability of causing unintended adverse consequences; and considering measures that are feasible, that is, measures that can be technically implemented within the capacity of the CMS infrastructure for data collection, analyses, and calculation of reporting and performance rates as applicable.

3. FY 2014 Measure #1: Healthcare Associated Infection Measure (HAI): Urinary Catheter-Associated Urinary Tract Infections (CAUTI)

The first measure we propose for IRFs for purposes of calculating the FY 2014 Increase Factor is an application of the NQF-endorsed measure developed by the Centers for Disease Control (CDC) for hospitals entitled (NQF# 0138) "Urinary Catheter-Associated Urinary Tract Infection [CAUTI] for Intensive Care Unit Patients" to the IRF setting. This measure was developed by the CDC to measure the percentage of patients with urinary catheter associated urinary tract infections in the ICU context. At the time of this proposed rule, the measure we are applying (NQF# 0138) is undergoing measure maintenance review by NQF which may result in a change in how the CDC calculates the aggregated data from using a standard rate for CAUTI, to the use of a standardized infection ratio (SIR) of healthcare associated urinary catheter-associated urinary tract infections. We propose to adopt the current measure in this rulemaking cycle. However, we intend to propose the adoption of any modifications to this measure that may result from the NQF review process in future rulemaking. We recognize that the NQF has endorsed this measure for the hospital setting, but believe that this measure is highly relevant to IRFs in that urinary catheters are commonly used in the IRF setting. Section 1886(j)(7)(D)(ii) provides that "in the case of a specified area or medical topic determined appropriate by the Secretary for which a feasible and practical measure has not been endorsed by the entity with a contract under section 1890(a), the Secretary may specify a measure that is not so endorsed as long as due consideration is given to measures that have been endorsed or adopted by a consensus-based organization identified by the Secretary." We reviewed the NQF's consensus endorsed measures, and were unable to identify any NQF-endorsed measures for urinary catheter-associated urinary tract infections for the IRF setting. We are unaware of any other measures of urinary tract infections that have been approved by voluntary consensus standards bodies.

Having given due consideration to other measures that have been endorsed or adopted by a consensus entity, we propose to adopt an application of the NQF-endorsed CAUTI measure under the Secretary's authority to select non-NQF endorsed measures where NQF-endorsed measures do not exist for a specified area or medical topic. While we are proposing to adopt the measure under the exception authority provided in section 1886(j)(7)(D)(ii), we note that we intend to ask NQF to formally extend its endorsement of the existing CAUTI measure to the IRF setting.

Urinary tract infections (UTIs) are a common cause of morbidity and mortality. The urinary tract is the most common site of healthcare-associated infection, accounting for more than 30 percent of infections reported by acute care hospitals.[1] Healthcare-associated UTIs are commonly attributed to catheterization of the urinary tract.

CAUTI can lead to complications as cystitis, pyelonephritis, gram-negative bacteremia, prostatitis, epididymitis, and orchitis in males and, less commonly, endocarditis, vertebral osteomyelitis, septic arthritis, endophthalmitis, and meningitis in all patients. Complications associated with CAUTI include discomfort to the patient, prolonged hospital stay, and increased cost and mortality. Each year, more than 13,000 deaths are associated

[1] Klevens RM, Edward JR, *et al.* Estimating health care-associated infections and deaths in U.S. hospitals, 2002. Public Health Reports 2007;122:160–166.

with UTIs.[1] Prevention of CAUTIs is discussed in the CDC/HICPAC document, *Guideline for Prevention of Catheter-associated Urinary Tract Infections*.[2] The NQF endorsed CAUTI measure we are proposing is currently collected by the CDC's National Healthcare Safety Network (NHSN), a secure Internet-based health surveillance system, and we note that the CDC is also collecting data on this measure from IRFs. NHSN is currently used, in part, as one means by which certain State-mandated reporting and surveillance data are collected.

The HHS National Action Plan to Prevent HAI (*http://www.hhs.gov/ash/initiatives/hai/actionplan/index.html*) identified catheter-associated urinary tract infections as the leading type of HAI that is largely preventable. The technical expert panel (TEP) convened by the CMS measure-developer-contractor on February 4, 2011 (*https://www.cms.gov/LTCH-IRF-Hospice-Quality-Reporting/*) also identified CAUTI as a high priority quality issue for IRFs.

4. FY 2014 Measure #2: Percent of Patients With Pressure Ulcers That are New or Worsened

The second measure we propose for IRFs for purposes of calculating the FY 2014 increase factor is an application of a CMS developed NQF-endorsed measure for short-stay nursing home patients; (NQF# NH–012–10) "Percent of Residents with Pressure Ulcers that Are New or Worsened." This is the percentage of patients who have one or more stage 2–4 pressure ulcers that are new or worsened, when assessed at the time of discharge as compared with the patient's condition when it was assessed at admission. We recognize NQF endorsement of this measure is limited to short-stay nursing home patients, but believe that this measure is highly relevant and a high priority quality issue in the care of IRF patients. Currently, there are no other NQF-endorsed pressure ulcer measures that are applicable to IRFs and we were unable to identify other measures for pressure ulcers that have been endorsed or adopted for the IRF context by a consensus organization. We are also unaware of any other measures of pressure ulcers that have been approved by voluntary consensus standards bodies. For these reasons, we propose to adopt an application of this NQF-endorsed measure under the Secretary's authority to select non-NQF endorsed measures where measures do not exist for a specified area or medical topic. We also intend to ask NQF to extend its endorsement of the existing short-stay nursing home pressure ulcer measure to the IRF setting.

Pressure ulcers are high-volume and high-cost adverse events across the spectrum of health care settings from acute hospitals to home health. Patients in the IRF setting may have medically complex conditions and severe functional limitations, and are therefore at high risk for the development, or worsening, of pressure ulcers. Pressure ulcers are serious medical conditions and an important measure of quality. Pressure ulcers can lead to serious, life-threatening infections, which substantially increase the total cost of care. As reported in the August 22, 2007, Inpatient Hospital PPS Final Rule for FY 2008 (72 FR 47205) in 2006 there were 322,946 reported cases of Medicare patients with a pressure ulcer as a secondary diagnosis in acute care hospitals.

5. Potential FY 2014 measure #3: 30-day Comprehensive All-Cause Risk-Standardized Readmission Measure

Avoidable hospital readmissions are a high priority for HHS and CMS. We are currently developing setting-specific risk adjusted 30-day all-condition all-cause risk-standardized readmission measures for hospitals, IRFs, long term care hospitals and nursing homes. The main features of the measure methodology will be consistent with that of the NQF-endorsed CMS hospital risk-adjusted 30-day readmission measures for the Acute Myocardial Infarction (AMI), Heart Failure (HF), Pneumonia and Percutaneous Coronary Intervention (PCI). We plan to cover the maximum number of patient conditions possible in the all-condition measures. We will consult literature and national experts and conduct analyses on the types and comorbidities of the patients of each setting in order to establish appropriate risk-adjustment of the measures as well as the meaning/definition of readmission and the appropriate time-window for readmission for each care setting. To expand beyond the condition-specific measures to an all-condition readmission measure for each setting, we will conduct analyses to determine whether it is statistically and clinically sound to derive the all-condition measures from one single risk adjustment model, or if it would be better to form a composite of multiple models for multiple conditions. We plan to use hierarchical logistic regression modeling to take into account the effects of the clustering of patients and the sample size in the IRF setting. This measure is expected to be completed in late 2011, at which time it will be submitted to the entity with a contract under section 1890(a) of the Act for endorsement.

We invite public comments on the proposed quality measures for FY 2014: (1) Urinary Catheter-Associated Urinary Tract Infections (CAUTI); (2) Pressure Ulcers that are New or Have Worsened. We also invite public comment on our intent to propose a 30-day Comprehensive All-Cause Risk-Standardized Readmission Measure.

C. Data Submission Requirements

1. Proposed Method of Data Submission for HAI Measure (CAUTI)

We propose to require that IRFs submit data on the Urinary Catheter-Associated Urinary Tract Infection (CAUTI) measure through the Centers for Disease Control (CDC)/National Healthcare Safety Network (NHSN). As we noted above, the NHSN is a secure, Internet-based surveillance system maintained by the CDC that can be utilized by all types of healthcare facilities in the United States, including acute care hospitals, long term acute care hospitals, psychiatric hospitals, rehabilitation hospitals, outpatient dialysis centers, ambulatory surgery centers, and long term care facilities. The NHSN enables healthcare facilities to collect and use data about HAIs, including information on clinical practices known to prevent HAIs, information on the incidence or prevalence of multidrug-resistant organisms within their organizations, and information on other adverse events. Some States use the NHSN as a means of collecting state law mandated HAI reporting. NHSN collects data via a Web-based tool hosted by the CDC (*http://www.cdc.gov/*). This reporting service is provided free of charge to healthcare facilities. Additionally, the ability of the CDC to receive NHSN measures data from electronic health records (EHR) may be possible in the near future. Currently, more than 20 States require hospitals to report HAIs using NHSN, and the CDC supports more 4,000 hospitals that are using the NHSN.

We propose for IRFs to submit the data elements needed to calculate the Urinary Catheter-Associated Urinary Tract Infection measure using the NHSN's standard data submission requirements which requires submission of data on HAI events on all patients. Collecting data on all patients will provide CMS with the most robust,

[2] Wong ES. Guideline for prevention of catheter-associated urinary tract infections. Infect Control 1981; 2:126–30.

accurate reflection of the quality of care delivered to Medicare beneficiaries as compared with non-Medicare patients. Therefore, to measure the quality of care that is delivered to Medicare beneficiaries in the IRF setting, we are proposing to collect quality data related to HAI events on all patients regardless of payor.

CDC/NHSN requirements may include adherence to training requirements, use of CDC measure specifications, data element definitions, data submission requirements and instructions, data reporting timeframes, as well as NHSN participation forms and indications to CDC allowing CMS to access data for this measure for the IRF quality reporting program purposes. Detailed requirements for NHSN participation, measure specifications, and data collection can be found at *http://www.cdc.gov/nhsn/*. We propose to require IRFs to use the specifications and data collection tools for the proposed Urinary Catheter-Associated Urinary Tract Infections as required by CDC as of the time that the data is submitted.

For purposes of calculating the FY 2014 increase factor we propose to collect data on CAUTI events that occur from October 1, 2012 through December 31, 2012, the final fiscal quarter of FY 2013. We propose that all subsequent IRF quality reporting cycles would be based on a full calendar year (CY) cycle (that is January 1 through December 31 of the applicable year). For example, the FY 2015 payment determinations will be made based on CY 2013 data submitted to CDC. We welcome comments on the proposed reporting cycle for IRFs.

Should this proposed measure be finalized, further details regarding data submission and reporting requirements for this measure will be posted on the CMS Web site *http://www.cms.gov/LTCH-IRF-Hospice-Quality-Reporting/* by no later than January 31, 2012.

IRFs are also encouraged to visit the CDC Web site *http://www.cdc.gov/nhsn/* in order to review the NHSN enrollment and reporting requirements.

2. Proposed Method of Data Submission for the Percent of Patients With New or Worsened Pressure Ulcer Measure

We seek to implement the IRF Quality Reporting Program in a manner that imposes as little burden as possible. IRFs already are required to submit certain data for purposes of determining payment via the current Inpatient Rehabilitation Facility-Patient Assessment Instrument (IRF–PAI). The IRF–PAI also includes currently optional "quality indicators" (QI). To support the standardized collection and calculation of quality measures specifically focused on IRF services, we propose to modify the current IRF–PAI by replacing the current optional pressure ulcer items in the QI section of the IRF–PAI with mandatory pressure ulcer data elements for the proposed measure.

We propose for IRFs to submit the data needed to calculate the measure "Percent of Patients with New or Worsened Pressure Ulcers" on all Medicare patients. Therefore, to measure the quality of care that is delivered to Medicare beneficiaries in the IRF setting, we are proposing to collect quality data related to new or worsening pressure ulcers on all Medicare patients.

We propose to use the IRF–PAI to collect pressure ulcer data elements that would be similar to those collected through the Minimum Data Set 3.0 (MDS 3.0), which is a reporting instrument that is used in nursing homes. A draft of the proposed IRF–PAI revisions with the new pressure ulcer elements is available on the CMS Web site at *http://www.cms.gov/InpatientRehabFacPPS/04_IRFPAI.asp#TopOfPage*. The current MDS 3.0 pressure ulcer items evolved as an outgrowth of CMS' work to develop a standardized patient assessment instrument, now referred to as CARE (Continuity Assessment Record & Evaluation).

The CARE assessment instrument was developed and tested in the post-acute care payment reform demonstration (PAC–PRD) which included IRFs as required by section 5008 of the 2005 Deficit Reduction Act (DRA) (Pub. L. 109–171, enacted February 8, 2006) (more information may be found at *http://www.pacdemo.rti.org*). We note that the MDS data elements were supported by the National Pressure Ulcer Advisory Panel (NPUAP). We believe that modifying the current IRF–PAI pressure ulcer items to be consistent with the standardized data elements now used in the MDS 3.0, will drive uniformity across settings that will lead to better quality of care in IRFs and ultimately, across the continuum of care settings. If this proposal is finalized, additional details regarding the use of modified IRF–PAI data elements to calculate this measure will be published on the CMS Web site at *http://www.cms.gov/LTCH-IRF-Hospice-Quality-Reporting/* by no later than January 31, 2012. We invite comments on these proposals for the submission of data on the proposed quality measure for pressure ulcers.

3. Potential Method of Data Submission for the 30-day Comprehensive All-Cause Risk-Standardized Readmission Measure

In the FY 2013 rule cycle we anticipate being able to propose using claims data otherwise submitted by the IRF as the data to calculate this measure. As such, we anticipate not needing additional reporting to fulfill the data needs if this measure is proposed and adopted. We generally anticipate calculating the measure based on 3 years of claims data in order to provide a sufficient number of discharges to calculate this measure.

D. Public Reporting

Under section 1886(j)(7)(E) of the Act, the Secretary is required to establish procedures for making data submitted by IRFs under the IRF quality reporting program available to the public. In accordance with this provision, we propose to establish procedures to make the data available to the public. We do not intend to make individual patient data public. We believe that existing laws governing access to agency records will adequately address requests for such data. We will adopt procedures that will ensure that an IRF has the opportunity to review the data to be made public prior to the data being made public. Additionally, as required under section 1886(j)(7)(E) of the Act, we will report quality measures that relate to services furnished in IRFs on CMS Web site.

E. Quality Measures for Future Consideration for Determination of Increase Factors for Future Fiscal Year Payments

As indicated previously in this section, we ultimately seek to adopt a comprehensive set of quality measures to be available for widespread use for informed decision making and quality improvement. While we are beginning with a limited set of measures in the IRF context, we expect to expand the measure set through rulemaking which will allow us, for example, to assess an IRF patient's functional status and whether he/she has achieved his or her rehabilitation goals and potential. As noted above, IRFs are currently required to submit certain data for purposes of determining payment via the IRF–PAI. The IRF–PAI currently includes optional QIs, and, if finalized, it would include mandatory data elements for use in the calculation of the pressure ulcer measure. Only a small number of IRFs are currently submitting data on the optional QI data elements.

We intend to propose a more robust set of measures for the IRF quality reporting program in the FY 2013 rulemaking cycle for the determination of the FY 2015 payment increase factor. We are considering the measures listed in Table 13 which include, but are not limited to, measure topics reported by providers of skilled nursing facility (SNF) services for short stay nursing home patients. We invite public comment on which quality measures would be considered most feasible and useful for IRFs to report for purposes of the FY 2015 payment update.

The quality data on short stay nursing home patients, which generates the short stay nursing home measures, are generated from the MDS 3.0 data collection vehicle. We are currently analyzing the quality data collected by nursing homes through the 3.0 version of the MDS which was implemented nationally in nursing homes in October 2010. Nursing homes are reporting data for long stay residents as well as short stay residents. We will be analyzing the performance of these nursing home measures through the end of 2011 and expect to have findings on their performance in the nursing home setting by early 2012. Next steps would include analyzing whether any of these measures would be appropriate for application in the IRF setting. We would invite public comment on the application of some or all of the short stay nursing home measures listed below. We are seeking NQF endorsement of these measures by August 2011. These measures may also be found at the NQF Web site *http://www.qualityforum.org/*. CMS' short stay nursing home measures undergoing NQF endorsement include NH–010–10 percent of residents who self-report moderate to severe pain; NH–014–10 percent of residents assessed and appropriately given the seasonal influenza vaccine; NH–016–10 percent of residents assessed and appropriately given the seasonal pneumococcal vaccine and NH–009–10 percentage of residents on a scheduled pain medication regimen on admission who self-report a decrease in pain intensity or frequency.

If any of the short stay nursing home measures are appropriate for application to the IRF setting we would intend to propose some or all of those measures in the FY 2013 rulemaking cycle. Any added measures proposed through the FY 2013 rulemaking cycle would apply to the payment determination for FY 2015. We expect that any measures proposed through the FY 2013 rulemaking cycle would require changes to the IRF–PAI as a data collection vehicle and changes to the supporting information technology (IT) infrastructure. We expect that it would take providers, vendors, and CMS approximately one year to make the necessary changes to their IT systems to support the collection and reporting of new or modified IRF–PAI data elements. We would expect providers, vendors, and CMS to complete any needed changes to their IT systems by August 2013. We would intend to propose IRFs submit any additional or revised IRF–PAI data elements starting October 1, 2013 through December 31, 2013 for the FY 2015 payment update. Alternatively, we are considering and invite public comment on the possibility of basing future quality measures on data sources or assessment instruments other than the IRF–PAI. As stated earlier, we developed and tested the CARE assessment instrument for the post-acute demonstration under section 5008 of the DRA. We intend to submit a report to Congress by the end of 2011 with findings from the three year Post Acute Care-Payment Reform Demonstration (PAC–PRD) and its use of the CARE patient assessment instrument as a data collection vehicle. More details on the PAC–PRD which concluded in late 2010 are available at *http://www.pacdemo.rti.org*. We believe that the data elements that were collected using this CARE standardized assessment instrument could be used across all post-acute care sites to measure functional status and other factors during treatment and at discharge which are key indicators of quality in IRFs and in nursing homes treating short stay patients requiring rehabilitative services. We believe the instrument could be beneficial in supporting the submission of data on quality measures by IRFs and other care settings by ensuring standardized data collection. We invite comments on the use of a standardized assessment instrument such as the CARE assessment instrument in IRFs to collect data that would generate additional quality measures for the IRF quality reporting program in the future.

We also invite public comment on the measures and measures topics in Table 13, as well as potential methods for collecting quality data on the percent of patients whose individually stated goals were met and the percent of patients for whom care delivered was consistent with patient stated care preferences. During the NQF endorsement process for nursing home quality measures mentioned above, the NQF steering committee pointed to the need for CMS to consider pairing pain measures with a measure or measures that reflect patients' preferences for how their care, treatment and symptoms are managed by healthcare providers. These items, and other items in Table 13, are under consideration for future years. We also invite other suggestions regarding our implementation of the IRF quality measures program.

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TABLE 13: Possible Future Measures and Topics for the IRF Quality Reporting Program

Overarching Goal: Safety and Healthcare Acquired Conditions: Avoidable Adverse Events and Serious Reportable Events*	
	• Unplanned acute care hospitalizations • Falls with Major Injury* ** • Falls with major injury per 1000 days. • Incidence of venous thromboembolism (VTE), potentially preventable. * • Poly-pharmacy related injury • Medication errors* • Stage III and IV Pressure Ulcers**
Overarching Goal: Safety and Prevention	
	• VTE Prophylaxis • Patient Immunization for Influenza • Patient Immunization for Pneumonia • Staff immunization
Overarching Goal: Safety and Healthcare Acquired Conditions – HAIs	
	• Surgical site infections • Multidrug resistant organism infection
Overarching Goal: Better, Person Centered-Care: Care Coordination/Care Outcome	
	• Functional Change: Change in Motor Score • Change in Cognitive Function: Change in Cognitive Score • Communication • Percent of patients whose individually stated goals were met • Care Transitions Measure-3 (CTM-3) • Discharge Outcome/Discharge disposition: - Home - Assisted Living - Nursing Home - LTCH - Hospital - Hospice • Patient Preferences for care, treatment and management of symptoms by healthcare providers
Overarching Goal: Better, Person Centered-Care: Symptom Management	
	• Percent of patients on a scheduled pain management regime on admission who report a decrease in pain intensity or frequency • Percent of patients with pain assessment conducted and documented prior to therapy. • Percent of patients who self-report moderate to severe pain. • Percent of patients with dyspnea improved within one day of assessment.
Overarching Goal: Better, Person Centered-Care: Experience of Care	
	• Patient Survey, e.g., Hospital Consumer Assessment of Healthcare Providers & Systems • Percent of patients for whom care delivered was consistent with patient stated care preferences.

*Consistent with NQF Serious Reportable Events
**Consistent with HAC Prevalence Measure

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F. Proposed New Regulation Text for the IRF Quality Reporting Program

To implement the new IRF quality reporting program, we propose to re-designate the existing paragraph § 412.624(c)(4) as § 412.624(c)(5) and add a new paragraph § 412.624(c)(4). The specific proposed changes to the regulations at part 412 are shown in the "Regulation Text" of this proposed rule of this proposed rule. We encourage stakeholder comment on these proposed changes.

X. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

This proposed rule does not impose any new information collection requirements as outlined in the regulation text. However, this proposed rule does make reference to associated information collections that are not discussed in the regulation text contained in this document. The following is a discussion of these information collections, some of which have already received OMB approval.

As stated in Section IX.B. of the preamble of this proposed rule, for purposes of calculating the FY 2014 IRF PPS increase factor, we propose that IRFs submit data on 2 quality measures. These quality measures are: (1) Catheter Associated Urinary Tract Infections; and (2) Pressure Ulcers that are New or Have Worsened. The aforementioned measures will be collected via the following respective means.

Catheter Associated Urinary Tract Infections (CAUTI)

Regarding the collection of data on the first quality measure, Catheter Associated Urinary Tract Infections, we propose to require as the form and manner of submission for the measure, CAUTI rate per 1000 urinary catheter days, to be through the Centers for Disease Control (CDC)/National Health Safety Network (NHSN). Data collection by the NHSN occurs via a Web-based tool hosted by the CDC. This reporting service is provided free of charge to healthcare facilities. In fact, some IRFs are already using the NHSN to collect and submit this data. With this proposed rule, CMS seeks to impose an information collection requirement for the CAUTI measure. It should be noted that information collection activities associated with the CDC/NHSN are currently approved under OMB control number 0920–0666. Detailed requirements for NHSN participation, measure specifications, and data collection can be found at *http://www.cdc.gov/nhsn/*. IRFs must use the current specifications and data collection tools for Catheter Associated Urinary Tract Infections.

CMS does not currently require IRFs to report data to NHSN; however, according to the CDC, there are 26 IRFs that already submit data to NHSN either voluntarily or per state mandate. In order to report data to NHSN, the CDC requires the facility to enroll into the NHSN and take specified training. As per the NHSN Web site, we estimate that it will take 240 minutes (4 hours) to register and complete the necessary training provided by the CDC. The estimated annual burden associated with this requirement is 268,800 minutes/4,480 hours (240 minutes × 1,120 IRFs) at an estimated cost of $186,323. This cost is estimated using the average hourly wage of a Registered Nurse which is reported by the U.S. Bureau of Statistics to be $41.59. Once each facility has been properly registered into NHSN and trained, they will need to submit two types of forms in order for CDC to calculate the CAUTI rate per 1,000 urinary catheter days. The first form, the Urinary Tract Infection (UTI) form, is submitted by facilities for each patient with a CAUTI. We estimate that it will take 15 minutes per form per IRF. This time estimate consists of 5 minutes of nursing time needed to collect the clinical data and 10 minutes of clerical time necessary to enter the data into NHSN. We further anticipate that there will be approximately 2.25 forms submitted per IRF per month. Based on this estimate, we expect for each IRF to expend 33.75 minutes (0.5625 hours) per month and 405 minutes (6.75 hours) per year reporting to NHSN. The estimated annual burden to all IRFs in the U.S. for reporting to NHSN is 7,735.5 hours. The estimated cost per IRF is $186.14 per year. Similarly, the estimated total yearly cost across all IRFs is $213,322. These costs are estimated using an hourly wage for a Registered Nurse of $41.59 and a Medical Billing Clerk/Data Entry person of $20.57 as stated by the U.S. Bureau of Labor Statistics. The second form, the denominator form, is used to count daily the number of patients with an indwelling catheter device. These daily counts are summed and only the total for each month is submitted to NHSN. While CDC estimates that the denominator form takes 5 hours per month to complete, we estimate that it will take 2.5 hours per form per IRF per month, as the number of patients with an indwelling catheter is the only part of this form that IRFs will be required to complete. We anticipate that there will be one form submitted per IRF per month. Based on this estimate, we expect for each IRF to expend 150 minutes (2.5 hours) per month and 1,800 minutes (30 hours) per year reporting to NHSN. The estimated annual burden to all IRFs in the U.S. for reporting to NHSN is 34,380 hours. The estimated cost per IRF is $1,247.70 per year. Similarly, the estimated total yearly cost across all IRFs is $1,429,864. These costs are estimated using an hourly wage for a Registered Nurse of $41.59.

Pressure Ulcers That Are New or Have Worsened

As stated in Section IX.C.2 of this preamble, to support the standardized collection and calculation of quality measures specifically focused on IRF services, we propose to modify the current Inpatient Rehabilitation Facility-Patient Assessment Instrument (IRF–PAI) by replacing and harmonizing the pressure ulcer items with data elements similar to those collected through the Minimum Data Set 3.0 (MDS 3.0) used in nursing homes. Additionally, the MDS 3.0 pressure ulcer items have been harmonized with the Continuity Assessment Record and Evaluation (CARE) data set, which was developed for and broadly tested in the post-acute demonstration as required by section 5008 of the Deficit Reduction Act of 2005 (DRA) (Pub. L. 109–171, enacted on February 8, 2006). We believe modifying the IRF–PAI pressure ulcer items to be consistent with the standardized data elements now used in the MDS 3.0, and supported by the National Pressure Ulcer Advisory Panel (NPUAP), would provide better informed decision making and quality improvement in IRFs and ultimately, across the continuum of care settings.

Since all IRFs are already required to complete and transmit IRF–PAIs on all Medicare Part A fee-for-service and Medicare Part C (Medicare Advantage) patients in order to receive payment from Medicare, and the number of IRFs submitting claims to Medicare has remained stable over the past several years, we do not estimate that there are any IRFs that would need to conduct additional training or set-up for completing and transmitting the IRF–PAI. Thus, we do not estimate any additional burden on IRFs for these

activities. In addition, we do not estimate any additional burden for IRFs to complete the IRF–PAI with the mandatory quality measures as the IRF–PAI currently contains a voluntary "Quality Indicators" section. If finalized, the voluntary data items will be replaced with the proposed pressure ulcer question set. When the original burden estimates were completed for the IRF–PAI, we estimated that the "Quality Indicators" section of the IRF–PAI would take about 10 minutes to complete, and we assumed that all IRFs would complete the Quality Indicators items, even though completion of this section was voluntary. Thus, removing the Quality Indicators items from the IRF–PAI would decrease the total estimated burden of completing each IRF–PAI by about 10 minutes. However, we estimate that it will take about 10 minutes to complete the new pressure ulcer item that we are proposing to require IRFs to complete as part of the new IRF quality reporting program. Since the time to complete the items that we are proposing to remove from the IRF–PAI is the same as the time to complete the new items we are proposing to add, we estimate no net change in the amount of time associated with completing each IRF–PAI and no net change in burden.

We will be submitting a revision to the IRF–PAI information collection request currently approved under OMB control number 0938–0842 for OMB review and approval.

If you comment on these information collection and recordkeeping requirements, please do either of the following:

1. Submit your comments electronically as specified in the **ADDRESSES** section of this proposed rule; or

2. Submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget; Attention: CMS Desk Officer, CMS–1349–P; Fax: (202) 395–6974; or E-mail: *OIRA_submission@omb.eop.gov*.

XI. Response to Public Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the data 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 to that document.

XII. Economic Analyses

A. Regulatory Impact Analysis

1. Introduction

We have examined the impacts of this proposed rule as required by Executive Order 12866 (September 30, 1993, Regulatory Planning and Review), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (September 19, 1980, Pub. L. 96–354) (RFA), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct 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). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated an "economically" significant rule, under section 3(f)(1) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

2. Statement of Need

This proposed rule updates the IRF prospective payment rates for FY 2012 as required under section 1886(j)(3)(C) of the Act. It responds to Section 1886(j)(5) of the Act, which requires the Secretary to publish in the **Federal Register** on or before the August 1 that precedes the start of each fiscal year, the classification and weighting factors for the IRF PPS's case-mix groups and a description of the methodology and data used in computing the prospective payment rates for that fiscal year.

This rule also proposes some policy changes within the statutory discretion afforded to the Secretary under section 1886(j) of the Act. We believe that the proposed policy changes would better align IRF PPS policies with those of other Medicare payment systems and would clarify the current IRF payment regulations. Further, many of the proposed policy changes are designed to promote greater flexibility in the IRF PPS policies.

This proposed rule also implements section 3401(d) of the Affordable Care Act, which amended section 1886(j)(3)(C) of the Act and added section 1886(j)(3)(D) of the Act. Section 1886(j)(3)(C) of the Act requires the Secretary to estimate a multi-factor productivity adjustment to the market basket increase factor, and to apply other adjustments as defined by the Act. The productivity adjustment applies to FYs from 2012 forward. The other adjustments apply to FYs 2010–2019.

Finally, this proposed rule discusses the IRF quality measures that we are proposing to adopt for the first year of implementation of a new IRF quality reporting program, as required by section 3004(b) of the Affordable Care Act.

3. Overall Impacts

We estimate that the total impact of these proposed changes for estimated FY 2012 payments compared to estimated FY 2011 payments would be an increase of approximately $120 million (this reflects a $100 million increase from the update to the payment rates and a $20 million increase due to the proposed update to the outlier threshold amount to increase estimated outlier payments from approximately 2.7 percent in FY 2011 to 3 percent in FY 2012).

4. Detailed Economic Analysis

i. Basis and Methodology of Estimates

This proposed rule sets forth updates of the IRF PPS rates contained in the FY 2011 notice and proposes updates to the CMG relative weights and average length of stay values, the facility-level adjustments, the wage index, and the outlier threshold for high-cost cases. This proposed rule also implements a 0.1 percentage point reduction to the proposed FY 2012 rebased RPL market basket increase factor (updated from a 2002 base year to a 2008 base year) in accordance with sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act and a 1.2 percent productivity adjustment to the proposed FY 2012 rebased RPL market basket increase factor as required by section 1886(j)(3)(C)(ii)(I) of the Act.

We estimate that the FY 2012 impact would be a net increase of $120 million in payments to IRF providers (this reflects a $100 million estimated increase from the proposed update to the payment rates and a $20 million estimated increase due to the proposed update to the outlier threshold amount to increase the estimated outlier payments from approximately 2.7 percent in FY 2011 to 3.0 percent in FY 2012). The impact analysis in Table 14 of this proposed rule represents the projected effects of the proposed policy

changes in the IRF PPS for FY 2012 compared with estimated IRF PPS payments in FY 2011 without the proposed policy changes. We estimate the effects by estimating payments while holding all other payment variables constant. We use the best data available, but we do not attempt to predict behavioral responses to these proposed changes, and we do not make adjustments for future changes in such variables as number of discharges or case-mix.

We note that certain events may combine to limit the scope or accuracy of our impact analysis, because such an analysis is future-oriented and, thus, susceptible to forecasting errors because of other changes in the forecasted impact time period. Some examples could be legislative changes made by the Congress to the Medicare program that would impact program funding, or changes specifically related to IRFs. Although some of these changes may not necessarily be specific to the IRF PPS, the nature of the Medicare program is such that the changes may interact, and the complexity of the interaction of these changes could make it difficult to predict accurately the full scope of the impact upon IRFs.

In updating the rates for FY 2012, we are proposing a number of standard annual revisions and clarifications mentioned elsewhere in this proposed rule (for example, the proposed update to the wage index and market basket increase factor used to adjust the Federal rates). We estimate that these proposed revisions would increase payments to IRFs by approximately $100 million (all due to the update to the market basket increase factor, since the update to the wage index is done in a budget neutral manner—as required by statute—and therefore neither increases nor decreases aggregate payments to IRFs).

The aggregate change in estimated payments associated with this proposed rule is estimated to be an increase in payments to IRFs of $120 million for FY 2012. The market basket increase of $100 million and the $20 million increase due to the proposed update to the outlier threshold amount to increase estimated outlier payments from approximately 2.7 percent in FY 2011 to 3.0 percent in FY 2012 would result in a net change in estimated payments from FY 2011 to FY 2012 of $120 million.

The effects of the proposed changes that impact IRF PPS payment rates are shown in Table 14. The following proposed changes that affect the IRF PPS payment rates are discussed separately below:

- The effects of the proposed update to the outlier threshold amount, from approximately 2.7 to 3.0 percent of total estimated payments for FY 2012, consistent with section 1886(j)(4) of the Act.
- The effects of the 2.8 percent annual market basket update for FY 2012 (using the proposed rebased RPL market basket) to IRF PPS payment rates, as required by section 1886(j)(3)(A)(i) and section 1886(j)(3)(C) of the Act, including a 0.1 percentage point reduction for FY 2012 in accordance with sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act and a 1.2 percent productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act.
- The effects of applying the budget-neutral labor-related share and wage index adjustment, as required under section 1886(j)(6) of the Act.
- The effects of the proposed budget-neutral changes to the CMG relative weights and average length of stay values, under the authority of section 1886(j)(2)(C)(i) of the Act.
- The effects of the proposed budget-neutral changes to the facility-level adjustment factors, as permitted under section 1886(j)(3)(A)(v) of the Act.
- The effect of the data matching process to compute the DSH patient percentage used in the IPPS DSH adjustment that is also used by IRF PPS to compute the low-income percentage adjustment factor.
- The effect of the proposed IRF quality reporting program, Beginning in FY 2013.
- The total proposed change in estimated payments based on the FY 2012 proposed policies relative to estimated FY 2011 payments without the proposed policies.

ii. Description of Table 14

The table below categorizes IRFs by geographic location, including urban or rural location, and location with respect to CMS's nine census divisions (as defined on the cost report) of the country. In addition, the table divides IRFs into those that are separate rehabilitation hospitals (otherwise called freestanding hospitals in this section), those that are rehabilitation units of a hospital (otherwise called hospital units in this section), rural or urban facilities, ownership (otherwise called for-profit, non-profit, and government), and by teaching status. The top row of the table shows the overall impact on the 1,146 IRFs included in the analysis.

The next 12 rows of Table 14 contain IRFs categorized according to their geographic location, designation as either a freestanding hospital or a unit of a hospital, and by type of ownership; all urban, which is further divided into urban units of a hospital, urban freestanding hospitals, and by type of ownership; and all rural, which is further divided into rural units of a hospital, rural freestanding hospitals, and by type of ownership. There are 952 IRFs located in urban areas included in our analysis. Among these, there are 749 IRF units of hospitals located in urban areas and 203 freestanding IRF hospitals located in urban areas. There are 194 IRFs located in rural areas included in our analysis. Among these, there are 174 IRF units of hospitals located in rural areas and 20 freestanding IRF hospitals located in rural areas. There are 376 for-profit IRFs. Among these, there are 314 IRFs in urban areas and 62 IRFs in rural areas. There are 710 non-profit IRFs. Among these, there are 589 urban IRFs and 121 rural IRFs. There are 60 government-owned IRFs. Among these, there are 49 urban IRFs and 11 rural IRFs.

The remaining three parts of Table 14 show IRFs grouped by their geographic location within a region and by teaching status. First, IRFs located in urban areas are categorized with respect to their location within a particular one of the nine CMS geographic regions. Second, IRFs located in rural areas are categorized with respect to their location within a particular one of the nine CMS geographic regions. In some cases, especially for rural IRFs located in the New England, Mountain, and Pacific regions, the number of IRFs represented is small. Finally, IRFs are grouped by teaching status, including non-teaching IRFs, IRFs with an intern and resident to ADC ratio less than 10 percent, IRFs with an intern and resident to ADC ratio greater than or equal to 10 percent and less than or equal to 19 percent, and IRFs with an intern and resident to ADC ratio greater than 19 percent.

The estimated impacts of each proposed change to the facility categories listed above are shown in the columns of Table 14. The description of each column is as follows:

Column (1) shows the facility classification categories described above.

Column (2) shows the number of IRFs in each category in our FY 2010 analysis file.

Column (3) shows the number of cases in each category in our FY 2010 analysis file.

Column (4) shows the estimated effect of the proposed adjustment to the outlier threshold amount so that estimated outlier payments increase

from approximately 2.7 percent in FY 2011 to 3.0 percent of total estimated payments for FY 2012.

Column (5) shows the estimated effect of the rebased market basket update to the IRF PPS payment rates.

Column (6) shows the estimated effect of the update to the IRF labor-related share and wage index, in a budget neutral manner.

Column (7) shows the estimated effect of the update to the CMG relative weights and average length of stay values, in a budget neutral manner.

Column (8) shows the estimated effects of the updates to the facility-level adjustment factors (rural, LIP, and teaching status), in a budget neutral manner.

Column (9) compares our estimates of the payments per discharge, incorporating all of the proposed changes reflected in this proposed rule for FY 2012, to our estimates of payments per discharge in FY 2011 (without these proposed changes).

The average estimated increase for all IRFs is approximately 1.8 percent. This estimated increase includes the effects of the 1.5 percent market basket update, which is derived from a 2.8 percent rebased market basket update that is reduced by 0.1 percentage point for FY 2012 in accordance with sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act and by a 1.2 percentage point productivity adjustment as required by section 1886 (j)(3)(C)(ii)(I) of the Act. It also includes the 0.3 percent overall estimated increase (the difference between 2.7 percent in FY 2011 and 3.0 percent in FY 2012) in estimated IRF outlier payments from the proposed update to the outlier threshold amount. Because we are making the remainder of the proposed changes outlined in this proposed rule in a budget-neutral manner, they would not affect total estimated IRF payments in the aggregate. However, as described in more detail in each section, they would affect the estimated distribution of payments among providers.

TABLE 14: Proposed IRF Impact Table for FY 2012

Facility Classification	Number of IRFs	Number of Cases	Outlier	FY 2012 Adjusted Market Basket Increase Factor[1]	FY2012 CBSA wage index and labor-share	CMG	Facility Adjustments	Total Percent Change
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Total	1,146	393,611	0.3%	1.5%	0.0%	0.0%	0.0%	1.8%
Urban unit	749	198,550	0.4	1.5	-0.2	0.0	-0.3	1.4
Rural unit	174	27,842	0.3	1.5	0.7	0.1	0.6	3.3
Urban hospital	203	160,607	0.1	1.5	0.0	0.0	0.3	1.8
Rural hospital	20	6,612	0.1	1.5	1.6	0.0	0.7	3.9
Urban For-Profit	314	149,735	0.1	1.5	0.1	-0.1	0.2	1.9
Rural For-Profit	62	12,663	0.2	1.5	1.1	0.1	0.4	3.3
Urban Non-Profit	589	196,463	0.3	1.5	-0.3	0.0	-0.2	1.4
Rural Non-Profit	121	19,985	0.3	1.5	0.7	0.1	0.8	3.5
Urban Government	49	12,959	0.5	1.5	0.2	0.0	-0.8	1.3
Rural Government	11	1,806	0.5	1.5	1.3	0.2	0.2	3.6
Urban	952	359,157	0.3	1.5	-0.1	0.0	-0.1	1.6
Rural	194	34,454	0.3	1.5	0.9	0.1	0.7	3.4
Urban by region								
Urban New England	32	16,350	0.2	1.5	-1.1	0.0	-0.1	0.5
Urban Middle Atlantic	142	66,074	0.2	1.5	-0.7	0.0	-0.4	0.6
Urban South Atlantic	130	62,319	0.2	1.5	0.0	0.0	-0.1	1.7
Urban East North Central	188	56,771	0.3	1.5	0.0	0.0	0.2	2.1
Urban East South Central	49	26,281	0.1	1.5	0.4	-0.1	0.6	2.5
Urban West North Central	73	18,001	0.4	1.5	0.0	0.0	-0.1	1.8
Urban West South Central	168	65,894	0.2	1.5	0.5	0.0	0.6	2.8
Urban Mountain	70	23,787	0.3	1.5	0.2	-0.1	0.2	2.0
Urban Pacific	100	23,680	0.4	1.5	-0.2	0.0	-1.7	0.0
Rural by region								
Rural New England	6	1,350	0.6	1.6	0.8	0.1	1.1	4.1
Rural Middle Atlantic	16	3,207	0.1	1.5	1.8	0.1	1.9	5.4
Rural South Atlantic	24	5,958	0.2	1.5	0.8	0.1	0.9	3.4
Rural East North Central	33	5,749	0.3	1.5	0.1	0.1	1.4	3.4
Rural East South Central	23	3,983	0.2	1.5	1.3	0.0	-0.4	2.6
Rural West North Central	31	3,926	0.5	1.5	-0.2	0.1	1.1	3.0
Rural West South Central	50	9,228	0.3	1.5	1.6	0.1	-0.2	3.3
Rural Mountain	7	666	0.4	1.5	0.3	0.1	1.2	3.5
Rural Pacific	4	387	1.1	1.5	-0.3	0.0	0.6	2.9
Teaching status								
Non-teaching	1,029	341,958	0.2	1.5	0.1	0.0	0.5	2.3
Resident to ADC less than 10%	70	36,669	0.3	1.5	-0.4	0.0	-1.9	-0.5
Resident to ADC 10%-19%	32	12,272	0.4	1.5	-0.3	0.0	-3.4	-1.9
Resident to ADC greater than 19%	15	2,712	0.5	1.5	-0.6	0.0	-5.3	-3.9

[1]This column reflects the impact of the rebased RPL market basket increase factor for FY 2012 of 1.5 percent, including a 0.1 percentage point reduction in accordance with sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act and a 1.2 percent productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act.

iii. Impact of the Proposed Update to the Outlier Threshold Amount

In the FY 2011 IRF PPS notice (75 FR 42836), we used FY 2009 patient-level claims data (the best, most complete data available at that time) to set the outlier threshold amount for FY 2011 so that estimated outlier payments would equal 3 percent of total estimated payments for FY 2011. For this proposed rule, we are proposing to update our analysis using more current FY 2010 data. Using the updated FY 2010 data, we now estimate that IRF outlier payments, as a percentage of total estimated payments for FY 2011, decreased from 3 percent using the FY 2009 data to approximately 2.7 percent using the updated FY 2010 data. As a result, we are proposing to adjust the outlier threshold amount for FY 2012 to $11,822, reflecting total estimated outlier payments equal to 3 percent of total estimated payments in FY 2012.

The impact of the proposed update to the outlier threshold amount (as shown in column 4 of Table 14) is to increase estimated overall payments to IRFs by 0.3 percent. We do not estimate that any group of IRFs would experience a decrease in payments from this proposed update. We estimate the largest increase in payments to be a 1.1 percent increase in estimated payments to rural IRFs in the Pacific region.

iv. Impact of the Proposed Market Basket Update to the IRF PPS Payment Rates

The proposed adjusted market basket update to the IRF PPS payment rates is presented in column 5 of Table 14. The proposed FY 2008-based RPL market basket update is the same as the FY 2002-based RPL market basket (2.8 percent). In the aggregate the proposed update would result in a net 1.5 percent increase in overall estimated payments to IRFs. This net increase reflects the estimated rebased RPL market basket increase factor for FY 2012 of 2.8 percent, reduced by 0.1 percentage point in accordance with sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act and a 1.2 percent productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act.

v. Impact of the Proposed CBSA Wage Index and Labor-Related Share

In column 6 of Table 14, we present the effects of the proposed budget neutral update of the wage index and labor-related share. The changes to the wage index and the labor-related share are discussed together because the wage index is applied to the labor-related share portion of payments, so the changes in the two have a combined effect on payments to providers. As discussed in section V.A.4 of this proposed rule, the labor-related share decreased from 75.271 percent in FY 2011 to 70.334 percent in FY 2012.

In the aggregate, since these updates to the wage index and the labor-related share are applied in a budget-neutral manner as required under section 1886(j)(6) of the Act, we do not estimate that these updates will affect overall estimated payments to IRFs. However, we estimate that these proposed changes would have small distributional effects. For example, we estimate a 0.9 percent increase in payments to rural IRFs, with the largest increase in payments of 1.8 percent for rural IRFs in the Mid-Atlantic region. We estimate the largest decrease in payments from the proposed update to the CBSA wage index and labor-related share to be a 1.1 percent decrease for urban IRFs in the New England region.

vi. Impact of the Proposed Update to the CMG Relative Weights and Average Length of Stay Values

In column 7 of Table 14, we present the effects of the proposed budget neutral update of the CMG relative weights and average length of stay values. In the aggregate we do not estimate that these proposed updates will affect overall estimated payments to IRFs. However, we estimate that these proposed updates will have small distributional effects, with the largest increase in payments as a result of these updates being a 0.2 percent increase to rural government IRFs. The largest estimated decrease in payments as a result of these proposed updates is a 0.1 percent decrease to urban for-profit IRFs and urban IRFs in the Mountain region and East South Central region.

vii. Impact of the Proposed Update to the Rural, LIP, and Teaching Status Adjustment Factors

In column 8 of Table 14, we present the effects of the proposed budget neutral update to the rural, LIP, and teaching status adjustment factors. In the aggregate, we do not estimate that these proposed changes would affect overall estimated payments to IRFs. However, we estimate that these proposed changes would have small distributional effects. We estimate the largest increase in payments to be a 1.9 percent increase for IRFs in the rural Mid-Atlantic region. We estimate the largest decrease in payments to be a 5.3 percent decrease for teaching IRFs with resident to ADC ratios of greater than 19 percent.

viii. Impact of the IPPS Data Matching Process Changes on the IRF PPS Calculation of the Low-Income Percentage Adjustment Factor

In section VII of this proposed rule, we note the recent revision of the data matching process that is used to calculate the disproportionate share hospital (DSH) patient percentage used in the acute IPPS DSH adjustment. As we have stated previously, it is our policy in calculating the LIP adjustment factor to use the same disproportionate share hospital (DSH) patient percentage used in the acute IPPS DSH adjustment. This would include the data matching process. We are not able to provide a detailed analysis of the impact of the revised data matching process. That is, it is not possible to determine whether IRF LIP adjustment payments will generally increase or decrease, because IRFs' SSI fractions will vary depending on various factors, including the use of a more updated MedPAR claims data file, use of a more updated SSI eligibility data file, and the other features of the revised data matching process. See the FY 2011 IPPS final rule (75 FR 50663 through 50664) for more information on the revised data matching process.

ix. Impact of the Proposed IRF Quality Reporting Program Beginning in FY 2013

As discussed in section IX.B. of this proposed rule, we propose to begin collecting data on 2 quality measures from October 1, 2012 through December 31, 2012 (FY 2013). These quality measures are: (1) Catheter Associated Urinary Tract Infections; and (2) Pressure Ulcers that are New or Have Worsened. As discussed in section X. of this proposed rule, we estimate that IRFs would incur costs associated with the collection of these data, which we detail below.

Catheter Associated Urinary Tract Infections

As stated in section IX.C.1. of this proposed rule, we propose to collect data on the first quality measure, Catheter Associated Urinary Tract Infections, through the Centers for Disease Control (CDC)/National Health Safety Network (NHSN). CMS does not currently require IRFs to report data to NHSN. However, some IRFs submit data to NHSN either voluntarily or per state mandate. According to the CDC, 26 IRFs already report data to NHSN. We estimate that 1,120 IRFs (1146 minus the 26 IRFs that are already reporting data to NHSN) would incur costs for registering and completing the

necessary training provided by the CDC in FY 2012 in preparation for submitting the data beginning on October 1, 2012 (FY 2013). We estimate that registering and completing the necessary training of the required personnel at each IRF would take 4 hours at a cost of $41.59 per hour, at an estimated cost per IRF of $166.36 per IRF and a total estimated cost across all IRFs of $186,323.

Once IRFs begin submitting data to the NHSN on Catheter Associated Urinary Tract Infections by October 1, 2012 (FY 2013), they will need to submit two types of forms in order for CDC to calculate the CAUTI rate per 1000 urinary catheter days. We estimate that the first form, the Urinary Tract Infection (UTI) form, will take 15 minutes per reporting episode per IRF and that there will be approximately 2.25 NHSN submissions per IRF per month. Based on this estimate, we expect for each IRF to expend 33.75 minutes (0.5625) hours per month and 405 minutes (6.75) hours per year reporting to NHSN. The estimated annual burden to all IRFs in the U.S. for reporting to NHSN is 7,735.5 hours. The estimated yearly cost per IRF is $186.14 and the estimated total yearly cost across all IRFs is $213,322. While CDC estimates that the second form, the denominator form used to count daily the number of patients with an indwelling catheter device, will take 5 hours per month to complete, we estimate that it will take 2.5 hours per form per IRF per month as the number of patients with an indwelling catheter is the only part of this form that IRFs will be required to complete. We anticipate that there will be one form submitted per IRF per month and each IRF will expend 150 minutes (2.5 hours) per month and 1,800 minutes (30 hours) per year reporting to NHSN. The estimated annual burden to all IRFs in the U.S. for reporting to NHSN is 34,380 hours. The estimated cost per IRF is $1,247.70 per year and the estimated total yearly cost across all IRFs is $1,429,864. These costs are estimated using an hourly wage for a Registered Nurse of $41.59 and a Medical Billing Clerk/Data Entry person of $20.57.

Pressure Ulcers That Are New or Have Worsened

As stated in Section IX.C.2 of this proposed rule, we propose to modify the current IRF–PAI by removing the items currently in the "Quality Indicators" section and replacing them with pressure ulcer items similar to elements from the Minimum Data Set 3.0 (MDS 3.0) nursing home instrument. Since all IRFs are already required to complete and transmit IRF–PAIs on all Medicare Part A fee-for-service and Medicare Part C (Medicare Advantage) patients in order to receive payment from Medicare, and since the number of IRFs submitting claims to Medicare has remained stable over the past several years, we do not estimate that there are any IRFs that would need to conduct additional training or set-up for completing and transmitting the IRF–PAI. Thus, we do not estimate any additional cost to IRFs in FY 2012 for these activities. In addition, since IRFs are already transmitting the IRF–PAI form to CMS, we do not estimate any additional transmission costs associated with the proposed IRF quality reporting program. Further, we do not estimate any additional burden for IRFs to complete an IRF–PAI with mandatory quality measures as the IRF–PAI currently contains a voluntary "Quality Indicators" section, which will be replaced with the proposed pressure ulcer question set. When the original burden estimates were completed for the IRF–PAI, we estimated that the "Quality Indicators" section of the IRF–PAI would take about 10 minutes to complete, and we assumed that all IRFs would complete the Quality Indicators items, even though completion of this section was voluntary. Thus, removing the Quality Indicators items from the IRF–PAI would decrease the total estimated burden of completing each IRF–PAI by about 10 minutes. However, we estimate that it will take about 10 minutes to complete the new pressure ulcer item that we are proposing to require IRFs to complete as part of the new IRF quality reporting program. Since the time to complete the items that we are proposing to remove from the IRF–PAI is the same as the time to complete the new items we are proposing to add, we estimate no net change in the amount of time or the costs associated with completing each IRF–PAI.

5. Alternatives Considered

Although we have determined that this proposed rule will not have a significant economic impact on a substantial number of small entities, we have voluntarily prepared a discussion on the alternatives considered to the IRF PPS.

Section 1886(j)(3)(C) of the Act requires the Secretary to update the IRF PPS payment rates by an increase factor that reflects changes over time in the prices of an appropriate mix of goods and services included in the covered IRF services. Thus, we did not consider alternatives to updating payments using the estimated RPL market basket increase factor for FY 2012. In this proposed rule, we are proposing to rebase the RPL market basket for FY 2012, as we typically do every 5 to 7 years, from a 2002 base year to a 2008 base year. We considered not proposing this rebasing of the RPL market basket for FY 2012; however, periodically rebasing the RPL market basket ensures that it continues to reflect the most accurate account of the cost of relevant goods and services. For FY 2012, the proposed update on the FY 2008-based RPL market basket is the same as the FY 2002-based RPL market basket (2.8 percent). In accordance with the recently amended section 1886(j)(3)(C) of the Act, we are proposing to update IRF Federal prospective payments in this proposed rule by 1.5 percent (which equals the 2.8 percent estimated rebased RPL market basket increase factor for FY 2012 reduced by 0.1 percentage point, as required by sections 1886(j)(3)(C)(ii)(II) and 1886(j)(3)(D)(ii) of the Act and reduced by a 1.2 percent productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act).

We considered maintaining the existing CMG relative weights and average length of stay values for FY 2012. However, in light of recently available data and our desire to ensure that the CMG relative weights and average length of stay values are as reflective as possible of recent changes in IRF utilization and case mix, we believe that it is appropriate to update the CMG relative weights and average length of stay values at this time to ensure that IRF PPS payments continue to reflect as accurately as possible the current costs of care in IRFs.

We also considered maintaining the existing rural, LIP, and teaching status adjustment factors for FY 2012. However, as a result of recent changes in IRF utilization that have occurred because of changes in the IRF compliance percentage and the consequences of recent IRF medical necessity reviews, we believe that it is important to update these adjustment factors at this time to ensure that payments to IRFs reflect as accurately as possible the current costs of care in IRFs. In estimating the proposed updates to the rural, LIP, and teaching status adjustment factors, we implemented a 3-year moving average approach to updating the facility-level adjustment factors in the FY 2010 IRF PPS final rule (74 FR 39762) to provide greater stability and predictability of Medicare payments for IRFs.

We considered maintaining the existing outlier threshold amount for FY 2012. However, the proposed update to the outlier threshold amount would have a positive impact on IRF providers

and, therefore, on small entities (as shown in Table 14, column 4). If we were to maintain the FY 2011 outlier threshold amount, less outlier cases would qualify for the additional outlier payments in FY 2012. Analysis of updated FY 2010 data indicates that estimated outlier payments would not equal 3 percent of estimated total payments for FY 2012 unless we proposed to update the outlier threshold amount. Thus, we believe that this update is appropriate for FY 2012.

6. Accounting Statement

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf*), in Table 15 below, we have prepared an accounting statement showing the classification of the transfers associated with the provisions of this proposed rule. This table provides our best estimate of the increase in Medicare payments under the IRF PPS as a result of the proposed changes presented in this proposed rule based on the data for 1,146 IRFs in our database.

TABLE 15.--Accounting Statement: Classification of Estimated Transfers, from the 2011 IRF PPS Fiscal Year to the 2012 IRF PPS Fiscal Year

Category	Transfers
Annualized Monetized Transfers	$120 million
From Whom to Whom?	Federal Government to IRF Medicare Providers

7. Conclusion

Overall, the estimated payments per discharge for IRFs in FY 2012 are projected to increase by 1.8 percent, compared with those in FY 2011, as reflected in column 9 of Table 14. IRF payments are estimated to increase 1.6 percent in urban areas and 3.4 percent in rural areas, per discharge, compared with FY 2011. Payments to rehabilitation units in urban areas are estimated to increase 1.4 percent per discharge. Payments to rehabilitation freestanding hospitals in urban areas are estimated to increase 1.8 percent per discharge. Payments to rehabilitation units in rural areas are estimated to increase 3.3 percent per discharge, while payments to freestanding rehabilitation hospitals in rural areas are estimated to increase 3.9 percent per discharge.

Overall, the largest payment increase is estimated at 5.4 percent for rural IRFs in the Mid-Atlantic region. The only payment decreases we estimate are a 0.5 percent decrease, a 1.9 percent decrease, and a 3.9 percent decrease for teaching IRFs with resident to ADC ratios less than 10 percent, 10 to 19 percent, and greater than 19 percent, respectively.

B. Regulatory Flexibility Act Analysis

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most IRFs and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $34.5 million in any one year. (For details, see the Small Business Administration's Web site at *http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=2465b064ba6965cc1fbd2eae60854b11&rgn=div8&view=text&node=13:1.0.1.1.16.1.266.9&idno=13*) (refer to subsector 622). Because we lack data on individual hospital receipts, we cannot determine the number of small proprietary IRFs or the proportion of IRFs' revenue that is derived from Medicare payments. Therefore, we assume that all IRFs (an estimated 1,146 IRFs that are in our analysis file by virtue of having submitted at least one IRF claim to Medicare in FY 2010 that we are able to match to an IRF–PAI, of which approximately 60 percent are nonprofit facilities) are considered small entities and that Medicare payment constitutes the majority of their revenues. The Department of Health and Human Services generally uses a revenue or cost impact of 3 to 5 percent as a significance threshold under the RFA. There is no negative estimated impact as a result of this proposed rule that is within the significance threshold of 3 to 5 percent. As shown in Table 14, we estimate that the net revenue impact, of this proposed rule, on all IRFs is to increase estimated payments by about 1.8 percent, with an estimated increase in payments of 3 percent or higher for some categories of IRFs (such as rural IRFs in the New England, Mid-Atlantic, South Atlantic, East North Central, West North Central, West South Central, and Mountain) and an estimated decrease in payments of 3 percent or more for 15 teaching IRFs with resident to ADC ratios greater than 19 percent. Therefore, the majority of IRFs will experience a net positive increase in payments. As a result, the Secretary has determined that this proposed rule would not have a significant impact on a substantial number of small entities. We present, in the Alternatives Considered section (XII.A.5) above, an analysis of the alternatives we considered for this proposed IRF PPS rule. Medicare fiscal intermediaries and carriers are not considered to be small entities. Individuals and States are not included in the definition of a small entity. We solicit comment on the RFA analysis.

In addition, section 1102(b) of the Act requires us to prepare a RIA if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a MSA and has fewer than 100 beds. Based on the data of the 174 rural units and 20 rural hospitals in our database of 1,146 IRFs, we estimate that small rural IRF hospitals would receive between 2.6 percent and 5.4 percent higher net payments in FY 2012 due to the provisions in this proposed rule, with no rural IRF hospitals estimated to receive negative net payments. Thus, the Secretary has determined that the rates and policies set forth in this proposed rule would not have a significant impact on the operations of a substantial number of small rural hospitals.

C. Unfunded Mandates Reform Act Analysis

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any one year of $100 million in 1995 dollars, updated annually for inflation. In 2011, that threshold level is approximately $136 million. This proposed rule will not impose spending costs on State, local, or tribal governments, in the aggregate, or by the private sector, of $136 million.

XIII. Federalism Analysis

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. This proposed rule would have no substantial direct effect on State and local governments, preempt State law, or otherwise have Federalism implications.

List of Subjects in 42 CFR 412

Administrative practice and procedure, Health facilities, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV as follows:

PART 412—PROSPECTIVE PAYMENT SYSTEMS FOR INPATIENT HOSPITAL SERVICES

1. The authority citation for part 412 continues to read as follows:

Authority: Sections 1102, 1862, and 1871 of the Social Security Act (42 U.S.C. 1302, 1395y, and 1395hh).

Subpart B—Hospital Services Subject to and Excluded From the Prospective Payment Systems for Inpatient Operating Costs and Inpatient Capital-Related Costs

2. Section 412.23 is amended by revising paragraph (b) to read as follows:

§ 412.23 Excluded hospitals: Classifications.

* * * * *

(b) *Rehabilitation hospitals.* A rehabilitation hospital or unit must meet the requirements specified in § 412.29 of this subpart to be excluded from the prospective payment systems specified in § 412.1(a)(1) of this subpart and to be paid under the prospective payment system specified in § 412.1(a)(3) of this subpart and in subpart P of this part.

* * * * *

3. Section 412.25 is amended by revising paragraphs (b) and (e)(2)(ii)(A) to read as follows:

§ 412.25 Excluded hospital units: Common requirements.

* * * * *

(b) *Changes in the size of excluded units.* Except in the special cases noted at the end of this paragraph, changes in the number of beds or square footage considered to be part of an excluded unit under this section are allowed one time during a cost reporting period if the hospital notifies its Medicare contractor and the CMS RO in writing of the planned change at least 30 days before the date of the change. The hospital must maintain the information needed to accurately determine costs that are attributable to the excluded unit. A change in bed size or a change in square footage may occur at any time during a cost reporting period and must remain in effect for the rest of that cost reporting period. Changes in bed size or square footage may be made at any time if these changes are made necessary by relocation of a unit to permit construction or renovation necessary for compliance with changes in Federal, State, or local law affecting the physical facility or because of catastrophic events such as fires, floods, earthquakes, or tornadoes.

* * * * *

(e) * * *

(2) * * *

(ii) * * *

(A) For a rehabilitation unit, the requirements under § 412.29 of this subpart; or

* * * * *

4. Section 412.29 is revised to read as follows:

§ 412.29 Classification criteria for payment Under the Inpatient Rehabilitation Facility Prospective Payment System.

To be excluded from the prospective payment systems described in § 412.1(a)(1) of this subpart and to be paid under the prospective payment system specified in § 412.1(a)(3) of this subpart, an inpatient rehabilitation hospital or an inpatient rehabilitation unit of a hospital (otherwise referred to as an IRF) must meet the following requirements:

(a) Have (or be part of a hospital that has) a provider agreement under part 489 of this chapter to participate as a hospital.

(b) Except in the case of a "new" IRF or "new" IRF beds, as defined in paragraph (c) of this section, an IRF must show that, during its most recent, consecutive, and appropriate 12-month time period (as defined by CMS or the Medicare contractor), it served an inpatient population that meets the following criteria:

(1) For cost reporting periods beginning on or after July 1, 2004, and before July 1, 2005, the IRF served an inpatient population of whom at least 50 percent, and for cost reporting periods beginning on or after July 1, 2005, the IRF served an inpatient population of whom at least 60 percent required intensive rehabilitation services for treatment of one or more of the conditions specified at paragraph (b)(2) of this section. A patient with a comorbidity, as defined at § 412.602 of this part, may be included in the inpatient population that counts toward the required applicable percentage if—

(i) The patient is admitted for inpatient rehabilitation for a condition that is not one of the conditions specified in paragraph (b)(2) of this section;

(ii) The patient has a comorbidity that falls in one of the conditions specified in paragraph (b)(2) of this section; and

(iii) The comorbidity has caused significant decline in functional ability in the individual that, even in the absence of the admitting condition, the individual would require the intensive rehabilitation treatment that is unique to inpatient rehabilitation facilities paid under subpart P of this part and that cannot be appropriately performed in another care setting covered under this title.

(2) List of conditions.

(i) Stroke.

(ii) Spinal cord injury.

(iii) Congenital deformity.

(iv) Amputation.

(v) Major multiple trauma.

(vi) Fracture of femur (hip fracture).

(vii) Brain injury.

(viii) Neurological disorders, including multiple sclerosis, motor neuron diseases, polyneuropathy, muscular dystrophy, and Parkinson's disease.

(ix) Burns.

(x) Active, polyarticular rheumatoid arthritis, psoriatic arthritis, and seronegative arthropathies resulting in significant functional impairment of ambulation and other activities of daily living that have not improved after an appropriate, aggressive, and sustained course of outpatient therapy services or services in other less intensive rehabilitation settings immediately preceding the inpatient rehabilitation admission or that result from a systemic disease activation immediately before admission, but have the potential to

improve with more intensive rehabilitation.

(xi) Systemic vasculidities with joint inflammation, resulting in significant functional impairment of ambulation and other activities of daily living that have not improved after an appropriate, aggressive, and sustained course of outpatient therapy services or services in other less intensive rehabilitation settings immediately preceding the inpatient rehabilitation admission or that result from a systemic disease activation immediately before admission, but have the potential to improve with more intensive rehabilitation.

(xii) Severe or advanced osteoarthritis (osteoarthrosis or degenerative joint disease) involving two or more major weight bearing joints (elbow, shoulders, hips, or knees, but not counting a joint with a prosthesis) with joint deformity and substantial loss of range of motion, atrophy of muscles surrounding the joint, significant functional impairment of ambulation and other activities of daily living that have not improved after the patient has participated in an appropriate, aggressive, and sustained course of outpatient therapy services or services in other less intensive rehabilitation settings immediately preceding the inpatient rehabilitation admission but have the potential to improve with more intensive rehabilitation. (A joint replaced by a prosthesis no longer is considered to have osteoarthritis, or other arthritis, even though this condition was the reason for the joint replacement.)

(xiii) Knee or hip joint replacement, or both, during an acute hospitalization immediately preceding the inpatient rehabilitation stay and also meet one or more of the following specific criteria:

(A) The patient underwent bilateral knee or bilateral hip joint replacement surgery during the acute hospital admission immediately preceding the IRF admission.

(B) The patient is extremely obese with a Body Mass Index of at least 50 at the time of admission to the IRF.

(C) The patient is age 85 or older at the time of admission to the IRF.

(c) In the case of new IRFs (as defined in paragraph (c)(1) of this section) or new IRF beds (as defined in paragraph (c)(2)of this section), the IRF must provide a written certification that the inpatient population it intends to serve meets the requirements of paragraph (b) of this section. This written certification will apply until the end of the IRF's first full 12-month cost reporting period or, in the case of new IRF beds, until the end of the cost reporting period during which the new beds are added to the IRF.

(1) *New IRFs.* An IRF hospital or IRF unit is considered new if it has not been paid under the IRF PPS in subpart P of this part for at least 5 calendar years. A new IRF will be considered new from the point that it first participates in Medicare as an IRF until the end of its first full 12-month cost reporting period.

(2) *New IRF beds.* Any IRF beds that are added to an existing IRF must meet all applicable State Certificate of Need and State licensure laws. New IRF beds may be added one time at any point during a cost reporting period and will be considered new for the rest of that cost reporting period. A full 12-month cost reporting period must elapse between the delicensing or decertification of IRF beds in an IRF hospital or IRF unit and the addition of new IRF beds to that IRF hospital or IRF unit. Before an IRF can add new beds, it must receive written approval from the appropriate CMS RO, so that the CMS RO can verify that a full 12-month cost reporting period has elapsed since the IRF has had beds delicensed or decertified. New IRF beds are included in the compliance review calculations under paragraph (b) of this section from the time that they are added to the IRF.

(3) *Change of Ownership or Leasing.* An IRF hospital or IRF unit that undergoes a change of ownership or leasing, as defined in § 489.18 of this chapter, retains its excluded status and will continue to be paid under the prospective payment system specified in § 412.1(a)(3) of this subpart before and after the change of ownership or leasing if the new owner(s) of the IRF accept assignment of the previous owners' Medicare provider agreement and the IRF continues to meet all of the requirements for payment under the IRF prospective payment system. If the new owner(s) do not accept assignment of the previous owners' Medicare provider agreement, the IRF is considered to be voluntarily terminated and the new owner(s) may re-apply to participate in the Medicare program. If the IRF does not continue to meet all of the requirements for payment under the IRF prospective payment system, then the IRF loses its excluded status and is paid according to the prospective payment systems described in § 412.1(a)(1).

(4) *Mergers.* If an IRF hospital (or a hospital with an IRF unit) merges with another hospital and the owner(s) of the merged hospital accept assignment of the IRF hospital's provider agreement (or the provider agreement of the hospital with the IRF unit), then the IRF hospital or IRF unit retains its excluded status and will continue to be paid under the prospective payment system specified in § 412.1(a)(3) of this subpart before and after the merger, as long as the IRF hospital or IRF unit continues to meet all of the requirements for payment under the IRF prospective payment system. If the owner(s) of the merged hospital do not accept assignment of the IRF hospital's provider agreement (or the provider agreement of the hospital with the IRF unit), then the IRF hospital or IRF unit is considered voluntarily terminated and the owner(s) of the merged hospital may reapply to the Medicare program to operate a new IRF.

(d) Have in effect a preadmission screening procedure under which each prospective patient's condition and medical history are reviewed to determine whether the patient is likely to benefit significantly from an intensive inpatient hospital program. Each prospective patient's preadmission screening must be reviewed and approved by a rehabilitation physician prior to the patient's admission to the IRF.

(e) Ensure that the patients receive close medical supervision, as evidenced by at least 3 face-to-face visits per week by a licensed physician with specialized training and experience in inpatient rehabilitation to assess the patient both medically and functionally, as well as to modify the course of treatment as needed to maximize the patient's capacity to benefit from the rehabilitation process.

(f) Furnish, through the use of qualified personnel, rehabilitation nursing, physical therapy, and occupational therapy, plus, as needed, speech-language pathology, social services, psychological services (including neuropsychological services), and orthotic and prosthetic services.

(g) Have a director of rehabilitation who—

(1) Provides services to the IRF hospital and its inpatients on a full-time basis or, in the case of a rehabilitation unit, at least 20 hours per week;

(2) Is a doctor of medicine or osteopathy;

(3) Is licensed under State law to practice medicine or surgery; and

(4) Has had, after completing a one-year hospital internship, at least 2 years of training or experience in the medical-management of inpatients requiring rehabilitation services.

(h) Have a plan of treatment for each inpatient that is established, reviewed, and revised as needed by a physician in consultation with other professional personnel who provide services to the patient.

(i) Use a coordinated interdisciplinary team approach in the rehabilitation of each inpatient, as documented by the periodic clinical entries made in the patient's medical record to note the patient's status in relationship to goal attainment and discharge plans, and that team conferences are held at least once per week to determine the appropriateness of treatment.

(j) *Retroactive adjustments.* If a new IRF (or new beds that are added to an existing IRF) are excluded from the prospective payment systems specified in § 412.1(a)(1) of this subpart and paid under the prospective payment system specified in § 412.1(a)(3) of this subpart for a cost reporting period under paragraph (c) of this section, but the inpatient population actually treated during that period does not meet the requirements of paragraph (b) of this section, we adjust payments to the IRF retroactively in accordance with the provisions in § 412.130 of this subpart.

§ 412.30 [Removed and Reserved]

5. Section 412.30 is removed and reserved.

Subpart P—Prospective payment for inpatient rehabilitation hospitals and rehabilitation units

6. Section 412.624 is amended by:

A. Re-designating paragraph (c)(4) as (c)(5).

B. Adding a new paragraph (c)(4).

The addition reads as follows:

§ 412.624 Methodology for calculating the Federal prospective payment rates.

* * * * *

(c) * * *

(4) Applicable increase factor for fiscal year 2014 and for subsequent fiscal years. Subject to the provisions of paragraphs (c)(4)(i) and (c)(4)(ii) of this section, the applicable increase factor for fiscal year 2014 and for subsequent years for updating the standard payment conversion factor is the increase factor described in paragraph (a)(3) of this section, including adjustments described in paragraph (d) of this section as appropriate.

(i) In the case of an IRF that is paid under the prospective payment system specified in § 412.1(a)(3) of this part that does not submit quality data to CMS, in the form and manner specified by CMS, the applicable increase factor specified in paragraph (a)(3) of this section is reduced by 2 percentage points.

(ii) Any reduction of the increase factor will apply only to the fiscal year involved and will not be taken into account in computing the applicable increase factor for a subsequent fiscal year.

* * * * *

Authority: (Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: March 18, 2011.

Donald M. Berwick,

Administrator, Centers for Medicare & Medicaid Services.

Approved: April 18, 2011.

Kathleen Sebelius,

Secretary.

The following addendum will not appear in the Code of Federal Regulations.

Addendum

In this addendum, we provide the wage index tables referred to throughout the preamble to this proposed rule. The tables presented below are as follows:

Table A.—Proposed Inpatient Rehabilitation Facility Wage Index for Urban Areas for Discharges Occurring from October 1, 2011 through September 30, 2012.

Table B—Proposed Inpatient Rehabilitation Facility Wage Index for Rural Areas for Discharges Occurring from October 1, 2011 through September 30, 2012.

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TABLE A: PROPOSED INPATIENT REHABILITATION FACILITY WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM OCTOBER 1, 2011 THROUGH SEPTEMBER 30, 2012

	Urban Area (Constituent Counties)	Wage Index
10180	Abilene, TX Callahan County, TX Jones County, TX Taylor County, TX	0.8003
10380	Aguadilla-Isabela-San Sebastián, PR Aguada Municipio, PR Aguadilla Municipio, PR Añasco Municipio, PR Isabela Municipio, PR Lares Municipio, PR Moca Municipio, PR Rincón Municipio, PR San Sebastián Municipio, PR	0.3471
10420	Akron, OH Portage County, OH Summit County, OH	0.8843
10500	Albany, GA Baker County, GA Dougherty County, GA Lee County, GA Terrell County, GA Worth County, GA	0.9036
10580	Albany-Schenectady-Troy, NY Albany County, NY Rensselaer County, NY Saratoga County, NY Schenectady County, NY Schoharie County, NY	0.8653
10740	Albuquerque, NM Bernalillo County, NM Sandoval County, NM Torrance County, NM Valencia County, NM	0.9456
10780	Alexandria, LA Grant Parish, LA Rapides Parish, LA	0.7995
10900	Allentown-Bethlehem-Easton, PA-NJ Warren County, NJ Carbon County, PA Lehigh County, PA Northampton County, PA	0.9194
11020	Altoona, PA Blair County, PA	0.8620
11100	Amarillo, TX Armstrong County, TX Carson County, TX Potter County, TX Randall County, TX	0.8644
11180	Ames, IA Story County, IA	0.9970
11260	Anchorage, AK Anchorage Municipality, AK Matanuska-Susitna Borough, AK	1.1964
11300	Anderson, IN Madison County, IN	0.9192
11340	Anderson, SC Anderson County, SC	0.8691
11460	Ann Arbor, MI Washtenaw County, MI	1.0124
11500	Anniston-Oxford, AL Calhoun County, AL	0.7918
11540	Appleton, WI Calumet County, WI Outagamie County, WI	0.9361
11700	Asheville, NC Buncombe County, NC Haywood County, NC Henderson County, NC Madison County, NC	0.9001
12020	Athens-Clarke County, GA Clarke County, GA Madison County, GA Oconee County, GA Oglethorpe County, GA	0.9659

	Urban Area (Constituent Counties)	Wage Index
12060	Atlanta-Sandy Springs-Marietta, GA Barrow County, GA Bartow County, GA Butts County, GA Carroll County, GA Cherokee County, GA Clayton County, GA Cobb County, GA Coweta County, GA Dawson County, GA DeKalb County, GA Douglas County, GA Fayette County, GA Forsyth County, GA Fulton County, GA Gwinnett County, GA Haralson County, GA Heard County, GA Henry County, GA Jasper County, GA Lamar County, GA Meriwether County, GA Newton County, GA Paulding County, GA Pickens County, GA Pike County, GA Rockdale County, GA Spalding County, GA Walton County, GA	0.9549
12100	Atlantic City-Hammonton, NJ Atlantic County, NJ	1.1129
12220	Auburn-Opelika, AL Lee County, AL	0.7190
12260	Augusta-Richmond County, GA-SC Burke County, GA Columbia County, GA McDuffie County, GA Richmond County, GA Aiken County, SC Edgefield County, SC	0.9538
12420	Austin-Round Rock, TX Bastrop County, TX Caldwell County, TX Hays County, TX Travis County, TX Williamson County, TX	0.9514
12540	Bakersfield, CA Kern County, CA	1.1707
12580	Baltimore-Towson, MD Anne Arundel County, MD Baltimore County, MD Carroll County, MD Harford County, MD Howard County, MD Queen Anne's County, MD Baltimore City, MD	1.0255
12620	Bangor, ME Penobscot County, ME	0.9777
12700	Barnstable Town, MA Barnstable County, MA	1.2823
12940	Baton Rouge, LA Ascension Parish, LA East Baton Rouge Parish, LA East Feliciana Parish, LA Iberville Parish, LA Livingston Parish, LA Pointe Coupee Parish, LA St. Helena Parish, LA West Baton Rouge Parish, LA West Feliciana Parish, LA	0.8583
12980	Battle Creek, MI Calhoun County, MI	0.9656
13020	Bay City, MI Bay County, MI	0.9221
13140	Beaumont-Port Arthur, TX Hardin County, TX Jefferson County, TX Orange County, TX	0.8488
13380	Bellingham, WA Whatcom County, WA	1.1390
13460	Bend, OR Deschutes County, OR	1.1372

	Urban Area (Constituent Counties)	Wage Index
13644	Bethesda-Frederick-Gaithersburg, MD Frederick County, MD Montgomery County, MD	1.0525
13740	Billings, MT Carbon County, MT Yellowstone County, MT	0.8674
13780	Binghamton, NY Broome County, NY Tioga County, NY	0.8719
13820	Birmingham-Hoover, AL Bibb County, AL Blount County, AL Chilton County, AL Jefferson County, AL St. Clair County, AL Shelby County, AL Walker County, AL	0.8611
13900	Bismarck, ND Burleigh County, ND Morton County, ND	0.7348
13980	Blacksburg-Christiansburg-Radford, VA Giles County, VA Montgomery County, VA Pulaski County, VA Radford City, VA	0.8314
14020	Bloomington, IN Greene County, IN Monroe County, IN Owen County, IN	0.8989
14060	Bloomington-Normal, IL McLean County, IL	0.9439
14260	Boise City-Nampa, ID Ada County, ID Boise County, ID Canyon County, ID Gem County, ID Owyhee County, ID	0.9273
14484	Boston-Quincy, MA Norfolk County, MA Plymouth County, MA Suffolk County, MA	1.2178
14500	Boulder, CO Boulder County, CO	1.0065
14540	Bowling Green, KY Edmonson County, KY Warren County, KY	0.8666
14740	Bremerton-Silverdale, WA Kitsap County, WA	1.0667
14860	Bridgeport-Stamford-Norwalk, CT Fairfield County, CT	1.2547
15180	Brownsville-Harlingen, TX Cameron County, TX	0.9173
15260	Brunswick, GA Brantley County, GA Glynn County, GA McIntosh County, GA	0.9209
15380	Buffalo-Niagara Falls, NY Erie County, NY Niagara County, NY	0.9530
15500	Burlington, NC Alamance County, NC	0.8863
15540	Burlington-South Burlington, VT Chittenden County, VT Franklin County, VT Grand Isle County, VT	0.9947
15764	Cambridge-Newton-Framingham, MA Middlesex County, MA	1.1250
15804	Camden, NJ Burlington County, NJ Camden County, NJ Gloucester County, NJ	1.0386
15940	Canton-Massillon, OH Carroll County, OH Stark County, OH	0.8749
15980	Cape Coral-Fort Myers, FL Lee County, FL	0.9195
16020	Cape Girardeau-Jackson, MO-IL Alexander County, IL Bollinger County, MO Cape Girardeau County, MO	0.8983
16180	Carson City, NV Carson City, NV	1.0465
16220	Casper, WY Natrona County, WY	0.9655

	Urban Area (Constituent Counties)	Wage Index
16300	Cedar Rapids, IA Benton County, IA Jones County, IA Linn County, IA	0.8844
16580	Champaign-Urbana, IL Champaign County, IL Ford County, IL Piatt County, IL	1.0235
16620	Charleston, WV Boone County, WV Clay County, WV Kanawha County, WV Lincoln County, WV Putnam County, WV	0.7895
16700	Charleston-North Charleston-Summerville, SC Berkeley County, SC Charleston County, SC Dorchester County, SC	0.9354
16740	Charlotte-Gastonia-Concord, NC-SC Anson County, NC Cabarrus County, NC Gaston County, NC Mecklenburg County, NC Union County, NC York County, SC	0.9420
16820	Charlottesville, VA Albemarle County, VA Fluvanna County, VA Greene County, VA Nelson County, VA Charlottesville City, VA	0.9342
16860	Chattanooga, TN-GA Catoosa County, GA Dade County, GA Walker County, GA Hamilton County, TN Marion County, TN Sequatchie County, TN	0.8829
16940	Cheyenne, WY Laramie County, WY	0.9392
16974	Chicago-Naperville-Joliet, IL Cook County, IL DeKalb County, IL DuPage County, IL Grundy County, IL Kane County, IL Kendall County, IL McHenry County, IL Will County, IL	1.0593
17020	Chico, CA Butte County, CA	1.1533
17140	Cincinnati-Middletown, OH-KY-IN Dearborn County, IN Franklin County, IN Ohio County, IN Boone County, KY Bracken County, KY Campbell County, KY Gallatin County, KY Grant County, KY Kenton County, KY Pendleton County, KY Brown County, OH Butler County, OH Clermont County, OH Hamilton County, OH Warren County, OH	0.9699
17300	Clarksville, TN-KY Christian County, KY Trigg County, KY Montgomery County, TN Stewart County, TN	0.7888
17420	Cleveland, TN Bradley County, TN Polk County, TN	0.7731
17460	Cleveland-Elyria-Mentor, OH Cuyahoga County, OH Geauga County, OH Lake County, OH Lorain County, OH Medina County, OH	0.9050
17660	Coeur d'Alene, ID Kootenai County, ID	0.9364

	Urban Area (Constituent Counties)	Wage Index
17780	College Station-Bryan, TX Brazos County, TX Burleson County, TX Robertson County, TX	0.9588
17820	Colorado Springs, CO El Paso County, CO Teller County, CO	0.9481
17860	Columbia, MO Boone County, MO Howard County, MO	0.8282
17900	Columbia, SC Calhoun County, SC Fairfield County, SC Kershaw County, SC Lexington County, SC Richland County, SC Saluda County, SC	0.8733
17980	Columbus, GA-AL Russell County, AL Chattahoochee County, GA Harris County, GA Marion County, GA Muscogee County, GA	0.9027
18020	Columbus, IN Bartholomew County, IN	0.9434
18140	Columbus, OH Delaware County, OH Fairfield County, OH Franklin County, OH Licking County, OH Madison County, OH Morrow County, OH Pickaway County, OH Union County, OH	1.0141
18580	Corpus Christi, TX Aransas County, TX Nueces County, TX San Patricio County, TX	0.8585
18700	Corvallis, OR Benton County, OR	1.0455
18880	Crestview-Fort Walton Beach-Destin, FL Okaloosa County, FL	0.8842

	Urban Area (Constituent Counties)	Wage Index
19060	Cumberland, MD-WV Allegany County, MD Mineral County, WV	0.8186
19124	Dallas-Plano-Irving, TX Collin County, TX Dallas County, TX Delta County, TX Denton County, TX Ellis County, TX Hunt County, TX Kaufman County, TX Rockwall County, TX	0.9860
19140	Dalton, GA Murray County, GA Whitfield County, GA	0.8622
19180	Danville, IL Vermilion County, IL	0.9693
19260	Danville, VA Pittsylvania County, VA Danville City, VA	0.8168
19340	Davenport-Moline-Rock Island, IA-IL Henry County, IL Mercer County, IL Rock Island County, IL Scott County, IA	0.8400
19380	Dayton, OH Greene County, OH Miami County, OH Montgomery County, OH Preble County, OH	0.9140
19460	Decatur, AL Lawrence County, AL Morgan County, AL	0.7621
19500	Decatur, IL Macon County, IL	0.7916
19660	Deltona-Daytona Beach-Ormond Beach, FL Volusia County, FL	0.8736

	Urban Area (Constituent Counties)	Wage Index
19740	Denver-Aurora-Broomfield, CO Adams County, CO Arapahoe County, CO Broomfield County, CO Clear Creek County, CO Denver County, CO Douglas County, CO Elbert County, CO Gilpin County, CO Jefferson County, CO Park County, CO	1.0718
19780	Des Moines-West Des Moines, IA Dallas County, IA Guthrie County, IA Madison County, IA Polk County, IA Warren County, IA	0.9621
19804	Detroit-Livonia-Dearborn, MI Wayne County, MI	0.9699
20020	Dothan, AL Geneva County, AL Henry County, AL Houston County, AL	0.7435
20100	Dover, DE Kent County, DE	0.9921
20220	Dubuque, IA Dubuque County, IA	0.8774
20260	Duluth, MN-WI Carlton County, MN St. Louis County, MN Douglas County, WI	1.0565
20500	Durham-Chapel Hill, NC Chatham County, NC Durham County, NC Orange County, NC Person County, NC	0.9664
20740	Eau Claire, WI Chippewa County, WI Eau Claire County, WI	0.9639
20764	Edison-New Brunswick, NJ Middlesex County, NJ Monmouth County, NJ Ocean County, NJ Somerset County, NJ	1.1006
20940	El Centro, CA Imperial County, CA	0.9258
21060	Elizabethtown, KY Hardin County, KY Larue County, KY	0.8449
21140	Elkhart-Goshen, IN Elkhart County, IN	0.9465
21300	Elmira, NY Chemung County, NY	0.8445
21340	El Paso, TX El Paso County, TX	0.8475
21500	Erie, PA Erie County, PA	0.8360
21660	Eugene-Springfield, OR Lane County, OR	1.1384
21780	Evansville, IN-KY Gibson County, IN Posey County, IN Vanderburgh County, IN Warrick County, IN Henderson County, KY Webster County, KY	0.8433
21820	Fairbanks, AK Fairbanks North Star Borough, AK	1.1080
21940	Fajardo, PR Ceiba Municipio, PR Fajardo Municipio, PR Luquillo Municipio, PR	0.3883
22020	Fargo, ND-MN Cass County, ND Clay County, MN	0.8064
22140	Farmington, NM San Juan County, NM	0.9339
22180	Fayetteville, NC Cumberland County, NC Hoke County, NC	0.9323

	Urban Area (Constituent Counties)	Wage Index
22220	Fayetteville-Springdale-Rogers, AR-MO Benton County, AR Madison County, AR Washington County, AR McDonald County, MO	0.8616
22380	Flagstaff, AZ Coconino County, AZ	1.2443
22420	Flint, MI Genesee County, MI	1.1496
22500	Florence, SC Darlington County, SC Florence County, SC	0.8252
22520	Florence-Muscle Shoals, AL Colbert County, AL Lauderdale County, AL	0.8144
22540	Fond du Lac, WI Fond du Lac County, WI	0.9223
22660	Fort Collins-Loveland, CO Larimer County, CO	0.9892
22744	Fort Lauderdale-Pompano Beach-Deerfield Beach, FL Broward County, FL	1.0160
22900	Fort Smith, AR-OK Crawford County, AR Franklin County, AR Sebastian County, AR Le Flore County, OK Sequoyah County, OK	0.7599
23060	Fort Wayne, IN Allen County, IN Wells County, IN Whitley County, IN	0.9362
23104	Fort Worth-Arlington, TX Johnson County, TX Parker County, TX Tarrant County, TX Wise County, TX	0.9474
23420	Fresno, CA Fresno County, CA	1.1422
23460	Gadsden, AL Etowah County, AL	0.7180
23540	Gainesville, FL Alachua County, FL Gilchrist County, FL	0.9160
23580	Gainesville, GA Hall County, GA	0.9223
23844	Gary, IN Jasper County, IN Lake County, IN Newton County, IN Porter County, IN	0.9084
24020	Glens Falls, NY Warren County, NY Washington County, NY	0.8507
24140	Goldsboro, NC Wayne County, NC	0.9067
24220	Grand Forks, ND-MN Polk County, MN Grand Forks County, ND	0.7717
24300	Grand Junction, CO Mesa County, CO	0.9850
24340	Grand Rapids-Wyoming, MI Barry County, MI Ionia County, MI Kent County, MI Newaygo County, MI	0.9169
24500	Great Falls, MT Cascade County, MT	0.8289
24540	Greeley, CO Weld County, CO	0.9496
24580	Green Bay, WI Brown County, WI Kewaunee County, WI Oconto County, WI	0.9586
24660	Greensboro-High Point, NC Guilford County, NC Randolph County, NC Rockingham County, NC	0.8882
24780	Greenville, NC Greene County, NC Pitt County, NC	0.9370

	Urban Area (Constituent Counties)	Wage Index
24860	Greenville-Mauldin-Easley, SC Greenville County, SC Laurens County, SC Pickens County, SC	0.9644
25020	Guayama, PR Arroyo Municipio, PR Guayama Municipio, PR Patillas Municipio, PR	0.3686
25060	Gulfport-Biloxi, MS Hancock County, MS Harrison County, MS Stone County, MS	0.8877
25180	Hagerstown-Martinsburg, MD-WV Washington County, MD Berkeley County, WV Morgan County, WV	0.9254
25260	Hanford-Corcoran, CA Kings County, CA	1.1205
25420	Harrisburg-Carlisle, PA Cumberland County, PA Dauphin County, PA Perry County, PA	0.9296
25500	Harrisonburg, VA Rockingham County, VA Harrisonburg City, VA	0.9158
25540	Hartford-West Hartford-East Hartford, CT Hartford County, CT Middlesex County, CT Tolland County, CT	1.0927
25620	Hattiesburg, MS Forrest County, MS Lamar County, MS Perry County, MS	0.7714
25860	Hickory-Lenoir-Morganton, NC Alexander County, NC Burke County, NC Caldwell County, NC Catawba County, NC	0.8693
25980	Hinesville-Fort Stewart, GA[1] Liberty County, GA Long County, GA	0.8958
26100	Holland-Grand Haven, MI Ottawa County, MI	0.8632
26180	Honolulu, HI Honolulu County, HI	1.1807
26300	Hot Springs, AR Garland County, AR	0.9151
26380	Houma-Bayou Cane-Thibodaux, LA Lafourche Parish, LA Terrebonne Parish, LA	0.7852
26420	Houston-Sugar Land-Baytown, TX Austin County, TX Brazoria County, TX Chambers County, TX Fort Bend County, TX Galveston County, TX Harris County, TX Liberty County, TX Montgomery County, TX San Jacinto County, TX Waller County, TX	0.9824
26580	Huntington-Ashland, WV-KY-OH Boyd County, KY Greenup County, KY Lawrence County, OH Cabell County, WV Wayne County, WV	0.8953
26620	Huntsville, AL Limestone County, AL Madison County, AL	0.9191
26820	Idaho Falls, ID Bonneville County, ID Jefferson County, ID	0.9663
26900	Indianapolis-Carmel, IN Boone County, IN Brown County, IN Hamilton County, IN Hancock County, IN Hendricks County, IN Johnson County, IN Marion County, IN Morgan County, IN Putnam County, IN Shelby County, IN	0.9672
26980	Iowa City, IA Johnson County, IA Washington County, IA	0.9657

	Urban Area (Constituent Counties)	Wage Index
27060	Ithaca, NY Tompkins County, NY	0.9842
27100	Jackson, MI Jackson County, MI	0.9155
27140	Jackson, MS Copiah County, MS Hinds County, MS Madison County, MS Rankin County, MS Simpson County, MS	0.8042
27180	Jackson, TN Chester County, TN Madison County, TN	0.8404
27260	Jacksonville, FL Baker County, FL Clay County, FL Duval County, FL Nassau County, FL St. Johns County, FL	0.8884
27340	Jacksonville, NC Onslow County, NC	0.7807
27500	Janesville, WI Rock County, WI	0.9415
27620	Jefferson City, MO Callaway County, MO Cole County, MO Moniteau County, MO Osage County, MO	0.8434
27740	Johnson City, TN Carter County, TN Unicoi County, TN Washington County, TN	0.8105
27780	Johnstown, PA Cambria County, PA	0.8090
27860	Jonesboro, AR Craighead County, AR Poinsett County, AR	0.7757
27900	Joplin, MO Jasper County, MO Newton County, MO	0.8214
28020	Kalamazoo-Portage, MI Kalamazoo County, MI Van Buren County, MI	1.0292
28100	Kankakee-Bradley, IL Kankakee County, IL	1.0619
28140	Kansas City, MO-KS Franklin County, KS Johnson County, KS Leavenworth County, KS Linn County, KS Miami County, KS Wyandotte County, KS Bates County, MO Caldwell County, MO Cass County, MO Clay County, MO Clinton County, MO Jackson County, MO Lafayette County, MO Platte County, MO Ray County, MO	0.9652
28420	Kennewick-Pasco-Richland, WA Benton County, WA Franklin County, WA	0.9976
28660	Killeen-Temple-Fort Hood, TX Bell County, TX Coryell County, TX Lampasas County, TX	0.8798
28700	Kingsport-Bristol-Bristol, TN-VA Hawkins County, TN Sullivan County, TN Bristol City, VA Scott County, VA Washington County, VA	0.7588
28740	Kingston, NY Ulster County, NY	0.9075
28940	Knoxville, TN Anderson County, TN Blount County, TN Knox County, TN Loudon County, TN Union County, TN	0.7842
29020	Kokomo, IN Howard County, IN Tipton County, IN	0.9130
29100	La Crosse, WI-MN Houston County, MN La Crosse County, WI	0.9803

	Urban Area (Constituent Counties)	Wage Index
29140	Lafayette, IN Benton County, IN Carroll County, IN Tippecanoe County, IN	0.9289
29180	Lafayette, LA Lafayette Parish, LA St. Martin Parish, LA	0.8489
29340	Lake Charles, LA Calcasieu Parish, LA Cameron Parish, LA	0.8196
29404	Lake County-Kenosha County, IL-WI Lake County, IL Kenosha County, WI	1.0781
29420	Lake Havasu City-Kingman, AZ Mohave County, AZ	1.0235
29460	Lakeland-Winter Haven, FL Polk County, FL	0.8447
29540	Lancaster, PA Lancaster County, PA	0.9344
29620	Lansing-East Lansing, MI Clinton County, MI Eaton County, MI Ingham County, MI	1.0298
29700	Laredo, TX Webb County, TX	0.7914
29740	Las Cruces, NM Dona Ana County, NM	0.9296
29820	Las Vegas-Paradise, NV Clark County, NV	1.2099
29940	Lawrence, KS Douglas County, KS	0.8533
30020	Lawton, OK Comanche County, OK	0.8285
30140	Lebanon, PA Lebanon County, PA	0.7807
30300	Lewiston, ID-WA Nez Perce County, ID Asotin County, WA	0.9358
30340	Lewiston-Auburn, ME Androscoggin County, ME	0.8903

	Urban Area (Constituent Counties)	Wage Index
30460	Lexington-Fayette, KY Bourbon County, KY Clark County, KY Fayette County, KY Jessamine County, KY Scott County, KY Woodford County, KY	0.8817
30620	Lima, OH Allen County, OH	0.9271
30700	Lincoln, NE Lancaster County, NE Seward County, NE	0.9617
30780	Little Rock-North Little Rock-Conway, AR Faulkner County, AR Grant County, AR Lonoke County, AR Perry County, AR Pulaski County, AR Saline County, AR	0.8546
30860	Logan, UT-ID Franklin County, ID Cache County, UT	0.8794
30980	Longview, TX Gregg County, TX Rusk County, TX Upshur County, TX	0.8563
31020	Longview, WA Cowlitz County, WA	1.0296
31084	Los Angeles-Long Beach-Glendale, CA Los Angeles County, CA	1.2130
31140	Louisville-Jefferson County, KY-IN Clark County, IN Floyd County, IN Harrison County, IN Washington County, IN Bullitt County, KY Henry County, KY Meade County, KY Nelson County, KY Oldham County, KY Shelby County, KY Spencer County, KY Trimble County, KY	0.8896

	Urban Area (Constituent Counties)	Wage Index
31180	Lubbock, TX Crosby County, TX Lubbock County, TX	0.8847
31340	Lynchburg, VA Amherst County, VA Appomattox County, VA Bedford County, VA Campbell County, VA Bedford City, VA Lynchburg City, VA	0.8694
31420	Macon, GA Bibb County, GA Crawford County, GA Jones County, GA Monroe County, GA Twiggs County, GA	0.9202
31460	Madera-Chowchilla, CA Madera County, CA	0.7986
31540	Madison, WI Columbia County, WI Dane County, WI Iowa County, WI	1.1294
31700	Manchester-Nashua, NH Hillsborough County, NH	0.9869
31740	Manhattan, KS Geary County, KS Pottawatomie County, KS Riley County, KS	0.7847
31860	Mankato-North Mankato, MN Blue Earth County, MN Nicollet County, MN	0.9083
31900	Mansfield, OH Richland County, OH	0.8918
32420	Mayagüez, PR Hormigueros Municipio, PR Mayagüez Municipio, PR	0.3640
32580	McAllen-Edinburg-Mission, TX Hidalgo County, TX	0.8837
32780	Medford, OR Jackson County, OR	1.0061

	Urban Area (Constituent Counties)	Wage Index
32820	Memphis, TN-MS-AR Crittenden County, AR DeSoto County, MS Marshall County, MS Tate County, MS Tunica County, MS Fayette County, TN Shelby County, TN Tipton County, TN	0.9268
32900	Merced, CA Merced County, CA	1.2359
33124	Miami-Miami Beach-Kendall, FL Miami-Dade County, FL	1.0128
33140	Michigan City-La Porte, IN LaPorte County, IN	0.9470
33260	Midland, TX Midland County, TX	0.9711
33340	Milwaukee-Waukesha-West Allis, WI Milwaukee County, WI Ozaukee County, WI Washington County, WI Waukesha County, WI	1.0183
33460	Minneapolis-St. Paul-Bloomington, MN-WI Anoka County, MN Carver County, MN Chisago County, MN Dakota County, MN Hennepin County, MN Isanti County, MN Ramsey County, MN Scott County, MN Sherburne County, MN Washington County, MN Wright County, MN Pierce County, WI St. Croix County, WI	1.1143
33540	Missoula, MT Missoula County, MT	0.8921
33660	Mobile, AL Mobile County, AL	0.7960
33700	Modesto, CA Stanislaus County, CA	1.2104

	Urban Area (Constituent Counties)	Wage Index
33740	Monroe, LA Ouachita Parish, LA Union Parish, LA	0.7993
33780	Monroe, MI Monroe County, MI	0.8684
33860	Montgomery, AL Autauga County, AL Elmore County, AL Lowndes County, AL Montgomery County, AL	0.8442
34060	Morgantown, WV Monongalia County, WV Preston County, WV	0.8137
34100	Morristown, TN Grainger County, TN Hamblen County, TN Jefferson County, TN	0.7041
34580	Mount Vernon-Anacortes, WA Skagit County, WA	1.0363
34620	Muncie, IN Delaware County, IN	0.8206
34740	Muskegon-Norton Shores, MI Muskegon County, MI	0.9809
34820	Myrtle Beach-North Myrtle Beach-Conway, SC Horry County, SC	0.8738
34900	Napa, CA Napa County, CA	1.4604
34940	Naples-Marco Island, FL Collier County, FL	0.9698
34980	Nashville-Davidson—Murfreesboro-Franklin, TN Cannon County, TN Cheatham County, TN Davidson County, TN Dickson County, TN Hickman County, TN Macon County, TN Robertson County, TN Rutherford County, TN Smith County, TN Sumner County, TN Trousdale County, TN Williamson County, TN Wilson County, TN	0.9457
35004	Nassau-Suffolk, NY Nassau County, NY Suffolk County, NY	1.2315
35084	Newark-Union, NJ-PA Essex County, NJ Hunterdon County, NJ Morris County, NJ Sussex County, NJ Union County, NJ Pike County, PA	1.1460
35300	New Haven-Milford, CT New Haven County, CT	1.1515
35380	New Orleans-Metairie-Kenner, LA Jefferson Parish, LA Orleans Parish, LA Plaquemines Parish, LA St. Bernard Parish, LA St. Charles Parish, LA St. John the Baptist Parish, LA St. Tammany Parish, LA	0.9070

	Urban Area (Constituent Counties)	Wage Index
35644	New York-White Plains-Wayne, NY-NJ Bergen County, NJ Hudson County, NJ Passaic County, NJ Bronx County, NY Kings County, NY New York County, NY Putnam County, NY Queens County, NY Richmond County, NY Rockland County, NY Westchester County, NY	1.2955
35660	Niles-Benton Harbor, MI Berrien County, MI	0.8872
35840	North Port-Bradenton-Sarasota-Venice, FL Manatee County, FL Sarasota County, FL	0.9481
35980	Norwich-New London, CT New London County, CT	1.1215
36084	Oakland-Fremont-Hayward, CA Alameda County, CA Contra Costa County, CA	1.6354
36100	Ocala, FL Marion County, FL	0.8468
36140	Ocean City, NJ Cape May County, NJ	1.0879
36220	Odessa, TX Ector County, TX	0.9436
36260	Ogden-Clearfield, UT Davis County, UT Morgan County, UT Weber County, UT	0.9267
36420	Oklahoma City, OK Canadian County, OK Cleveland County, OK Grady County, OK Lincoln County, OK Logan County, OK McClain County, OK Oklahoma County, OK	0.8877
36500	Olympia, WA Thurston County, WA	1.1269

	Urban Area (Constituent Counties)	Wage Index
36540	Omaha-Council Bluffs, NE-IA Harrison County, IA Mills County, IA Pottawattamie County, IA Cass County, NE Douglas County, NE Sarpy County, NE Saunders County, NE Washington County, NE	0.9583
36740	Orlando-Kissimmee, FL Lake County, FL Orange County, FL Osceola County, FL Seminole County, FL	0.9163
36780	Oshkosh-Neenah, WI Winnebago County, WI	0.9566
36980	Owensboro, KY Daviess County, KY Hancock County, KY McLean County, KY	0.8370
37100	Oxnard-Thousand Oaks-Ventura, CA Ventura County, CA	1.2377
37340	Palm Bay-Melbourne-Titusville, FL Brevard County, FL	0.9211
37380	Palm Coast, FL Flagler County, FL	0.8405
37460	Panama City-Lynn Haven-Panama City Beach, FL Bay County, FL	0.7954
37620	Parkersburg-Marietta-Vienna, WV-OH Washington County, OH Pleasants County, WV Wirt County, WV Wood County, WV	0.7455
37700	Pascagoula, MS George County, MS Jackson County, MS	0.8299
37764	Peabody, MA Essex County, MA	1.0979
37860	Pensacola-Ferry Pass-Brent, FL Escambia County, FL Santa Rosa County, FL	0.8254

	Urban Area (Constituent Counties)	Wage Index
37900	Peoria, IL Marshall County, IL Peoria County, IL Stark County, IL Tazewell County, IL Woodford County, IL	0.9149
37964	Philadelphia, PA Bucks County, PA Chester County, PA Delaware County, PA Montgomery County, PA Philadelphia County, PA	1.0803
38060	Phoenix-Mesa-Scottsdale, AZ Maricopa County, AZ Pinal County, AZ	1.0642
38220	Pine Bluff, AR Cleveland County, AR Jefferson County, AR Lincoln County, AR	0.8012
38300	Pittsburgh, PA Allegheny County, PA Armstrong County, PA Beaver County, PA Butler County, PA Fayette County, PA Washington County, PA Westmoreland County, PA	0.8605
38340	Pittsfield, MA Berkshire County, MA	1.0371
38540	Pocatello, ID Bannock County, ID Power County, ID	0.9507
38660	Ponce, PR Juana Díaz Municipio, PR Ponce Municipio, PR Villalba Municipio, PR	0.4326
38860	Portland-South Portland-Biddeford, ME Cumberland County, ME Sagadahoc County, ME York County, ME	0.9899
38900	Portland-Vancouver-Beaverton, OR-WA Clackamas County, OR Columbia County, OR Multnomah County, OR Washington County, OR Yamhill County, OR Clark County, WA Skamania County, WA	1.1476
38940	Port St. Lucie, FL Martin County, FL St. Lucie County, FL	1.0723
39100	Poughkeepsie-Newburgh-Middletown, NY Dutchess County, NY Orange County, NY	1.1354
39140	Prescott, AZ Yavapai County, AZ	1.2234
39300	Providence-New Bedford-Fall River, RI-MA Bristol County, MA Bristol County, RI Kent County, RI Newport County, RI Providence County, RI Washington County, RI	1.0714
39340	Provo-Orem, UT Juab County, UT Utah County, UT	0.9321
39380	Pueblo, CO Pueblo County, CO	0.8721
39460	Punta Gorda, FL Charlotte County, FL	0.8759
39540	Racine, WI Racine County, WI	1.0580
39580	Raleigh-Cary, NC Franklin County, NC Johnston County, NC Wake County, NC	0.9811
39660	Rapid City, SD Meade County, SD Pennington County, SD	1.0442
39740	Reading, PA Berks County, PA	0.8904
39820	Redding, CA Shasta County, CA	1.4134

	Urban Area (Constituent Counties)	Wage Index
39900	Reno-Sparks, NV Storey County, NV Washoe County, NV	1.0419
40060	Richmond, VA Amelia County, VA Caroline County, VA Charles City County, VA Chesterfield County, VA Cumberland County, VA Dinwiddie County, VA Goochland County, VA Hanover County, VA Henrico County, VA King and Queen County, VA King William County, VA Louisa County, VA New Kent County, VA Powhatan County, VA Prince George County, VA Sussex County, VA Colonial Heights City, VA Hopewell City, VA Petersburg City, VA Richmond City, VA	0.9661
40140	Riverside-San Bernardino-Ontario, CA Riverside County, CA San Bernardino County, CA	1.1570
40220	Roanoke, VA Botetourt County, VA Craig County, VA Franklin County, VA Roanoke County, VA Roanoke City, VA Salem City, VA	0.8827
40340	Rochester, MN Dodge County, MN Olmsted County, MN Wabasha County, MN	1.0942
40380	Rochester, NY Livingston County, NY Monroe County, NY Ontario County, NY Orleans County, NY Wayne County, NY	0.8595

	Urban Area (Constituent Counties)	Wage Index
40420	Rockford, IL Boone County, IL Winnebago County, IL	1.0033
40484	Rockingham County-Strafford County, NH Rockingham County, NH Strafford County, NH	1.0026
40580	Rocky Mount, NC Edgecombe County, NC Nash County, NC	0.9034
40660	Rome, GA Floyd County, GA	0.8635
40900	Sacramento-Arden-Arcade-Roseville, CA El Dorado County, CA Placer County, CA Sacramento County, CA Yolo County, CA	1.4053
40980	Saginaw-Saginaw Township North, MI Saginaw County, MI	0.8728
41060	St. Cloud, MN Benton County, MN Stearns County, MN	1.1042
41100	St. George, UT Washington County, UT	0.9133
41140	St. Joseph, MO-KS Doniphan County, KS Andrew County, MO Buchanan County, MO DeKalb County, MO	1.0302

	Urban Area (Constituent Counties)	Wage Index
41180	St. Louis, MO-IL Bond County, IL Calhoun County, IL Clinton County, IL Jersey County, IL Macoupin County, IL Madison County, IL Monroe County, IL St. Clair County, IL Crawford County, MO Franklin County, MO Jefferson County, MO Lincoln County, MO St. Charles County, MO St. Louis County, MO Warren County, MO Washington County, MO St. Louis City, MO	0.9090
41420	Salem, OR Marion County, OR Polk County, OR	1.1133
41500	Salinas, CA Monterey County, CA	1.5686
41540	Salisbury, MD Somerset County, MD Wicomico County, MD	0.9005
41620	Salt Lake City, UT Salt Lake County, UT Summit County, UT Tooele County, UT	0.9266
41660	San Angelo, TX Irion County, TX Tom Green County, TX	0.8303
41700	San Antonio, TX Atascosa County, TX Bandera County, TX Bexar County, TX Comal County, TX Guadalupe County, TX Kendall County, TX Medina County, TX Wilson County, TX	0.8998
41740	San Diego-Carlsbad-San Marcos, CA San Diego County, CA	1.1979
41780	Sandusky, OH Erie County, OH	0.8686
41884	San Francisco-San Mateo-Redwood City, CA Marin County, CA San Francisco County, CA San Mateo County, CA	1.5733
41900	San Germán-Cabo Rojo, PR Cabo Rojo Municipio, PR Lajas Municipio, PR Sabana Grande Municipio, PR San Germán Municipio, PR	0.4560
41940	San Jose-Sunnyvale-Santa Clara, CA San Benito County, CA Santa Clara County, CA	1.6703
41980	San Juan-Caguas-Guaynabo, PR Aguas Buenas Municipio, PR Aibonito Municipio, PR Arecibo Municipio, PR Barceloneta Municipio, PR Barranquitas Municipio, PR Bayamón Municipio, PR Caguas Municipio, PR Camuy Municipio, PR Canóvanas Municipio, PR Carolina Municipio, PR Cataño Municipio, PR Cayey Municipio, PR Ciales Municipio, PR Cidra Municipio, PR Comerío Municipio, PR Corozal Municipio, PR Dorado Municipio, PR Florida Municipio, PR Guaynabo Municipio, PR Gurabo Municipio, PR Hatillo Municipio, PR Humacao Municipio, PR Juncos Municipio, PR Las Piedras Municipio, PR Loíza Municipio, PR Manatí Municipio, PR Maunabo Municipio, PR Morovis Municipio, PR Naguabo Municipio, PR	

	Urban Area (Constituent Counties)	Wage Index
	Naranjito Municipio, PR Orocovis Municipio, PR Quebradillas Municipio, PR Río Grande Municipio, PR San Juan Municipio, PR San Lorenzo Municipio, PR Toa Alta Municipio, PR Toa Baja Municipio, PR Trujillo Alto Municipio, PR Vega Alta Municipio, PR Vega Baja Municipio, PR Yabucoa Municipio, PR	0.4296
42020	San Luis Obispo-Paso Robles, CA San Luis Obispo County, CA	1.2915
42044	Santa Ana-Anaheim-Irvine, CA Orange County, CA	1.2162
42060	Santa Barbara-Santa Maria-Goleta, CA Santa Barbara County, CA	1.1909
42100	Santa Cruz-Watsonville, CA Santa Cruz County, CA	1.6740
42140	Santa Fe, NM Santa Fe County, NM	1.0847
42220	Santa Rosa-Petaluma, CA Sonoma County, CA	1.6143
42340	Savannah, GA Bryan County, GA Chatham County, GA Effingham County, GA	0.8907
42540	Scranton--Wilkes-Barre, PA Lackawanna County, PA Luzerne County, PA Wyoming County, PA	0.8238
42644	Seattle-Bellevue-Everett, WA King County, WA Snohomish County, WA	1.1556
42680	Sebastian-Vero Beach, FL Indian River County, FL	0.9097
43100	Sheboygan, WI Sheboygan County, WI	0.9233
43300	Sherman-Denison, TX Grayson County, TX	0.8279

	Urban Area (Constituent Counties)	Wage Index
43340	Shreveport-Bossier City, LA Bossier Parish, LA Caddo Parish, LA De Soto Parish, LA	0.8536
43580	Sioux City, IA-NE-SD Woodbury County, IA Dakota County, NE Dixon County, NE Union County, SD	0.9091
43620	Sioux Falls, SD Lincoln County, SD McCook County, SD Minnehaha County, SD Turner County, SD	0.9299
43780	South Bend-Mishawaka, IN-MI St. Joseph County, IN Cass County, MI	0.9948
43900	Spartanburg, SC Spartanburg County, SC	0.9383
44060	Spokane, WA Spokane County, WA	1.0571
44100	Springfield, IL Menard County, IL Sangamon County, IL	0.9130
44140	Springfield, MA Franklin County, MA Hampden County, MA Hampshire County, MA	1.0251
44180	Springfield, MO Christian County, MO Dallas County, MO Greene County, MO Polk County, MO Webster County, MO	0.8371
44220	Springfield, OH Clark County, OH	0.9234
44300	State College, PA Centre County, PA	0.8779
44600	Steubenville-Weirton, OH-WV Jefferson County, OH Brooke County, WV Hancock County, WV	0.7315

	Urban Area (Constituent Counties)	Wage Index
44700	Stockton, CA San Joaquin County, CA	1.2644
44940	Sumter, SC Sumter County, SC	0.7860
45060	Syracuse, NY Madison County, NY Onondaga County, NY Oswego County, NY	0.9905
45104	Tacoma, WA Pierce County, WA	1.1343
45220	Tallahassee, FL Gadsden County, FL Jefferson County, FL Leon County, FL Wakulla County, FL	0.8806
45300	Tampa-St. Petersburg-Clearwater, FL Hernando County, FL Hillsborough County, FL Pasco County, FL Pinellas County, FL	0.9054
45460	Terre Haute, IN Clay County, IN Sullivan County, IN Vermillion County, IN Vigo County, IN	0.9205
45500	Texarkana, TX-Texarkana, AR Miller County, AR Bowie County, TX	0.7748
45780	Toledo, OH Fulton County, OH Lucas County, OH Ottawa County, OH Wood County, OH	0.9432
45820	Topeka, KS Jackson County, KS Jefferson County, KS Osage County, KS Shawnee County, KS Wabaunsee County, KS	0.8952
45940	Trenton-Ewing, NJ Mercer County, NJ	1.0150
46060	Tucson, AZ Pima County, AZ	0.9480
46140	Tulsa, OK Creek County, OK Okmulgee County, OK Osage County, OK Pawnee County, OK Rogers County, OK Tulsa County, OK Wagoner County, OK	0.8793
46220	Tuscaloosa, AL Greene County, AL Hale County, AL Tuscaloosa County, AL	0.8843
46340	Tyler, TX Smith County, TX	0.8065
46540	Utica-Rome, NY Herkimer County, NY Oneida County, NY	0.8471
46660	Valdosta, GA Brooks County, GA Echols County, GA Lanier County, GA Lowndes County, GA	0.7941
46700	Vallejo-Fairfield, CA Solano County, CA	1.4931
47020	Victoria, TX Calhoun County, TX Goliad County, TX Victoria County, TX	0.8219
47220	Vineland-Millville-Bridgeton, NJ Cumberland County, NJ	1.0534

	Urban Area (Constituent Counties)	Wage Index
47260	Virginia Beach-Norfolk-Newport News, VA-NC Currituck County, NC Gloucester County, VA Isle of Wight County, VA James City County, VA Mathews County, VA Surry County, VA York County, VA Chesapeake City, VA Hampton City, VA Newport News City, VA Norfolk City, VA Poquoson City, VA Portsmouth City, VA Suffolk City, VA Virginia Beach City, VA Williamsburg City, VA	0.8961
47300	Visalia-Porterville, CA Tulare County, CA	1.0738
47380	Waco, TX McLennan County, TX	0.8403
47580	Warner Robins, GA Houston County, GA	0.8028
47644	Warren-Troy-Farmington Hills, MI Lapeer County, MI Livingston County, MI Macomb County, MI Oakland County, MI St. Clair County, MI	0.9648

	Urban Area (Constituent Counties)	Wage Index
47894	Washington-Arlington-Alexandria, DC-VA-MD-WV District of Columbia, DC Calvert County, MD Charles County, MD Prince George's County, MD Arlington County, VA Clarke County, VA Fairfax County, VA Fauquier County, VA Loudoun County, VA Prince William County, VA Spotsylvania County, VA Stafford County, VA Warren County, VA Alexandria City, VA Fairfax City, VA Falls Church City, VA Fredericksburg City, VA Manassas City, VA Manassas Park City, VA Jefferson County, WV	1.0723
47940	Waterloo-Cedar Falls, IA Black Hawk County, IA Bremer County, IA Grundy County, IA	0.8462
48140	Wausau, WI Marathon County, WI	0.9563
48300	Wenatchee-East Wenatchee, WA Chelan County, WA Douglas County, WA	0.9615
48424	West Palm Beach-Boca Raton-Boynton Beach, FL Palm Beach County, FL	0.9934
48540	Wheeling, WV-OH Belmont County, OH Marshall County, WV Ohio County, WV	0.6675
48620	Wichita, KS Butler County, KS Harvey County, KS Sedgwick County, KS Sumner County, KS	0.8898
48660	Wichita Falls, TX Archer County, TX Clay County, TX Wichita County, TX	0.9566

	Urban Area (Constituent Counties)	Wage Index
48700	Williamsport, PA Lycoming County, PA	0.7256
48864	Wilmington, DE-MD-NJ New Castle County, DE Cecil County, MD Salem County, NJ	1.0580
48900	Wilmington, NC Brunswick County, NC New Hanover County, NC Pender County, NC	0.9202
49020	Winchester, VA-WV Frederick County, VA Winchester City, VA Hampshire County, WV	1.0002
49180	Winston-Salem, NC Davie County, NC Forsyth County, NC Stokes County, NC Yadkin County, NC	0.8939
49340	Worcester, MA Worcester County, MA	1.1012
49420	Yakima, WA Yakima County, WA	1.0067
49500	Yauco, PR Guánica Municipio, PR Guayanilla Municipio, PR Peñuelas Municipio, PR Yauco Municipio, PR	0.3536
49620	York-Hanover, PA York County, PA	0.9983
49660	Youngstown-Warren-Boardman, OH-PA Mahoning County, OH Trumbull County, OH Mercer County, PA	0.8625
49700	Yuba City, CA Sutter County, CA Yuba County, CA	1.1043
49740	Yuma, AZ Yuma County, AZ	0.9283

[1] At this time, there are no hospitals located in this urban area on which to base a wage index.

TABLE B: PROPOSED INPATIENT REHABILITATION FACILITY WAGE INDEX FOR RURAL AREAS FOR DISCHARGES OCCURRING FROM OCTOBER 1, 2011 THROUGH SEPTEMBER 30, 2012

State Code	Nonurban Area	Wage Index
1	Alabama	0.7380
2	Alaska	1.2626
3	Arizona	0.9095
4	Arkansas	0.7222
5	California	1.2056
6	Colorado	0.9933
7	Connecticut	1.1128
8	Delaware	0.9757
10	Florida	0.8409
11	Georgia	0.7566
12	Hawaii	1.1189
13	Idaho	0.7556
14	Illinois	0.8343
15	Indiana	0.8391
16	Iowa	0.8545
17	Kansas	0.7981
18	Kentucky	0.7830
19	Louisiana	0.7712
20	Maine	0.8588
21	Maryland	0.9175
22	Massachusetts[1]	1.1769
23	Michigan	0.8555
24	Minnesota	0.9038
25	Mississippi	0.7620
26	Missouri	0.7655
27	Montana	0.8517
28	Nebraska	0.8911
29	Nevada	0.9350
30	New Hampshire	1.0207
31	New Jersey[1]	-----
32	New Mexico	0.8911
33	New York	0.8185
34	North Carolina	0.8359

State Code	Nonurban Area	Wage Index
35	North Dakota	0.6831
36	Ohio	0.8561
37	Oklahoma	0.7860
38	Oregon	1.0029
39	Pennsylvania	0.8480
40	Puerto Rico[1]	0.4047
41	Rhode Island[1]	-----
42	South Carolina	0.8413
43	South Dakota	0.8536
44	Tennessee	0.7886
45	Texas	0.7806
46	Utah	0.8649
47	Vermont	0.9591
48	Virgin Islands	0.7993
49	Virginia	0.7841
50	Washington	1.0184
51	West Virginia	0.7474
52	Wisconsin	0.9186
53	Wyoming	0.9528
65	Guam	0.9611

[1] All counties within the State are classified as urban, with the exception of Massachusetts and Puerto Rico. Massachusetts and Puerto Rico have areas designated as rural; however, no short-term, acute care hospitals are located in the area(s) for FY 2011. The rural Massachusetts wage index is calculated as the average of all contiguous CBSAs. The Puerto Rico wage index is the same as FY 2010.

[FR Doc. 2011–10159 Filed 4–22–11; 4:15 pm]

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Part V

Department of Agriculture

Agricultural Marketing Service

7 CFR Part 970

Proposed National Marketing Agreement Regulating Leafy Green Vegetables; Recommended Decision and Opportunity To File Written Exceptions to Proposed Marketing Agreement No. 970; Proposed Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 970

[Doc. No. AO–FV–09–0138; AMS–FV–09–0029; FV09–970–1]

Proposed National Marketing Agreement Regulating Leafy Green Vegetables; Recommended Decision and Opportunity To File Written Exceptions to Proposed Marketing Agreement No. 970

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and opportunity to file exceptions.

SUMMARY: This recommended decision proposes the issuance of a marketing agreement (agreement) under the Agricultural Marketing Agreement Act of 1937 to cover the handling of fresh leafy green vegetables in the United States. Leafy green vegetables include lettuce, spinach, cabbage, and similar items. The proposed agreement would authorize the development and implementation of production and handling regulations (audit metrics) to reflect United States Food and Drug Administration (FDA) Good Agricultural Practices (GAPs) and Good Manufacturing Practices (GMPs), and United States Department of Agriculture (USDA) Good Handling Practices (GHPs). The program would be voluntary, and cover both United States and imported leafy green vegetables. Signatory handlers would agree to only handle leafy green vegetables that meet the requirements of the program. The program would be financed primarily by assessments collected from signatory first handlers. A Board, whose members would be appointed by the Secretary, would administer the proposed agreement with USDA oversight. This rule also announces USDA Agricultural Marketing Service's (AMS) intention to request approval by the Office of Management and Budget for new information collection requirements to implement this program.

DATES: Written exceptions must be filed by July 28, 2011. Pursuant to the Paperwork Reduction Act, comments on the information collection burden must be received by July 28, 2011.

ADDRESSES: Written exceptions should be filed with the Hearing Clerk, United States Department of Agriculture, 1400 Independence Ave., SW., Room 1031–S, Washington, DC 20250–9200, Fax: (202) 720–9776 or via the Internet at *http://www.regulations.gov.* All exceptions should reference the docket number and the date and page number of this issue of the **Federal Register**. Comments will be made available for public inspection in the Office of the Hearing Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov.*

To the extent practicable, all documents filed with the hearing clerk also should be submitted electronically to Melissa Schmaedick at the e-mail address noted for her in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Antoinette Carter, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., Stop 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or E-mail: *Antoinette.Carter@ams.usda.gov;* or Melissa Schmaedick, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 805 SW. Broadway, Suite 930, Portland, OR 97205; Telephone (503) 326–2724, Fax (503) 326–7440, or E-mail: *Melissa.Schmaedick@ams.usda.gov.*

Small businesses may request information on this proceeding by contacting Antoinette Carter at the address provided for her above.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Public Hearing issued on August 31, 2009, and published in the September 3, 2009, issue of the **Federal Register** (74 FR 45565); and Notice of Additional Time for Public Hearing issued on September 18, 2009, and published in the September 23, 2009, issue of the **Federal Register** (74 FR 48423).

These actions are governed by the provisions of sections 556 and 557 of title 5 of the United States Code and are therefore excluded from the requirements of Executive Order 12866.

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to the proposed marketing agreement regulating the handling of leafy green vegetables in the United States, and the opportunity to file written exceptions thereto. Copies of this recommended decision can be obtained from Melissa Schmaedick, whose address is listed above.

This recommended decision is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (48 Stat. 31, as amended; 7 U.S.C. 601–674), hereinafter referred to as the "Act", and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900).

The proposed agreement is based on the record of a public hearing held on: September 22 through 24, 2009, in Monterey, California; September 30 through October 1, 2009, in Jacksonville, Florida; October 6, 2009, in Columbus, Ohio; October 8, 2009, in Denver, Colorado; October 14 and 15, 2009, in Yuma, Arizona; October 20, 2009, in Syracuse, New York; and October 22, 2009, in Charlotte, North Carolina.

The hearing was held to receive evidence on the proposed agreement from producers, handlers, and other interested parties. The Notice of Public Hearing was published in the **Federal Register** on September 3, 2009 (74 FR 45565).

Background

In mid-September 2006, FDA issued the first public alerts of a multi-State Escherichia coli (E. coli) outbreak linked to fresh spinach grown in California's Salinas Valley. The resulting recall was the largest ever for fresh leafy green vegetables. Investigations by FDA and the California Department of Health Services, in cooperation with the Centers for Disease Control and Prevention, and USDA's Animal and Plant Health Inspection Service, concluded that the E. coli contamination might have been attributed to environmental factors in the production area.

In response to this E. coli outbreak, members of the California leafy green vegetable industry initiated the establishment of a State marketing agreement for handlers of leafy green vegetables. The California Leafy Green Products Handler Marketing Agreement became effective February 10, 2007. At the time of the hearing, 99 percent of leafy green vegetables produced and handled in California were subject to the State program. In October 2007, a similar program was implemented in Arizona: The Arizona Leafy Green Products Shipper Marketing Agreement. Approximately 75 percent of the leafy green vegetables produced and handled in Arizona were being regulated under that State's program at the time of the hearing. While both the California and Arizona programs are voluntary, the requirements of these State marketing agreements are mandatory for all signatories within each respective State.

On October 4, 2007, AMS published an Advance Notice of Proposed Rulemaking (ANPR) in the **Federal Register** (72 FR 56678) in response to industry interest in the establishment of a national marketing program to address

the handling of leafy green vegetables nationwide. The ANPR explored the concept of establishing a regulatory program to reduce microbial contamination and improve product quality of leafy green vegetables available in the United States' produce market. Proposals and comments were sought from the public, particularly from producers, handlers, buyers, and sellers of leafy green vegetables.

The ANPR resulted in the submission and consideration of more than 3,500 public comments on the need and level of support for a nationwide regulatory program for GAPs, GHPs, and GMPs. These comments may be viewed at *http://www.regulations.gov* and by typing the following docket number into the search function: AMS–FV–07–0090.

On June 10, 2009, a petition for rulemaking and a request for public hearing on a proposed national agreement for leafy green vegetables were submitted to AMS. The proposal was submitted by a group of producers, handlers, and interested persons representing a cross-section of the national fresh and fresh-cut produce industry, hereinafter referred to as the "proponents" or "proponent group". The proponent group is comprised of the membership of the following organizations: United Fresh Produce Association, Produce Marketing Association, Georgia Fresh Vegetable Association, Georgia Farm Bureau, Texas Vegetable Association, Arizona Farm Bureau, Leafy Greens Council, California Farm Bureau, California Leafy Greens Products Handler Marketing Agreement, Grower-Shipper Association of Central California, Western Growers, and the Imperial Valley Vegetable Growers Association. The proponents, whose membership includes both conventional and organic producers and handlers, as well as business entities of all sizes, claim to represent a majority of the volume of leafy green vegetables produced and handled for the United States market.

In their request and at the hearing, the proponents proposed the establishment of a program that would oversee a systematic application of good agricultural production, handling, and manufacturing practices for leafy green vegetables. Proponents stated that the proposed agreement would minimize the potential for microbial contamination in production and handling systems and would improve consumer confidence in leafy green vegetables in the United States market.

Proponents supported the establishment of a voluntary program that would require mandatory compliance for its signatories under the authority of the Act and that it be administered by USDA. Proponents explained that, if implemented, an administrative body comprised of leafy green vegetable producers, handlers, and other representatives of the leafy green vegetable industry should be established to administer the program under USDA oversight. In addition to the administrative body, proponents proposed two committees: One to assist the administrative body in the identification and development of audit metrics, and one to advise the administrative body on research and development projects administered under the program.

Proponents defined the proposed production area as the 50 States of the United States of America and the District of Columbia. It was further proposed that the agreement be financed primarily by assessments collected from signatory first handlers on the volume of leafy green vegetables handled. In addition, contributions could be received for the purposes of funding research and development activities.

As a voluntary program, proponents explained that only signatory handlers to the proposed agreement would be regulated. Signatory handlers would be required to only handle leafy green vegetables that were produced and handled in adherence to specific requirements (audit metrics) established under the proposed agreement. Proponents stated that audit metrics should be science-based, scalable, and regionally applicable in order to accommodate compliance of varying size and types of operations. Moreover, any audit metrics proposed under the program would require approval of the USDA prior to implementation.

Proponents explained that audits should be conducted by the USDA Inspection Service, or persons or organizations authorized to audit on its behalf, to verify signatory handler compliance to the proposed agreement. If implemented, proponents stated that such audits should be conducted on both domestic and imported product handled by signatory handlers.

One hundred and twenty individuals testified during the 9 days of hearings which resulted in 4,935 pages of testimony. One hundred and thirty-nine exhibits were submitted. Witnesses represented leafy green producers and handlers, and representatives from stakeholder interest groups including State and local government representatives, certified organic auditors, organic and sustainable agriculture advocacy groups, consumer advocacy groups, conservation and wildlife advocacy organizations, academia, and others. Some witnesses supported the proposed agreement, while others opposed it or suggested modifications or changes to it.

In addition to other opponents of the proposed agreement, an opponent group comprised of member organizations of the National Organic Coalition (NOC) testified at the hearing. Members of the NOC include: Beyond Pesticides, Center for Food Safety, Equal Exchange, Food and Water Watch, Maine Organic Farmers and Gardeners Association, Midwest Organic Farmers and Gardeners Association, National Cooperative Grocers Association, Northeast Organic Dairy Producers Alliance, Northeast Organic Farming Association-Interstate Council, Organically Grown Company, Rural Advancement Foundation International-USA, and the Union of Concerned Scientists.

Witnesses opposed to the program cited several areas of concern. These included: The cost of becoming compliant and maintaining compliance with the proposed agreement; the existing proliferation of audit requirements from private sector customers, the addition of a new and potentially conflicting set of audit requirements, and "audit fatigue"; the need for science-based production and handling requirements, as well as the need for adequate peer-review of scientific studies used to establish them; potential conflicts between existing Federal, State, and local conservation, wildlife, and environmental regulations and any proposed metrics; the need for recognition of organic and other non-conventional production and handling practices in the development of audit metrics; the appropriateness and authority for USDA oversight of the proposed agreement; and, the need for a national program.

At the conclusion of the hearing, the Administrative Law Judge fixed January 13, 2010, as the due date for interested persons to file proposed findings and conclusions or written arguments based on the evidence received at the hearing. Upon a motion for extension from the proponents as well as member organizations of the National Organic Coalition, the date was extended until January 27, 2010.

Sixteen briefs were filed in total. Those submitting briefs included: Pollinator Partnership, Global Organic Specialty Source, Inc., Chiquita Brands International, Inc., Arizona Leafy Green Products Shipper Marketing Agreement, Office of the Attorney General for the State of Arizona, Episcopal Diocese of California, DNO, Inc., Duda Farm Fresh Foods, Inc., National Organic Coalition

(including Food and Water Watch, Carolina Farm Stewardship Association, and Florida Certified Organic Growers and Consumers, Inc.), Canadian Horticultural Council, Partners for Sustainable Pollination, Association of Food and Drug Officials, Massachusetts Farm Bureau Federation, Inc., Grower's Management, Inc., Western Growers, and California Roundtable on Agriculture and the Environment.

Overview

After extensive analysis and review of the hearing record, USDA has incorporated in this recommended decision changes and revisions to the text of the proposed marketing agreement. Changes and modifications include numerical redesignations of sections, combining of regulatory text, the addition of new provisions, and clarifications. For ease of reference in reading this recommended decision, the following table provides a summary that identifies the differences between the sections proposed in the Notice of Hearing and the sections proposed in this recommended decision.

Notice of hearing	Changes and revisions	Recommended decision
970.1		970.1
	NEW	970.2
970.2	REDESIGNATED AND REVISED	970.3
970.3	REDESIGNATED AND REVISED	970.4
	NEW	970.5
970.4	REDESIGNATED AND REVISED	970.6
970.6	REDESIGNATED AND REVISED	970.8
	NEW	970.9
970.7	REDESIGNATED AND REVISED	970.10
970.8	REDESIGNATED AND REVISED	970.11
970.9	REDESIGNATED AND REVISED	970.12
970.10	REDESIGNATED AND REVISED	970.13
970.11	REDESIGNATED AND REVISED	970.14
970.12	REDESIGNATED AND REVISED	970.15
970.13	REDESIGNATED AND REVISED	970.16
970.14	REDESIGNATED AND REVISED	970.17
970.15	REDESIGNATED AND REVISED	970.18
970.16	REDESIGNATED AND REVISED	970.19
970.17	REDESIGNATED AND REVISED	970.20
	NEW	970.21
	NEW	970.22
970.18	REDESIGNATED AND REVISED	970.23
	NEW	970.24
970.19	REDESIGNATED	970.25
970.20	REDESIGNATED AND REVISED	970.27
970.21	REDESIGNATED AND REVISED	970.19
970.22	REDESIGNATED AND REVISED	970.26
970.23	REDESIGNATED	970.28
	NEW	970.29
970.24	REDESIGNATED AND REVISED	970.30
970.25	REDESIGNATED	970.31
	NEW	970.32
970.26	REDESIGNATED AND REVISED	970.33
	NEW	970.34
970.27	REDESIGNATED AND REVISED	970.35
	NEW	970.36
970.28	REDESIGNATED AND REVISED	970.37
970.35	REDESIGNATED AND REVISED	970.39
970.40	REVISED	970.40
	NEW	970.41
970.41	REDESIGNATED AND REVISED	970.42
970.42	REDESIGNATED AND REVISED	970.43
970.43	REDESIGNATED AND REVISED	970.44
970.44	REDESIGNATED AND REVISED	970.45
970.45	REDESIGNATED AND REVISED	970.46
970.46	REDESIGNATED AND REVISED	970.47
970.47	REDESIGNATED AND REVISED	970.48
970.48	REDESIGNATED AND REVISED	970.49
970.49	REDESIGNATED AND REVISED	970.50
970.50	REDESIGNATED AND REVISED	970.51
970.55	REVISED	970.55
970.56	REVISED	970.56
970.57	REVISED	970.57
970.58	REVISED	970.58
970.65	REVISED	970.65
970.66	REVISED	970.66
970.67	REVISED	970.67
970.68	REVISED	970.68
970.69	REVISED	970.69
970.70	REVISED	970.70
970.71	REVISED	970.71

Notice of hearing	Changes and revisions	Recommended decision
970.72	REVISED	970.72
970.75	REVISED	970.75
970.80	REVISED	970.80
970.81	REVISED	970.81
970.82	REVISED	970.82
970.83	REVISED	970.83
970.85	REVISED	970.85
970.86	REVISED	970.86
970.87	REVISED	970.87
970.88		970.88
970.89	REVISED	970.89
970.90		970.90
970.91	REVISED	970.91
970.92		970.92
970.93	REVISED	970.93
970.94		970.94
970.95	REVISED	970.95
970.96	REVISED	970.96
970.97	REVISED	970.97
970.98	REVISED	970.98
	NEW	970.99

This recommended decision takes into consideration the record of the public hearing as well as the arguments contained in the post-hearing briefs. The merits of these arguments are discussed in the findings and conclusions of this recommended decision.

Material Issues

The material issues presented on the record of hearing are as follows:

1. Whether the handling of leafy green vegetables in the production area is in the current of interstate commerce or foreign commerce, or directly burdens, obstructs, or affects such commerce;

2. Whether market conditions justify a need for a Federal marketing agreement which would tend to effectuate the declared policy of the Act;

3. What the definition of the production area and the commodity to be covered by the proposed agreement should be;

4. What the identity of the persons and the activities to be regulated under the proposed agreement should be;

5. What the specific terms and provisions of the proposed agreement should be, including:

(a) The definition of terms used therein, which are necessary and incidental to attain the declared objectives and policy of the Act;

(b) Whether an administrative body should be established to assist USDA in the administration and oversight of the proposed agreement, and what the membership composition, administrative procedures, powers, and duties of that body should be;

(c) Whether the proposed agreement should include the authority to establish regulations and audit requirements that would apply to signatory handlers;

(d) Whether the proposed agreement should include the authority to incur expenses and establish procedures to levy assessments on signatory first handlers to obtain revenue for paying such expenses;

(e) Whether the proposed agreement should include the authority to establish signatory handler reporting and recordkeeping requirements;

(f) Whether the proposed agreement should require signatory handler compliance with all provisions of the agreement and with any regulations issued under it;

(g) Whether the proposed agreement should include the authority to establish rules, regulations, or safeguards for exemption from the requirements of the agreement;

(h) Whether the proposed agreement should include the authority to establish or provide for the establishment of research and market development projects;

(i) Whether the proposed agreement should include additional terms and conditions as set forth in § 970.85 through § 970.98 of the Notice of Hearing published in the **Federal Register** on September 3, 2009 (74 FR 45565), which are common to all agreements; and

6. What the handler sign-up process should be, and if provisions should be made for signatory handlers to discontinue participation in the program.

Findings and Conclusions

The following findings and conclusions on the material issues are based on the evidence presented at the hearing and the record thereof.

Material Issue Number 1—Current of Interstate Commerce or Foreign Commerce

The record indicates that the handling of leafy green vegetables grown in the United States, or leafy green vegetables grown outside the United States and imported by United States handlers, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

Evidence is that the leafy green vegetable industry is a highly integrated, complex system of large, mid-size, and small producers delivering product to handlers, retailers, and foodservice operators nation-wide. Leafy green vegetables may be produced in one State, processed in another State, and then shipped for consumption to many States or nationally. Moreover, the product of one or more producers of varying sizes and origin may be handled by one or more handlers, also of varying size or origin.

Evidence also is that leafy green vegetables are imported, mainly from Mexico and Canada, and that such leafy green vegetables are often co-mingled with United States produced leafy green vegetables and distributed throughout the United States market. Similarly, United States produced leafy green vegetables are regularly exported, primarily to Canada. Exported leafy green vegetables may contain product produced by a variety of producers, varying in size and origin, and may be handled by one or more handlers.

For these reasons, evidence confirms that the handling of leafy green vegetables is at multiple levels of interstate or foreign commerce and has an effect on such commerce.

Industry Overview

Producers and Handlers

According to USDA Census of Agriculture data (Census) and other USDA data presented at the hearing, there were 8,216 farms that harvested 433,023 acres of leafy green vegetables specifically for the fresh market in 2007.

While data indicates that leafy green vegetable production is found in all 50 United States, evidence is that most production tends to be concentrated in the States of California, Arizona, Florida, New York, Texas, Georgia, and Colorado, and on farms that exceed the Small Business Administration (SBA) definition of a small agricultural producer. Under 13 CFR 121.201, the SBA defines "small" agricultural producers as farming operations having gross annual receipts of $750,000 or less. This is the threshold by which USDA analyzes the impact of the proposed marketing agreement on small producer entities. Farm data by States from the 2007 Census of Agriculture (Census), unavailable from other sources, has also been used in developing the recommended decision. However, the Census defines small producers as those with annual receipts of less than $250,000 and large producers as those with $250,000 or more. Thus, in some of the discussion and analysis in this recommended decision, the Census data cannot be reconciled with the SBA definition for small producers.

California and Arizona are the largest producing States of leafy green vegetables, with California alone accounting for 75 percent of total United States production in 2007, and Arizona representing 15 percent of total United States production in that same year. Evidence is that the remaining 10 percent of production is spread throughout the United States and tends to be sourced by handlers from small to mid-size farms.

For such farms, leafy green vegetable production commonly only represents a portion of these diversified farms' total production. According to the hearing record, a "diversified farm" is a farming operation that produces a variety of crops or animals, or both, on one farm, as distinguished from a producer who specializes solely in the production of leafy green vegetables.

Marketing Research Association (MRA) data presented at the hearing indicates that there were approximately 1,285 handlers of leafy green vegetables in the United States in 2009. This data is published in the Blue Book Marketing Research Service Directory (Blue Book), which can be found at *http://www.bluebook.org*.

According to the record, many small and mid-size producers also operate as handlers by way of their direct sales to consumers, foodservice operators, or retailers. Evidence is that the Blue Book likely does not account for many of these smaller producer-handler businesses because they are not directly engaged in the mainstream, conventional market. Therefore, record evidence indicates that the number of leafy green vegetable handlers in the United States that would qualify to participate as signatory handlers under the proposed agreement is more than 1,285. Record evidence is unclear, however, as to how many small producer-handler operations handling leafy green vegetables exist in the United States.

According to the record, the majority of leafy green vegetables handled in the United States are subject to seasonal contracts between producers and handlers, and these relationships are usually long-term. Typically, such contracts are prepared using quantity, weight, acreage, or price.

Any leafy green vegetable crop for sale in the market that is not covered under a contract is considered part of the cash, or "spot" market, where produce is sold for cash and delivered immediately. Small farms often sell directly to consumers at farmers' markets, roadside stands, and through community-supported agriculture (CSA) programs, as well as directly to smaller retailers and local foodservice operators. According to the record, these types of transactions are considered part of the spot market.

Evidence shows that some leafy green vegetables for the United States market are sold through produce auctions, where members of the auction maintain their membership through a contractual relationship with the auction organization. In this scenario, produce supplied by auction members is sold through the auction method, where prices obtained for the produce can fluctuate based on daily market supply and demand, and quality of produce. According to the hearing record, sales of leafy green vegetables made through a produce auction also are considered part of the spot market.

Production

USDA data presented at the hearing indicates that the value of leafy green vegetables grown for the United States fresh and fresh-cut market was $2.5 billion in 2008. The majority of United States leafy green vegetable production is accounted for by three lettuce crops (head, leaf, and romaine), spinach, and fresh cabbage. Of the 2008 production value, lettuce crops accounted for 79 percent, cabbage accounted for 15 percent, and spinach accounted for 7 percent, for a total of 81 percent. Other minor fresh leafy green vegetable crops, such as collards, escarole, endives and specialty varieties of kale, are produced regionally and seasonally. Evidence is that these crops are produced widely across the United States and are generally available throughout the year. Since 1997, United States production of major fresh leafy green vegetables has grown by almost 25 percent.

Major Fresh Leafy Green Vegetable Crops

At the time of the hearing, head lettuce production was estimated at 5.3 billion pounds. Even though head lettuce's average share of United States lettuce production has declined from an average of 77 percent during 1996 to 1998, to 56 percent from 2006 to 2008, head lettuce continues to represent the majority of total leafy green vegetable production in the United States. Iceberg lettuce is harvested year-round in California. Of the other States with large production of head lettuce, Arizona harvests in the winter, New Jersey harvests in the spring and fall, and Colorado harvests in the summer.

According to 2007 Census data, 1,158 farms harvested head lettuce from nearly 167,000 acres. Although the farms harvesting head lettuce were spread over 48 States, only three States reported harvesting more than 1,000 acres: California (118,676 acres), Arizona (39,187 acres), and Colorado (2,268 acres).

USDA statistical evidence presented at the hearing indicates that demand for lettuce has shifted away from head lettuce to romaine and other varieties of leaf lettuce. Leaf and romaine lettuce production from major States increased 125 percent between 1990 and 1999, and an additional 42 percent between 2000 and 2009. Total production of leaf and romaine lettuce for 2009 was estimated at 3.9 billion pounds accounting for 42 percent of United States lettuce production. Leaf and romaine lettuce are harvested year-round in California. Arizona is the other main producer of these lettuces in the winter. According to 2007 Census record data, 2,891 farms in all 50 States harvested leaf lettuce from approximately 59,000 acres. For romaine lettuce, the figures are 87,000 acres harvested from 1,057 farms in 49 States.

According to the hearing record, demand for fresh spinach resulted in

average production increases of over 6 percent per year since 1990, with production from major States estimated to have reached 513 million pounds in 2009. According to the 2007 Census, 1,121 farms in all 50 States harvested spinach for the fresh market from almost 30,000 acres. In 2007, the top producers of spinach for the fresh market were California (harvesting 18,000 acres), Arizona (harvesting 3,600 acres), Texas (harvesting 2,200 acres), Colorado (harvesting 1,900 acres), and New Jersey (harvesting 1,500 acres). These States accounted for 94 percent of the fresh spinach acreage. Seasonal production data indicates that California harvests spinach throughout the year. Arizona and Texas harvest in the winter, Colorado harvests in the summer, and New Jersey harvests in the spring and fall.

Production increases for fresh cabbage have been significantly less than for lettuce and spinach over the past 20 years, but do indicate a steady increase in demand for fresh cabbage. Production averaged 2.3 billion pounds in the 1990s, 11 percent higher than the average for the 1980s. For the 10-year period between 2000 and 2009, fresh cabbage production in major States averaged 2.4 billion pounds, 4 percent higher than the 1990s average.

In 2007, 88 percent of harvested cabbage acreage was for fresh use. In 2007, the top 5 State producers of cabbage for the fresh market were California (harvesting 14,000 acres), New York (harvesting 10,300 acres), Florida (harvesting 9,800 acres), Texas (harvesting 6,800 acres), and Georgia (harvesting 6,600 acres), and accounted for 67 percent of United States total fresh cabbage production. Other States that produce large quantities of fresh cabbage include North Carolina, Wisconsin, and Arizona. According to the 2007 Census, 3,986 farms in all 50 States harvested cabbage for the fresh market from approximately 71,000 acres. Of the States with large production of fresh cabbage, Florida, Georgia, and Texas harvest in the winter and spring, California harvests year round, and New York harvests in the summer.

Minor Fresh Leafy Green Vegetable Crops

The 2007 Census included limited data for the following leafy green vegetables for the United States market: Chinese cabbage, escarole & endive (data combined), kale, and mustard greens.

According to hearing record evidence, there were a total of 618 farms growing Chinese cabbage on a total of 11,471 acres in 2007. The top producing States for Chinese cabbage include California (harvesting 5,593 acres on 111 farms), Florida (harvesting 3,206 acres on 40 farms), New Jersey (harvesting 981 acres on 27 farms), Texas (harvesting 517 acres on 7 farms), and Hawaii (harvesting 271 acres on 53 farms).

For escarole and endive, the 2007 Census numbers reported for national acreage and numbers of farms are 3,169 and 132, respectively. The top producing States for these crops are California (harvesting 1,974 acres on 28 farms), New Jersey (harvesting 546 acres on 32 farms), Florida (harvesting 402 acres on 7 farms), Ohio (harvesting 164 acres on 4 farms), and New York (harvesting 75 acres on 13 farms).

For kale, the 2007 Census numbers reported for national acreage and numbers of farms are 3,784 and 946, respectively. The top producing States for these crops are California (harvesting 1,077 acres on 96 farms), North Carolina (harvesting 363 acres on 64 farms), Texas (harvesting 214 acres on 13 farms), Colorado (harvesting 84 acres on 12 farms), and Ohio (harvesting 76 acres on 28 farms).

For mustard greens, the 2007 Census numbers reported for national acreage and numbers of farms are 7,013 and 848, respectively. The top producing States for these crops are California (harvesting 1,902 acres on 87 farms), Georgia (harvesting 1,585 acres on 36 farms), South Carolina (harvesting 581 acres on 35 farms), Texas (harvesting 470 acres on 61 farms), and Michigan (harvesting 308 acres on 29 farms).

Consumption

According to the hearing record, annual per capita lettuce consumption in the United States was 21 pounds in the 1960s, 24 pounds in the 1970s, and 25 pounds in the first half of the 1980s. Since the late 1980s, lettuce consumption has averaged about 30 pounds per person, an increase of 40 percent compared to the 1960s. The type of lettuce consumed has changed over this period of time. Historically, head lettuce has accounted for the majority of national leafy green vegetable consumption. While still representing the majority of leafy green vegetable production volume, evidence is that consumer demand for head lettuce is slowly shifting toward other leafy green vegetable crops. Evidence is that demand is shifting to leaf lettuce, romaine, spinach, and specialty crops.

Consumption of head lettuce decreased from 23.5 pounds per person in 2000 to 16.9 pounds per person in 2008. At the same time, consumption of leaf and romaine lettuce increased from 8.4 pounds per person in 2000 to 11.1 pounds per person in 2008. Consumption of spinach peaked in 2005 at 2.3 pounds per person, and has remained at most 15 percent below peak consumption since the E. coli outbreak in 2006. Average per capita consumption of spinach was forecasted at 1.6 pounds per person for 2009. Cabbage consumption has remained steady since 2004, oscillating from 8.1 pounds per person in that year to 7.8 pounds per person in 2005–06 to 8.2 pounds per person in 2009.

Leafy Green Vegetable Imports and Exports

According to data submitted into evidence, the United States is the second largest producer of leafy green vegetables in the world, accounting for roughly 22 percent of global production in 2009. China is the world's largest leafy green vegetable producer, with a world market share equal to 51 percent in 2008.

Witnesses explained that United States leafy green vegetable producers compete on both a domestic and international level with foreign leafy green producers. Since 2002, Mexico has been the largest exporter of leafy green vegetables to the United States, followed by Canada, Peru, and Israel. In 2006, Mexico exported 118 million pounds of leafy green vegetables to the United States. During the same period, Canada, Peru, and Israel exported 52 million pounds, 1.2 million pounds, and 365,000 pounds, respectively. In 2006, the United States exported slightly less than 12 percent of its leafy green vegetable production.

Even though China consumes the majority of its leafy green vegetable production, witnesses stated that China is the main competitor to United States leafy green vegetable exports to Asian markets. Although Japan and India both are top ten global producers of leafy green vegetables, neither country exports more than 0.1 percent of the leafy green vegetables that they produce.

Mexico is the largest producer of leafy green vegetables in Latin America and was the ninth largest global producer in 2006. Its proximity to the United States market makes Mexico a competitor in both the United States and Mexican markets, in addition to other Latin American markets. Witnesses also explained that some of the leafy green vegetables from Mexico are produced by United States companies operating in both countries.

Major producers and exporters in the European Union are Spain and Italy. Both Spain and Italy produced approximately 2 million pounds of leafy

green vegetables annually from 2000–2006. Total exports from Spain and Italy average 45 percent and 10 percent of their respective leafy green vegetable production.

Record evidence from the hearing illustrates that the handling of United States grown leafy green vegetables is multi-State, regional, national, and international in scope. Within the United States, the handling of leafy green vegetables in one State exerts an influence on all other handling of leafy green vegetables within the production area. Additionally, the handling of imported fresh leafy green vegetables also impacts interstate commerce and foreign commerce. Record evidence is that imported leafy green vegetables are widely distributed throughout the United States market alongside domestic leafy green vegetables. Moreover, record evidence is that sometimes imported product is co-mingled with domestic product prior to its distribution in United States markets. Thus, the evidence shows that the handling of leafy green vegetables for the United States market, whether the leafy green vegetables are produced domestically or imported, is in the current of interstate and foreign commerce and directly affects such commerce.

Material Issue Number 2—The Need for a National Leafy Green Vegetable Marketing Agreement

The record evidence demonstrates that there is a need for the proposed program to regulate the handling of leafy green vegetables, and that such a program would improve quality by minimizing the occurrence of microbial contamination of those vegetables. If implemented, the proposed program would provide for the establishment of audit metrics and verification audits of all product handled by signatory handlers within the United States. Any audit metrics developed under the proposed program would reflect FDA good agricultural practice guidelines (GAPs) and FDA fresh product manufacturing regulation (GMPs). Any regulation would also take into account leafy green vegetable industry stakeholder interests and concerns regarding varying production and handling environments across the nation. Furthermore, the proposed program would assist in stabilizing market conditions if a contamination event were to occur, and would increase consumer confidence in the quality of leafy green vegetables.

While participation in the proposed program would be voluntary, any handler becoming a signatory to the agreement would be subject to mandatory compliance. The proposed program would also cover any imported leafy green vegetables handled by signatory handlers. According to record evidence, foreign producers and handlers doing business with signatory handlers would be required to meet equivalent audit metrics as in effect for the domestic industry.

USDA Inspection Service would serve as the primary auditing authority to conduct verification audits under the proposed program. USDA Inspection Service would also have the authority to designate other entities approved or recognized by USDA to conduct audits on its behalf.

According to the hearing record, there are no national, mandatory food quality or safety regulations for the growing and handling of fresh leafy green vegetables. There are, however, FDA guidelines that are commonly used by leafy green vegetable producers and handlers in their development of private or customer-driven food safety plans. These guidelines are: The "Guide to Minimize Microbial Food Safety Hazards for Fresh Fruits and Vegetables" (1998), and the "Guide to Minimize Microbial Food Safety Hazards for Fresh-cut Fruits and Vegetables" (2008). According to the hearing record, these guidelines jointly comprise what are referred to as "Good Agricultural Practices" or "GAPs". In 2009, FDA published a draft set of commodity specific guidelines for leafy green vegetables, the "Commodity Specific Food Safety Guidelines for Lettuce and Leafy Greens Supply Chain". These guidelines have not been finalized yet and, therefore, are not being actively used in the industry.

Mandatory FDA regulation does exist for manufacturers of fresh-cut leafy green vegetables. Manufacturers alter leafy green vegetables from their fresh form into a fresh-cut form. FDA regulations regarding the manufacturing of fresh-cut leafy green vegetables are found in 21 CFR Part 110. According to the record, these regulations are commonly referred to as Good Manufacturing Practices (GMPs).

The AMS, in partnership with State departments of agriculture, offers a voluntary, audit-based program that verifies adherence to the two FDA guidelines identified above. Under AMS's Good Agricultural and Good Handling Practices Audit Verification Programs, the FDA GAPs guidelines are divided into two specific programs: GAPs verification audits, which examine farm practices, and Good Handling Practices (GHPs), which concentrate on packing facilities, storage facilities, and wholesale distribution centers. The AMS programs are not mandatory. However, according to the hearing record, many commercial purchasers of leafy green vegetables require their vendors to be audited under one of the above mentioned programs.

There are two State programs that have been established specifically for the purpose of regulating the handling of fresh leafy green vegetables. These programs are found in California and Arizona.

The California Leafy Green Products Handler Marketing Agreement became effective February 10, 2007. Record evidence indicates that, at the time of the hearing, 99 percent of leafy green vegetables produced and handled in California were subject to the State program. In October 2007, a similar program was implemented in Arizona: The Arizona Leafy Green Products Shipper Marketing Agreement. Evidence is that approximately 75 percent of the leafy green vegetables produced and handled in Arizona were being regulated under that State's program at the time of the hearing. While both the California and Arizona programs are voluntary, the requirements of these State marketing agreements are mandatory for all signatories within each respective State.

Proponents of the proposed agreement stated that a national program would allow for the coordination of audit verifications for all fresh leafy green vegetables at a national level and would allow for continuity of product quality as it moves between States.

While proponents acknowledged that leafy green vegetable GAP and GHP programs have been designed and implemented in cooperation with the USDA Inspection Service in two States (Arizona and California), they argued that the development of a national program was necessary. Proponents stated that a national program would minimize the potential for contamination of fresh leafy green vegetables in all States where they were produced or handled, not just California and Arizona. According to the record, participation in the two State programs represents roughly 99 and 75 percent of production in California and Arizona, respectively, but participation of production outside of those two States is inconsistent and limited. Proponents explained that producers and handlers who currently undergo GAP or GHP audit verifications outside of the States of California and Arizona primarily do so either electively or at the request of their buyers.

Proponents explained that a fresh leafy green vegetable may be grown in one State, shipped to another State for washing and preliminary handling, and then shipped to a third State for further processing and packaging prior to that product reaching consumers. For this reason, proponents stated that consistency in good agricultural and handling practices were needed in all States in which leafy green vegetables are grown or handled. Proponents stated that national coordination of such practices is needed to maintain the integrity of product quality, including minimizing the potential for microbial contamination.

For example, the California Leafy Green Products Handler Marketing Agreement does not cover lettuce or leafy green vegetables grown outside of California. It does not have the authority to send inspectors to audit growers or handlers in another State. Therefore, if a handler who is based in California receives product from outside the State, that product may not be required to meet the GAPs or GHPs. According to the proponents, the development of a national GAP and GHP program for leafy green vegetables based on FDA guidelines would foster consistency in agricultural and handling practices across all States.

Proponents explained that FDA-based GAPs and GHPs provide general guidance on critical steps within the growing, harvesting, transportation, cooling, packing, and storage of fresh produce where food safety might be compromised. FDA guidelines alert producers and handlers to critical areas within the production and handling of fresh leafy green vegetables that present potential for microbiological contamination. FDA guidelines do not, however, describe the actions that need to be taken by producers or handlers within their individual businesses to meet the guidance benchmark. Proponents explained that guidance of this kind is established in the form of "audit metrics".

For example, FDA guidelines state that mechanical or machine harvest has become increasingly prevalent and that this activity leads to increased surface contact exposure of leafy green vegetables with components of the harvest machinery. FDA guidelines identify surface contact in mechanical harvesting as a critical step. One of the guidelines offered by FDA to reduce the potential for contamination at this critical step includes establishing appropriate measures that reduce, control, or eliminate the potential introduction of human pathogens at the cut surface during and after the mechanical harvest operation. Under the proposed program, audit metrics would be developed to identify actions that would meet this guideline, such as equipment cleaning schedules and requirements for harvest workers to use gloves or other protective clothing.

According to proponents, if the proposed program were implemented, its administrative body would have authority to recommend "audit metrics". Witnesses explained that audit metrics are standards or steps within a production or handling system at which some action or measure should be taken to minimize the potential for microbial contamination. The standards or steps within a production or handling system at which action or measures are taken are also referred to as "control points" of a "process control". It was further explained that any "audit metrics" established under the proposed program would represent a set of auditable standards or requirements within a process control that would allow an auditor to determine if a producer or handler is in compliance with the program.

While proponent witnesses supported the need for a uniform verification audit program, they also supported the development of a program that recognizes differences among producers and handlers across regions in the production area. For example, differences in water sources, geography, climate, or size of operation could require slight variations in the types of actions needed to be taken for a producer or handler to be compliant under the proposed program.

It also was argued that the proposed agreement should allow for the development of audit metrics that are reflective of current industry practices and are scientifically-based. According to the record, standardization of production and handling audit metrics would result in increased efficiencies and reduced costs related to multiple buyer-specific requirements. Proponents explained that usage of current industry practices was important for two reasons. First, current practices for organic handling operations are likely different from conventional handling operations. However, the audit metric established for each respective type of handling operation should result in both operations meeting the FDA guidelines and complying with the proposed program.

Secondly, proponents advocated that audit metrics be supported by current scientific research accepted within the professional and academic scientific community. Proponents stated that the proposed program would positively address the increasingly common practice among fresh produce buyers to develop their own food safety requirements for producers and handlers. According to the hearing record, these requirements often differ from buyer to buyer, resulting in a complex web of private standards that producers and handlers need to adhere to in order to sell their product.

Implementation of these varied requirements is costly to the producer and handler, and is often redundant. Moreover, many witnesses testified that some buyer requirements are not scientifically justified and, in turn, have led to production and handling practices that challenge existing industry technology or are contra-indicated to findings of current scientific research.

To this end, proponents expressed the importance of including input from stakeholder groups including, but not limited, to organic producers and handlers, small businesses, and natural resource interest groups. Additionally, proponents stated that members of the professional and academic community should be represented in the audit metric development process.

Proponents argued that because the handling of imported fresh leafy green vegetables impacts domestic commerce, foreign product handled by signatories should also be regulated. As discussed in Material Issue 1, imported leafy green vegetables are widely distributed throughout the United States market alongside domestic leafy green vegetables. Moreover, record evidence shows that imported product can be co-mingled with domestic product prior to its distribution in United States markets.

Witnesses explained that if microbial contamination were to occur during the growing or handling of foreign leafy green vegetables imported by United States handlers and consumed by United States consumers, the United States fresh leafy green vegetable industry would suffer economic losses regardless of the origin of the contaminated product. Witnesses stressed the importance of having a Federally-regulated program through which the industry could stabilize any negative market impacts, and proactively address consumer confidence with regard to domestically handled leafy green vegetables, if such an event were to occur.

According to the hearing record, the regulation of imported product handled by signatory handlers would ensure that both domestic and foreign product was held to the same, or equivalent, good agricultural and handling practices. This would allow for consistency of

product quality among participants of the proposed program.

Proponents stated that it is critical for the industry to improve and ensure the safety and quality of leafy green vegetables. The relationship among quality, consumer demand, and producer returns was demonstrated at the hearing. Furthermore, the correlation between product quality and the absence of microbial contamination was clearly defined.

Witnesses testifying at the hearing used the example of the September 2006, multi-state outbreak of E. coli linked to fresh spinach grown in California's Salinas Valley. According to the record, the resulting recall was the largest ever for the fresh leafy green vegetable industry. Investigations by FDA and the California Department of Health Services, in cooperation with the Centers for Disease Control and Prevention, and USDA Animal and Plant Health Inspection Service, concluded that E. coli contamination might have been attributed to environmental factors in the production area.

Witnesses who were impacted by the recall stated that consumer demand for fresh spinach dropped by more than 60 percent immediately following FDA's public alerts. Witnesses also explained that after the contamination had been linked to California, consumer consumption of spinach remained at record lows regardless of the State within which it was produced. According to record evidence, consumer demand for spinach remains below pre-2006 levels.

Proponents used the 2006 E. coli outbreak, and the subsequent damage to consumer confidence and demand for leafy green vegetables, to demonstrate that a contamination event in one State can impact industry participants nation-wide. Witnesses stressed the need to have a regulatory system in place as a means of minimizing the potential for future contamination events. Witnesses also expressed the usefulness of having a Federally regulated program to facilitate the rapid identification and containment of contamination events if they occur. Proponents explained that such a national program would safeguard consumers, as well as provide the leafy green vegetable industry with a mechanism to address potential loss of consumer confidence in product quality.

According to record evidence, USDA has several programs—namely the Qualified Through Verification and the GAPs and GHPs Audit Verification Programs—that provide independent verification that growers and handlers are following FDA's guidance and commodity-specific best practices.

Proponents further stated that USDA and FDA have an established working relationship on food quality programs. For example, AMS offers the GAPs and GHPs Fresh Produce Audit Verification Program, a voluntary, audit-based program for the fresh produce industry based on the FDA's "Guidance to Minimize Microbial Food Safety Hazards for Fresh Fruits and Vegetables", and also coordinates Inspection Service audits under both the California and Arizona leafy green vegetable marketing agreements.

Witnesses in favor of USDA oversight also cited the history of interagency cooperation. As an example, witnesses at the hearing referred to the USDA and FDA co-sponsorship of the National Advisory Committee on Microbiological Criteria for Foods by the Food Safety and Inspection Services, along with other Federal agencies such as the Centers for Disease Control and Prevention.

Witnesses opposed to the proposed program, as well as those who voiced the need for revisions to the proponents' proposal, expressed apprehension over the ability of program administrators to collaborate with stakeholder interest groups. Specifically, witnesses were concerned that the development and recommendation process of audit metrics would not take into consideration differences between conventional and organic production and handling practices, as well as scale of business operations. Other areas of particular concern noted during the hearing include topics such as conservation practices and natural resource management.

These witnesses also explained that regulatory jurisdiction over some of these topics is shared by multiple Federal, State, and local government agencies, and stated the need to include representatives from these regulatory agencies in the audit metric development process. It was argued that their involvement would mitigate the potential for conflicting requirements being placed on producers or handlers that are subject to multiple sets of standards and compliance issues.

Some witnesses opposed to the proposed program expressed concern that its implementation would lead to further proliferation of private sector standards. These critics argue that the current California and Arizona State programs have had little positive impact on the reduction of private standards in those States since their implementation.

While many witnesses testified at the hearing that a relationship between product quality and food safety does exist, some stated that a regulatory program would be better placed under FDA oversight, or perhaps under a system of State regulatory programs.

Critics of USDA oversight of such a program stated that USDA lacks the scientific expertise needed for the development and implementation of a science-based regulatory program for food safety. Critics also explained that their understanding of the mission of AMS is to facilitate the marketing of agricultural products and therefore should not be involved in the oversight of quality as it relates to food safety issues. These witnesses stated that monitoring of food safety is not relevant to food quality and should not be included under the purview of marketing and market stability.

Others witnesses stated that individual State departments of agriculture would be better equipped at addressing the particular needs and unique characteristics of their producer and handler constituents. Witnesses in favor of State regulatory programs argued that the implementation of a national program would result in a "one-size fits all" Federal regulatory program. These witnesses believe that regulation would be developed to reflect the agricultural practices of regions producing the most volume of leafy green vegetables to the detriment of regions producing less volume.

Lastly, concerns were raised during the hearing process and in the post-hearing briefs submitted over the development process of any audit metrics applied to foreign production or handling operations. Witnesses also raised questions over the proposed agreement's ability to recognize foreign GAPs, GHPs and GMPs programs, foreign auditing services, or independent third-party auditing services currently in operation both domestically and internationally.

Based on hearing record evidence, USDA concludes that there is a need for a national program to regulate the handling of leafy green vegetables. The evidence supports that the proposed program would allow a uniform baseline of regulation to be proficiently administered throughout the complex and diverse leafy green vegetable industry. The proposed program should allow for participation and compliance among the diverse community of growing and handling operations across the United States.

Through the proposed program, leafy green vegetable industry stakeholders could work cooperatively together to develop and recommend a uniform, auditable, science-based food quality

verification program. Furthermore, audit oversight conducted by the USDA Inspection Service or USDA approved or recognized entities in coordination with current FDA guidelines, would benefit the industry and would be in the best interest of consumers. Finally, the proposed agreement would tend to effectuate the declared policy of the Act.

Material Issue Number 3—Definition of Leafy Green Vegetables and Production Area

The proposed agreement should provide for the definition of the commodity and the area that would be regulated. Terms related to the commodity to be covered by the proposed agreement, such as "fresh" and "fresh-cut" should also be defined.

Leafy Green Vegetables

The proponents testified that leafy green vegetables are short-lived herbaceous plants that are eaten raw. Most leafy green vegetables are produced in raised beds that are either directly seeded or transplanted with plugs (immature plants). Leafy green vegetables produced for fresh market production are harvested either as single leaves or as whole plants. Some types of leafy green vegetables, such as chard, kale, mizuna, and baby leaf lettuce may be harvested multiple times in a crop year. Record evidence pertaining to the leafy green vegetables included in the definition follows.

Arugula, a member of the *Brassicaceae* family of plants, has three species that are used for human consumption: the annual species—*Eruca sativa* (domesticated) and *Eruca sativa vesicaria* (L.) Cav. (wild-type); perennial species—*Diplotaxis tenuifolia* (L.) DC; and a polyploidy perennial *Diplotaxis muralis* (L.) DC. Arugula is a low-growing annual that is commonly called rocket, roquette (French), rughetta, and rucola (Italian). If arugula is marketed as a single commodity, it is usually bunched and packed into cartons in the field. Arugula that is for the fresh-cut market is shipped from the field to the processing facility in bulk containers.

According to record evidence, arugula produced in Arizona is primarily produced for value-added packaged salad mixes. In this example, the plants are not thinned after sprouting and are harvested as immature arugula. This differs from producers in New Jersey, who generally harvest, wash, and bundle their crop, and sell it as a single commodity at local produce auctions in wholesale units of 24 bunches per crate. Record evidence indicates that small producers who produce arugula generally sell their crop in bunches directly to customers at farmers' markets.

Cabbage, one of the most consumed vegetables in the world, is a member of the *Brassica oleracea* species (*Capitata* Group) of the family *Brassicaceae.* Cabbage is produced year-round in all 50 States. A mature head of cabbage generally weighs 3–5 pounds, depending on the variety. Cabbage produced for the fresh market is harvested by hand and packed 18–24 heads per carton.

Chard (*Beta vulgaris var. cicla*) is a member of the *Amaranthaceae* family of plants that is commonly called Swiss chard in the United States. It is the same species as beetroot. Stems of the chard plant vary from white to red and yellow depending on the variety. If only mature leaves are harvested, chard will continue to be productive for up to a year. Leaves are typically bunched in the field during harvest. Immature or baby leaves may be added to packaged salad mixes.

Cilantro (*Coriandrum sativum*) is an annual herb in the family *Apiaceae* that is also called Chinese or Mexican parsley in the United States. In Florida, cilantro is produced for the fresh-cut market between late September and May, whereas in California it is produced year-round. Hand-harvested cilantro is sold in bunches tied with a rubber band or twist tie. Conventional packing is 30 bunches in 10 pound boxes.

There are three major cress species known in North America: Garden cress, Upland cress, and watercress. All are members of the family *Brassicaceae.* Garden cress (*Lepidium sativum*), also called peppergrass, pepper cress, or pepperwort, is a fast-growing plant. Introduced to the United States from China, it is botanically related to mustard and watercress and is sometimes referred to as an herb. Garden cress is commonly used in salads as a "baby green". Upland cress (*Barbarea verna*) is native and grows wild in the southeast; it is often called creasy greens, highland creasy, or creasy salad. Watercress (*Nasturtium officinale, N. microphyllum*) is a fast-growing aquatic or semi-aquatic perennial plant. It is thought to be one of the oldest known leafy green vegetables consumed by humans.

Dandelion is produced commercially in the United States from two species, *Taraxacum officinale* and *Chichorium intybus,* both belonging to the *Asteraceae* family. A perennial herbaceous plant, dandelions are native to North America and produced as weeds worldwide. Dandelion use as a fresh leafy green is growing in popularity.

Endigia is a new variety of forced red chicory that is a cross between Belgian endive and two varieties of radicchio—Chioggia and Verona.

Endive (*Cichorium endivia*) is a leafy green belonging to the large *Asteraceae* family. There are two main varieties of endive, curly endive, or frisee (var. *crispum*), and escarole (var. *latifolia*). The leaves from endive are harvested by hand and tied in bunches before being packed into cartons. Belgian endive (*Cichorium intybus* var. *foliosum*) is also known as witloof in the United States.

Kale is a member of the *Brassica oleracea* species (*Acephala* Group) with common varieties of green kale, red kale, red Russian kale, and Lacinto or dinosaur kale. At harvest, two cuttings may generally be taken from one seeding. If harvested as an immature leaf, kale is often co-mingled with other immature or baby leaf variety leafy green vegetables in salad mixes. Mature kale is typically cooked prior to eating. However, witnesses testified that mature kale is often used on salad bars for decoration, so it comes into contact with other leafy green vegetables in that context.

Lettuce (*Lactuca sativa*) is produced in all 50 States and is highly perishable. Lettuce crops include head, leaf, and romaine. Common varieties of head lettuce (*Lactuca sativa* var. *capitata*) are iceberg (also called crisphead) and butterhead (also called Boston, bibb, buttercrunch, or Tom Thumb). During harvesting in Arizona and California, outer leaves are stripped from the lettuce heads before boxing. Head lettuce sold fresh is boxed 24 heads to a carton—either naked or film-wrapped. Head lettuce that will be further processed is shipped in bulk to the processing facility where it is washed, cored, shredded, and/or cut and packaged as ready-to-eat products. Leaf lettuce (*Lactuca sativa* var. *crispa*) has steadily grown in popularity in the United States in the past 15 years. Common leaf lettuce varieties are red leaf, green leaf, and baby leaf or salad/spring mix. At harvest, leaf lettuce is generally naked packed 24 to a carton. Romaine lettuce (*Lactuca sativa* var. *longifolia*), also called Cos lettuce, is generally loosely packed.

Mâche (*Valerianella locusta*) is a small annual plant of the family *Valeriancaceae.* It is also called corn salad, Lewiston cornsalad, lamb's lettuce, lamb's tongue, field lettuce, field salad, rapunzel, and fetticus.

Parsley (*Petroselinum crispum*) is a biennial green leaf herb that is a member of the family *Apiaceae.* Parsley

is available in two varieties—curly leaf and Italian or flat leaf. Parsley is harvested by cutting 1.5–2 inches above ground so that re-growth may occur, allowing for three to four cuttings per planting.

Radicchio, a type of chicory (*Cichorium intybus* var. *foliosum*), is a member of the family *Asteraceae.* Sometimes called Italian chicory, varieties of radicchio are named after the regions of Italy from which they originate. The most common variety of radicchio found in the United States is Radicchio di Chioggia. Other lesser known varieties available are Radicchio di Treviso, Tardivo, and Radicchio di Castelfranco. In Italy, radicchio is often grilled or roasted, but in the United States it is most often used as a colorful addition to leafy green salad mixes. The United States also imports radicchio from Italy and Chile.

Spinach (*Spinancia oleracea*) is a hardy leafy green vegetable that is produced in all 50 States. There are several different varieties of spinach that are classified according to leaf shape and texture. Varieties include savoy, which has wrinkled leaves, semi-savoy, and varieties with smooth or flat leaves. Savoy types are sold mainly for fresh market uses, while types with smooth or flat leaves are used mainly for processing. The growing season varies by location, and leaves may be cut as often as four times during a crop year. Spinach is sold in bunches or as loose leaf in cellophane packaging to food service and retail outlets.

Tat soi (*Brassica rapa* var. *rosularis, Narinosa* group) is an Asian leafy green vegetable and a member of the *Brassicaceae* family.

Winter purslane (*Claytonia perfoliata*) is a member of the *Portulacaceae* family. Also known as Cuban Spinach and Miner's lettuce, winter purslane is an annual plant.

Proponents and other witnesses testified that they believe this is a comprehensive list of the leafy green vegetables produced in the United States and available in the market. However, new varieties of lettuces and other leafy greens appear in the market on an annual basis. Those varieties would be covered by the proposed agreement. Similarly, witnesses testified that "baby leaf" or "baby greens" are a seed variety that is to be harvested and marketed as a vegetable, rather than being an immature version of a leafy green vegetable. These varieties would also be covered by the program. The definition of leafy green vegetables should be revised to clarify that all varieties of the listed items would be covered.

Some witnesses supported adding mustards and herbs to the proponents' definition. However, record evidence does not support extending program coverage to those items. Proponents testified, for example, that mustards were not included in the definition of leafy green vegetables because they are normally cooked prior to consumption.

The proponents supported including "spring mix" in the definition of leafy green vegetables. However, the record evidence is that spring mix is not a single commodity, but a mixture of a variety of leafy green vegetables. Proponents and other witnesses testified that there is no universal, standard ingredient blend for spring mix. A spring mix typically includes, but is not limited to, arugula, chard, cress, lettuce, and radicchio. It also includes baby leaf items such as cress, dandelion, endiga, mache, mizuna, tat soi, and winter purslane. While the list of leafy green vegetables includes most items commonly used in a spring mix, signatory handlers who produce a spring mix would need to ensure that all ingredients of their spring mix are produced and handled in accordance with the terms of the proposed agreement.

The proposed agreement is intended to cover all mixes (such as spring mix and other salad blends) of leafy green vegetables. The definition of leafy green vegetables is revised to clarify this point by adding a new paragraph (b). In a related matter, sometimes salad mixes contain items that are not leafy green vegetables, such as carrots or dressings. These items would not be covered by the agreement. Such language is being added to the definition of leafy green vegetables as a new paragraph (c). (This provision appeared in § 970.8 of the proponents' proposal, but that section of the proposed agreement is being deleted as unnecessary.)

Some witnesses stated that the program should apply only to fresh-cut leafy green vegetables. These witnesses cited that there is a different safety risk for leafy green vegetables produced for fresh-cut versus the fresh market. Other witnesses with generally the same viewpoint stated that the list of leafy green vegetables presented by the proponents was too broad and should provide an exception for leafy green vegetables that require cooking.

Based on hearing record evidence, all leafy green vegetables included in the proposed definition that are handled by signatory handlers and that are intended for human consumption in the fresh form (whether fresh-cut or not) should be covered under the proposed agreement. Record evidence demonstrates that the movement of leafy green vegetables from producers to handlers is fluid and that oftentimes it is difficult to anticipate what the end use of a harvested field will be. Moreover, record evidence supports that the opportunity for microbial contamination exists throughout the industry at the production, harvesting, handling and processing stages. Therefore, coverage of all leafy green vegetables, whether in their fresh or fresh-cut form, is necessary and is in the best interest of consumers.

Regarding witness requests to exempt leafy green vegetables that require cooking prior to human consumption, this exemption is unnecessary as the proposed program would only cover leafy green vegetables intended for consumption in their raw or uncooked form. This is because the process of cooking is identified as a "kill step" in food safety guidelines and is believed to eliminate contamination.

Lastly, the record evidence supports the authority for the Board, with the approval of the Secretary, to add and remove leafy green vegetables from the definition as deemed necessary. This authority would enable the program to adapt and change to the needs of the leafy green vegetable industry. Any change would require that the Board approve such a recommendation at a public meeting and then submit the recommendation to the Secretary for review. If appropriate, USDA would initiate rulemaking.

In summary, the definition of "leafy green vegetables" that appeared in the Notice of Hearing as § 970.15, is revised as discussed above and redesignated as § 970.18.

Fresh

Proponents and other witnesses stated that "fresh" means any leafy green vegetable in the raw or natural form. Proponents described the many different ways that leafy green vegetables are harvested fresh in the field. One witness described how cilantro could be harvested using any of three different methods: (1) Cut the foliage 1–2 inches above the crown (the most common method); (2) cut the whole plant just below the soil; and (3) bulk harvest into bins using a mower and conveyor. Another witness provided the example that a head of lettuce that is field-cored and wrapped in the field is considered a raw agricultural commodity in a package. Both of these examples demonstrate that while harvesting involves cutting the foliage growth from the stem or crown of the plant, such cutting does not

constitute the creation of a fresh-cut leafy green vegetable.

The term "fresh" was used often as witnesses discussed GAPs and GHPs, since both pertain only to the fresh commodity. Thus, based on record evidence, a new definition § 970.9, "fresh" is added to the proposed agreement. This is necessary to identify and describe how fresh leafy green vegetables are different from fresh-cut leafy green vegetables.

Fresh-Cut

Proponents proposed a definition of "fresh cut" to mean fresh leafy green vegetables that have been altered from their natural form by cutting, dicing, peeling, slicing, chopping, shredding, coring, or trimming, with or without washing prior to being packaged for use by the consumer, foodservice industry, or a retail establishment. Proponents provided examples of fresh-cut leafy green vegetables by citing lettuce that is shipped in bulk to the processing facility where it is washed, cored, shredded or cut, and packaged as ready-to-eat bagged salads. It was noted that this process would also apply to cabbage.

Section 970.7 is revised for clarification and redesignated as § 970.10.

In addition, proponents proposed a definition in the Notice of Hearing as § 970.8, "fresh-cut, packaged leafy green product". However, witnesses testified that this term means the same as the definition of "fresh-cut". This definition is being removed from the proposed agreement as unnecessary. Likewise, the definition of "Packaged" that appeared in the Notice of Hearing as § 970.18 is deleted as unnecessary.

Production Area

The term "production area" should be included in order to identify the area in which the proposed program would be applicable. According to the hearing record, the production area should include the fifty of the United States and the District of Columbia.

Proponents testified that the intent of the proposed program is to put into effect a national, standardized system to increase quality by minimizing microbial contamination of leafy green vegetables intended for raw or uncooked human consumption in the United States. Furthermore, the proposed program would assist in stabilizing market conditions if a contamination event were to occur, and would increase consumer confidence in the quality of leafy green vegetables.

According to record evidence and as discussed in Material Issue 1, leafy green vegetables are produced and handled year-round in all 50 States and the District of Columbia. Handlers in the United States may acquire leafy green vegetables that are produced in one State, manufactured in another State, and shipped nationally for consumption by consumers. Additionally, witnesses stated that some handlers have production or manufacturing operations, or both, in multiple locations throughout the United States. Thus, the national scope of the leafy green vegetable industry supports defining the production area as all 50 States and the District of Columbia.

Lastly, the production area and the zones into which it would be divided would determine the eligibility of persons to serve on the Board. The proposed program would require that all handlers, producers, and at-large members are located within the production area. The topic of the division of the production area into zones and Board membership are further discussed in Material Issue 5(b).

Based on the hearing record, the term "production area" should be defined to mean all 50 States and the District of Columbia of the United States of America. The definition of "production area" that appeared in the Notice of Hearing as § 970.23 is redesignated as § 970.28.

Material Issue Number 4—Persons and Activities To Be Regulated

Certain terms should be defined to identify the persons and the activities that would be regulated under the proposed agreement. The proposed agreement would regulate the act of handling leafy green vegetables in the production area by those handlers would voluntarily agree to adhere to the agreement requirements. As such, the following terms should be defined: "handle", "handler", "importer", "manufacture", "manufacturer", "signatory first handler", and "signatory handler."

According to record testimony, within the leafy green vegetable industry, businesses in the farm to fork continuum include growers/producers, handlers (commonly known as processors, shippers, packers), wholesalers/distributors, agents/brokers, exporters/importers, retail outlets such as grocery stores, and foodservice providers. Small farms as defined by SBA commonly sell their leafy green vegetables directly to consumers at farmer markets, through Community Supported Agriculture (CSA) programs, or to retailers. Record testimony indicates that large farm operations usually sell their leafy green vegetable crops to handlers or directly to retailers at wholesale produce auctions.

Record testimony indicates that there basically are two types of handlers "first handlers" and "secondary handlers" or handlers other than first handlers. "First handlers" take possession of leafy green vegetables and may process and package leafy green vegetables before selling to other handlers or retailers. "Secondary handlers" such as manufacturers—the record indicates—commonly buy from first handlers. However, such handlers also could buy directly from producers.

According to record testimony, handling generally begins when the harvested leafy green vegetable crop leaves the field and is in the possession of the handler. Record testimony also indicates that fresh leafy green vegetable crops may change hands as many as three times through handling activities before reaching its final destination.

According to record evidence, the term "handle" should be defined to mean "receive, acquire, sell, process, ship, distribute, or import leafy green vegetables. The record indicates that "handle" should not include retail sales, foodservice sales, or brokering of such leafy green vegetables. According to record evidence, the act of handling places leafy green vegetables or products into the current of commerce both within the production area, and between the production area and any point outside that area. As such, "handle" which appeared in the Notice of Hearing as § 970.11 should be redesignated as § 970.14, and revised slightly for clarity.

"Handler" should be defined to mean any person who handles leafy green vegetables. The record indicates that a handler could be an individual, joint venture, partnership, corporation, or other business entity. According to record testimony, a handler represents the segment of the industry that processes, ships, sells, consigns, or imports leafy green vegetables, or any combination thereof. As proposed by under this agreement, distributors, packers, processors, shippers, and wholesalers would be handlers. The record also indicates that producers who engage in the act of handling leafy green vegetables would be considered handlers. As handlers, such producers would directly place their product into the stream of commerce, through direct sales to consumers, retailers, or other handlers such as a manufacturer or foodservice operator.

For the purposes of the proposed agreement, the term "handler" should specify that brokers, retailers, and foodservice operators would not be considered handlers unless such

persons are otherwise engaged in handling. The record indicates that generally brokers serve as intermediaries and, negotiate with producers or handlers on behalf of their customers without ever taking possession or ownership of the actual leafy green vegetables.

The term "handler" appeared in the Notice of Hearing as § 970.12, and should be re-designated § 970.15, and revised slightly for clarity.

Record evidence indicates that the term "signatory" should be modified to "signatory handler" and the definition should be revised to mean a handler located in the production area who is party to the proposed agreement. The revisions clarify that only handlers could become signatories to the proposed agreement, and that such persons would have to be located within the production area.

According to the record, a signatory handler would be responsible for meeting the requirements of the proposed agreement, complying with audit requirements, and submitting reports and other information required for the administration of the proposed agreement. In cases where a signatory handler contracts for services, the signatory handler would be responsible for verifying and retaining documentation that the contracting service provider or agent meets any requirements in effect under the proposed agreement.

Signatory handlers would be eligible to nominate persons to the Board and to serve as handler members or their alternates on the Board. Signatory handlers also would be eligible to nominate persons to serve on Committees of the Board and be eligible to serve as members of the Technical Review Committee. Additionally, record evidence indicates that signatory handlers would need to be located in the production area because they are responsible for handling leafy green vegetables in the United States.

The term "signatory", which appeared in the Notice of Hearing as § 970.26, is revised to "signatory handler", and redesignated as § 970.33.

Record testimony indicates that, signatory handlers would be identified as "first" or "secondary" handlers under the proposed agreement. Record evidence supports adding a new § 970.32. This section would establish the definition of "signatory first handler" to mean the person located in the production area who signs the proposed agreement and who is the first to handle leafy green vegetables. This definition is intended to identify signatory handlers who first receive leafy green vegetables for the purposes of assessment collection. As proposed under the agreement and supported by the record, signatory first handlers would be financially responsible for the payment of assessments under the proposed agreement. It is important to identify the responsible party, since leafy green vegetables may be handled by several different signatory handlers and the assessment should only be applied once.

According to proponents of the proposed agreement, "signatory first handlers" would be identified as the handler who first takes possession of leafy green vegetables in their natural form from a producer with the intent to sell them to retailers or other handlers. As an example, a signatory first handler may contract with an independent harvesting company to harvest a producer's crop and deliver that crop to the signatory first handler's facility. In such a case, the signatory first handler would take ownership of the crop, yet would not be the first business entity to physically engage in the act of handling. According to record evidence, given that the harvesting company is contracted by the signatory first handler, and the handler assumes ownership, the said handler, and not the harvester, would be identified as the signatory first handler. Therefore, the signatory first handler would be responsible for ensuring that the contracting harvester is in compliance with any provisions in effect under the proposed agreement. Additionally, the signatory first handler would be responsible for the payment of assessments on such leafy green vegetables.

As another example, if a producer were to harvest a leafy green vegetable crop and then engage in the act of handling the crop that producer would be considered a "signatory first handler" and responsible for ensuring crop is in program compliance with the proposed agreement, assuming the producer in its capacity as a handler had signed the agreement.

Witnesses explained that while some leafy green vegetables are minimally handled after they are harvested, some product is sold or transferred to a secondary handler or a handler other than a first handler for further processing. These secondary handlers are commonly known as "manufacturers" or "processors". Record testimony indicates that secondary handlers or handlers other than first handlers generally buy from first handlers, and could receive product from other handlers, processors, or manufacturers. Additionally, such secondary handlers also may purchase leafy green vegetables directly from producers.

According to the hearing record, the term "process", which is included in the definition of "handle", is synonymous with "manufacture" and means "to change fresh leafy green vegetables from their natural or raw form into packaged fresh-cut products." During the manufacturing process, leafy green vegetables are typically washed, and then shredded, cut, cored, trimmed, or blended with other types of fresh-cut leafy green vegetables, or any combination thereof. Ultimately, the processed product is packaged for distribution. Processed fresh leafy green vegetable products are then typically transported in refrigerated trucks or coolers to the secondary handler's customer. These customers may include consumers, retailers, foodservice companies, or wholesale produce operations supplying a range of products to retail and foodservice companies.

Witnesses were careful to clarify that activities of a manufacturer do not include the packing of leafy green vegetables in the field. Additionally, record testimony indicates that, in some cases, coring and trimming activities can be part of a producer or handler harvesting activity. Therefore, the definition of manufacture should not include leafy green vegetables packed in the field. Additionally, the terms "manufacture" and "process" appeared in the Notice of Hearing as § 970.16 and § 970.21, respectively, and should be combined and revised slightly for purposes of clarification and redesignated as § 970.19.

The term "manufacturer" as indicated above should be defined to mean any person who manufactures. As slightly revised, the definition should not include a retailer, a foodservice operator, or broker, except to the extent that such a person is otherwise engaged in handling. The term "manufacturer" appeared in the Notice of Hearing as § 970.17, and should be redesignated as § 970.20.

Hearing record evidence supports the inclusion of the term "import" under the definition of "handle". As such, the term "importer" should be defined to mean "a handler located in the production area who imports leafy green vegetables that are produced or handled outside of the production area." The term "importer" appeared in the Notice of Hearing as § 970.13, and should be re-designated as § 970.16.

Material Issue Number 5(a)—Definition of Terms

In addition to the definitions addressed in Material Issues 3 and 4, certain terms should be defined for the purpose of specifically designating their applicability and limitations whenever they are used in the proposed agreement.

"Act" should be defined in § 970.1 of the proposed agreement as the Agricultural Marketing Agreement Act of 1937, as amended (48 Stat. 31, as amended; 7 U.S.C. 601–674). This is the statute under which the proposed regulatory agreement would be operative.

Record evidence supports adding a new definition § 970.2, "Audit metric", to the proposed agreement. According to the record, "audit metric" should be defined to mean an auditable standard or requirement within a process control prescribed pursuant to § 970.67.

"Audit verification" should be revised to "audit" and should mean an official review conducted by the Inspection Service to verify and document that good agricultural, handling, and manufacturing practices are adhered to throughout the growing, harvesting, packing, manufacturing, and transportation of leafy green vegetables. Additionally, according to the record, an audit would include a physical visit to the farm or facility subject to audit while it is in operation. This audit would represent a "snapshot in time" based on documentation reviewed, persons interviewed, and operations observed. The intention of the audit is to provide the auditor with a picture of the handler's activities with the ultimate goal of ensuring that such activities comply with program requirements.

The definition for "audit verification" that appeared in the Notice of Hearing as § 970.2, should be redesignated as § 970.3, "audit".

The term "broker" should mean a person who coordinates the sale and transportation of leafy green vegetables for retail or foodservice operators, without taking ownership of such vegetables. This definition appeared in the Notice of Hearing as § 970.3, and should be redesignated as § 970.4 and reworded for clarity.

As witnesses explained, and as recommended in this decision, the term "critical limit" should refer to a maximum or minimum value that is assigned to a process control when a biological, chemical, or a physical parameter must be controlled. This prevents or minimizes the occurrence of a food safety hazard. "Critical limit" appeared in the Notice of Hearing as § 970.4, and should be redesignated as § 970.6 and revised slightly for clarity.

The term "crop year" should be defined to mean the 12-month period beginning on April 1 of any year and ending on March 31 of the following year. The record indicates that leafy green vegetables are produced year round in the production area. The proposed April through March period mirrors the existing crop year in the predominant production areas for leafy green vegetables. This period represents a fixed timeline that would prescribe a period of conduct essential for the Board's administrative activities, such as preparing an annual budget of expenses and accounting for receipts and expenditures of funds. Thus, the term "crop year" would be synonymous with "fiscal year."

The definition of "crop year" should be revised to include authority for the Board, subject to approval of the Secretary, to recommend any other annual period if a different annual period is found to be more appropriate. The definition of "crop year" that appeared in the Notice of Hearing as § 970.5 should be revised as indicated above and redesignated as § 970.7.

The definition of "foodservice distributor" that appeared in the Notice of Hearing should be replaced by a definition of "foodservice operator". The term should be defined to mean a person that provides leafy green vegetables to the public as a restaurant, cafeteria, industrial caterer, hospital, or nursing homes. These businesses directly deliver leafy green vegetables to consumers, either by sale or by offering for direct consumption. Foodservice operators are excluded from the definition of "handler" in their role as a foodservice operator, much the same as retailers are excluded from the term handlers in their roles as retailers.

Record evidence also supports clarifying that the list of businesses identified in the proponents' definition of foodservice operators is not all inclusive. This clarification is being added to the definition of foodservice operator, which appeared as § 970.6 and is being revised and redesignated as § 970.8.

"Good agricultural and handling practices" refer to general practices established by FDA to reduce microbial food safety hazards in leafy green vegetables. According to the hearing record, good agricultural and handling practices are described in two FDA guideline documents, the "Guide to Minimize Microbial Food Safety Hazards for Fresh Fruits and Vegetables" and the "Guide to Minimize Microbial Food Safety Hazards for Fresh-cut Fruits and Vegetables".

FDA is the agency at the U.S. Department of Health and Human Services charged with primary regulatory responsibility for food safety. The FDA guidelines referenced above, broadly referred to as "GAPs" and "GHPs", are intended to assist the produce industry in minimizing the risk of food-borne contamination throughout the industry's production and handling activities. According to the hearing record, GAPs and GHPs, would provide the scientific baseline or reference for all audit metrics relating to production and handling activities developed under the proposed agreement.

As witnesses explained, and as included in the proposed agreement, the Board should have authority to recommend, for approval by the Secretary, the adoption of any other documents or regulations, established for the purposes of minimizing microbial food safety hazards in the production and handling of leafy green vegetables. These documents and regulations would be used as the basis for audits conducted by the Inspection Service under the program.

Section 970.9 that appeared in the Notice of Hearing is being modified for clarification and redesignated as § 970.11.

According to the hearing record, "good manufacturing practices", or "GMPs", mean any FDA regulations which describe the methods, equipment, facilities, and controls required for producing fresh-cut food, including processed, packaged leafy green vegetables. Current FDA regulations appear in 21 CFR Part 110. According to the hearing record, GMPs would provide the scientific baseline or reference for all audit metrics relating to manufacturing activities developed under the proposed agreement.

As recommended in this proposed agreement, the Board should have authority to recommend, for approval by the Secretary, the adoption of FDA guidance documents, regulations, or any other documents, for use in audits conducted by the Inspection Service under this part. This definition appeared in the Notice of Hearing as § 970.10, "good manufacturing practices" and should be revised and redesignated as § 970.13, "good manufacturing practices or GMPs".

"Inspection Service" should be defined to mean Fruit and Vegetable Programs, Agricultural Marketing Service, USDA, its designees, or any other entity approved or recognized by USDA to conduct audits on leafy green vegetables. USDA recommends revising

this definition to more clearly define the Inspection Service's role in the audit process. This definition appeared in the Notice of Hearing as § 970.14 and should be revised and redesignated as § 970.17.

The term "National Leafy Green Vegetable Board" or "Board" be added to the list of defined terms as § 970.22 of the proposed agreement. "Board" should mean the administrative board established pursuant to § 970.40 and § 970.41.

The term "part" should be added to the proposed agreement as § 970.24 and should be defined to mean the marketing agreement regulating the handling of leafy green vegetables and all rules, and regulations issued thereunder.

As presented in the Notice of Hearing, proponents proposed that "Person" should be defined to mean an individual, partnership, corporation, association, or any other business unit or legal entity. This definition should be revised to make it consistent with the definition of the same term in the Act and redesignated as § 970.25.

The definition of "process control" should be revised so that it more clearly reflects the usage of this term as it was presented by witnesses during the hearing. "Process control" should mean a step or point within a production, harvesting, handling, manufacturing, or transportation process at which the potential for microbiological contamination can be reduced. This definition appeared in the Notice of Hearing as § 970.22, and should be revised and redesignated as § 970.26.

"Producer" is synonymous with "grower" and should be defined to mean any person engaged in a proprietary capacity in the production of leafy green vegetables for sale or delivery to a signatory handler.

Section § 970.20 of the Notice of Hearing should be modified for clarity and redesignated as § 970.27.

Witnesses proposed the addition of the term "region" to the list of definitions to clarify that "region" is distinctly different from the term "zone". As discussed later in Material Issue 5(b), zones are related to Board membership. According to record evidence, "region" should mean a production or growing area distinguished by common environmental or growing conditions including, but not limited to, geography, climate, production practices, water sources and distribution systems, and wildlife. This definition should be added to the list of definitions as § 970.29 of the proposed agreement.

"Retailer" should be defined to mean any person that sells leafy green vegetables directly to the consumer. Retailers' sales typically involve the sale of leafy green vegetables for further preparation or home consumption by the consumer. An example of a retailer would be a grocery store.

This definition appeared in the Notice of Hearing as § 970.24, and should be revised for clarity and redesignated as § 970.30.

"Secretary" means the Secretary of Agriculture of the United States or any officer or employee of the USDA who is acting on their behalf. This definition appeared in the Notice of Hearing as § 970.25 and should be redesignated as § 970.31.

"United States Department of Agriculture or USDA" should be defined to mean any officer, employee, service, program, or branch of the Department of Agriculture, or any other person acting as the Secretary's agent or representative in connection with any provisions of this part. This definition appeared in the Notice of Hearing as § 970.27 and should be revised with minor modifications for clarity and redesignated as § 970.35.

A definition of the term "United States Food and Drug Administration or FDA" should be added to the list of defined terms as § 970.36 of the proposed agreement and should mean the agency within the United States Department of Health and Human Services. This definition allows the FDA acronym to be used throughout the proposed agreement.

The definition of "Zone" that appeared in the Notice of Hearing as § 970.28 should be revised and redesignated as § 970.37. "Zone" should be defined to mean one of the subdivisions of the production area or such other subdivisions as may be established pursuant to § 970.41. Defining the zones would be important for the purpose of Board and the Technical Review Committee representation, and is related to §§ 970.40, 970.41, 970.42, 970.44, 970.46, 970.49 and 970.66.

Record evidence supports modifying the zones proposed by the proponents, as well as adding additional zones. Zones should be comprised of States that are geographically contiguous and reflect similarities in climate and crop production. Zones should also reflect the distribution of leafy green vegetable acreage, and distribution of leafy green vegetable farms. "Zone" is further discussed under Material Issue 5(b).

USDA recommends replacing the proponents' proposed five zones with eight zones, as stated below:

(1) *Zone 1* shall include the States of California and Hawaii.

(2) *Zone 2* shall include the States of Alaska, Idaho, Montana, Oregon, Washington, and Wyoming;

(3) *Zone 3* shall include the States of Arizona, Colorado, Nevada, New Mexico, and Utah;

(4) *Zone 4* shall include the States of Illinois, Iowa, Minnesota, Nebraska, North Dakota, South Dakota, and Wisconsin;

(5) *Zone 5* shall include the States of Arkansas, Kansas, Louisiana, Missouri, Oklahoma, and Texas;

(6) *Zone 6* shall include the States of Delaware, District of Columbia, Indiana, Kentucky, Maryland, Michigan, Ohio, Virginia, and West Virginia;

(7) *Zone 7* shall include the States of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, and Tennessee; and,

(8) *Zone 8* shall include the States of Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont.

Material Issue 5(b)—Administrative Board

The proposed agreement should provide for the establishment of an administrative body (Board) to administer the program and to provide for its effective and efficient operation. Membership on the Board should be reflective of leafy green vegetable industry stakeholders, namely signatory handlers, producers supplying such signatory handlers, importers, retailers, foodservice operators, and the public (consumers). Further, the proposed agreement should delineate the procedures, powers, and duties of the Board.

USDA recommends that, based on record evidence, the provisions of the proposed agreement pertaining to zones, Board membership allocation among zones, eligibility requirements, and nomination procedures, be revised from those provisions that appeared in the Notice of Hearing. Specifically, USDA recommends increasing the number of zones and redefining them so that regional similarities are recognized as well as leafy green vegetable acreage and the number of farms harvesting leafy green vegetables. USDA also proposes that the Board's membership be expanded and revised to reflect the proposed changes in zones, and to increase opportunity for participation of industry representatives on the Board. Lastly, USDA proposes that eligibility requirements and nomination procedures be revised to address witness concerns regarding diverse

stakeholder (small businesses, organic businesses, diversified businesses) representation among the Board membership. This would provide for an open, transparent, and inclusive nomination, selection, and appointment process.

This Material Issue addresses §§ 970.37, 970.40, 970.41, 970.42, 970.43, 970.44, 970.45, 970.48, 970.49, 970.50, and 970.51 of the proposed agreement. These sections address the subject areas of: establishment of zones, establishment and membership of the Board, rezoning and reallocation, eligibility, term of office, nominations, alternate members, compensation and expenses, administrative procedures, and powers and duties of the Board. These sections were originally proposed in the Notice of Hearing as §§ 970.28, 970.40, 970.41, 970.42, 970.43, 970.44, 970.47, 970.48, 970.49, and 970.50, respectively.

Definition of Zones

The proponents testified that the production area should be subdivided into five zones for the purpose of industry representation on the Board and administration of the proposed agreement. The five zones were proposed as follows:

(1) *Zone 1:* California, Washington, Oregon, Hawaii, and Alaska.

(2) *Zone 2:* Arizona, Montana, North Dakota, Wyoming, South Dakota, Idaho, Nevada, and Utah.

(3) *Zone 3:* New Mexico, Colorado, Nebraska, Minnesota, Iowa, Kansas, Oklahoma, Texas, Missouri, Arkansas, and Louisiana.

(4) *Zone 4:* Wisconsin, Michigan, Ohio, Illinois, Indiana, Kentucky, Tennessee, Mississippi, Alabama, and Georgia.

(5) *Zone 5:* Maine, New Hampshire, Vermont, New York, Connecticut, Massachusetts, Pennsylvania, New Jersey, West Virginia, Virginia, Maryland, Delaware, Rhode Island, North Carolina, South Carolina, Florida, and the District of Columbia.

For this zone structure, the proponents utilized 2007 United States Census production volume data for leafy green vegetables. Proponents explained that they attempted to anchor each zone with a key leafy green vegetable-producing State, as detailed in Material Issue 1. For this reason, the States of California and Arizona were purposefully separated so that their production volume would not be attributed to one zone, thereby not skewing the balance of Board member representation in favor of those two States and thus, a specific zone. Other anchor States that produce the majority of leafy green vegetables in the United States are Texas, Colorado, Georgia, Florida, and New York.

Proponents explained that their intent was to create zones strictly for the purpose of industry representation on the Board. Proponents contended that the proposed zones and corresponding Board representation would provide for the development of audit metrics that recognized regional differences. Proponents further explained that they intended to develop a process that would be inclusive and transparent to allow for the participation of various stakeholder groups and the recognition of regional, geographic differences. The topic of audit metrics development is discussed in Material Issue 5(c).

A considerable number of witnesses, both those who were opposed to the establishment of the proposed agreement, as well as those who supported the concept of a national agreement but suggested improvements to the proponents' proposal, raised concerns over the proponents' proposed zones. Witnesses testified that the proposed zones were geographically too large, and did not recognize regional differences in geography, types of crops grown, production practices, environmental factors, climate, and diverse stakeholder concerns that exist in the United States leafy green vegetable industry. Witnesses also testified that the proposed zones did not accurately reflect the distribution of leafy green vegetable acreage or the distribution of farms.

Witnesses contended that the proponents' proposed zones were not established based on agricultural or climatic conditions to reflect common growing seasons or agronomic zone characteristics. Witnesses further claimed that it was unreasonable to expect representatives of zones inclusive of States that greatly differ in leafy green vegetable crop type, production methods, geography, and climate, to adequately understand the growing conditions across such a wide geography. Witnesses cited several examples to illustrate the proponents' proposed zones were geographically too large and included States in the same zone that do not share geographic and climate characteristics, but would be represented by the same membership and Board member allocation.

As an example, witnesses testified that proponents' proposed Zone 4 included 10 States that stretched from Wisconsin to Alabama. These witnesses pointed out that, as proposed, the States of Georgia and Ohio, and the States of Wisconsin and Alabama, would be in the same zone even though they have distinct differences in geography and climate. Witnesses also noted that proponents' proposed Zone 5, which included 16 States and the District of Columbia, combined southern States such as Florida with northern States such as Vermont, Maine, and New York which vary widely in geography, climate, and production practices. Witnesses further asserted that the States in proposed Zone 5 have different soil types, water sources, growing seasons, and marketing channels.

Witnesses testified that production practices, which vary across the United States, were reflective of climates. Witnesses suggested that the proposed zones should include similar climate areas such as the Upper Midwest as one zone. An example cited by witnesses identified Upper Midwest States as having climate requiring different production practices than those found in Georgia or California. Witnesses explained that Upper Midwest States tend to have periods of hard freezes, thereby limiting their production season to the months of May through October. In contrast, witnesses noted that the State of Georgia has a high humidity climate, Northeast States have cooler climates, and Southern California has more of a desert climate.

Witnesses asserted that States having similar climate and geography should be grouped together in order to represent a contiguous area as further support of proper representation of like concerns among States. One witness offered the example of combining the States of Florida, Georgia, and Alabama as an appropriate representation of like geography, climate, and production practices. Another witness suggested subdividing the State of Maryland to place the northern half of Maryland with States west to Michigan in one zone, and southern part of Maryland with States west of the Mississippi River in another zone. Additionally, another witness suggested combining the Northeast States into one single zone because of similarities in climate.

Some witnesses suggested that the division of zones and Board membership allocation among those zones should be based on the number of leafy green vegetables acres harvested for the fresh and fresh-cut market. Witnesses explained that some production areas benefit from production environments that allow for multiple harvests of high-yielding crops, while other areas only harvest one crop per year.

According to witnesses, an example of this difference would be a producer in California that may harvest a field of immature or baby leaf varieties of leafy

green vegetables several times within one growing season, while producers of cabbage in New York may only harvest one time per growing season. In this example, if production volume were used instead of acreage, the producer in California would be given more weight in the allocation of producer seats under the proponents' proposal. However, witnesses indicated that if the number of acres were used as a basis of member allocation, the example farm in California would be equally weighted to the farm in New York. As such, witnesses suggested that the usage of acres would therefore result in a more equitable representation of producers on the Board.

Other witnesses, including those opposed to the proposed agreement, suggested using the number of farms per State to capture the distribution of producers nationwide as opposed to relying solely on production volume to determine producer representation. These witnesses explained that while some States have a concentration of large producer entities producing high-yielding crops, other States have a high number of smaller producer entities that produce leafy green vegetables as a portion of their overall farm production. Witnesses argued that under a zone and membership allocation structure that focuses on production volume, such as that proposed by the proponents, States having a high number of small, low-volume farms risk being under-represented compared to States with fewer high-volume farms. Witnesses contended that under-representation of these small farm operations would result from the proponents' proposed zones. Witnesses with this concern stated that the proposed zones and corresponding member representation on the Board should be revised to better recognize diversified, small-scale operations.

Witnesses argued that an increase in the number of zones together with a more accurate zone definition would likely result in greater opportunities for stakeholders, such as small diversified farms, farms using non-conventional production methods, and handler entities interacting with local, small-scale markets and producer associations, to gain representation. Witnesses stated that increased opportunity for stakeholders would result in the inclusion of those groups' concerns in Board decisions, including the audit metric development process.

Witnesses argued that, contrary to the proponents' position, the definition of zones and the recommendation of audit metrics by Board members are intrinsically linked. Witnesses disagreed with the proponents' position that the division of zones would not have an impact on the process of developing audit metrics under the proposed agreement. They explained that if the proposed zones did not adequately represent regional differences in geography, climate, and production practices, the composition of Board membership would not adequately represent the complex spectrum of producer and signatory handler interests that exist in the United States leafy green vegetable industry. Furthermore, because the Board would ultimately be responsible for recommending audit metrics to USDA for approval, witnesses feared that minority and diverse stakeholder concerns would be overlooked in this process because they may not be represented on the Board.

Lastly, witnesses, including proponent witnesses, stated that the Board should have the ability to modify the number and definition of zones, in order to reflect the diverse and changing leafy green vegetable industry.

Proponent witnesses testified that their intent in defining the proposed zones was to allow for adequate participation by stakeholders to ensure consideration of diverse interests in Board decision-making, including the development of the audit metrics. However, there was record testimony that the proposed zones were geographically too large to ensure adequate representation of diverse stakeholder interests. The record further establishes that acreage of leafy green vegetables and the number of farms harvesting leafy green vegetables rather than production volume also should be considered in subdividing the production area into zones.

Throughout the hearing, proponents stated they were open to revisions in the proposed agreement to address concerns brought to light by the hearing process. Proponents asserted that they were willing to collaborate with concerned witnesses and USDA to improve the proposed agreement's effectiveness. Several proponents stated that, while their proposal attempted to present an equitable, balanced division of geographic zones and diverse perspectives of the supply chain, USDA should have the discretion, based on hearing record evidence, to modify the proposal so that it better reflects the needs of the industry. In addition, both witnesses who were opposed to the proponents' proposal and those who advocated improvements to the proposal, stated that USDA should revise the proposed zones and Board membership eligibility requirements to ensure that leafy green stakeholder groups are adequately represented. These stakeholder groups would include, but are not limited to: Small producer and signatory handler entities, organic producers and signatory handlers, and diversified farming operations.

USDA has analyzed witness testimony in conjunction with record data and has developed recommended changes to the proposed zones. Evidence reviewed by USDA includes both Census and NASS leafy green vegetable data, and information specific to the distribution of leafy green vegetable acreage and the number of farm reporting such acreage by State. In addition, USDA considered information supplied by witnesses with regard to geography, climate, and seasonal growth patterns of different leafy green vegetable crops to more appropriately group States into zones.

USDA's analysis of the distribution of leafy green acreage throughout the production area as compared to the volume of production demonstrated that significant variances exist between areas producing high-yielding crops and those producing low-yielding crops. An acreage-based analysis places leafy green vegetable acreage having smaller annual per acre production yields on more equal footing with leafy green vegetable acreage having higher annual per acre production yields. This should result in greater and more equitable opportunity for participation in States having lower yields per acre. As such, USDA recommends that acreage rather than production volume, as proposed by proponents, should be utilized in defining zones.

Furthermore, USDA's analysis of the number of farms reporting harvest of leafy green vegetables (specifically for the fresh and fresh-cut market) allowed USDA to assess the distribution of industry stakeholders across the production area. Using the number of farms harvesting leafy green vegetables in defining zones would address concerns that States having a high number of small producer entities would be under-represented under the zone structure proposed by proponents. Lastly, defining zones on a combined analysis of leafy green vegetable acreage and the number of leafy green farms provides better representation on the Board of diverse stakeholder interests.

USDA also took into consideration witness testimony that zones should reflect grouping of States that are contiguous and share geographic and climate similarities. According to hearing record evidence, incorporating guidelines that would require, to the extent practicable, grouping of States

into zones that are contiguous and share climate and similarities in agricultural practices would result in zones comprised of States that share similar production and handling concerns.

Regarding the above, USDA recommends grouping, to the extent practicable, geographically contiguous States into zones to reflect similarities in climate and agricultural practices. For example, southeastern States such as Mississippi, Alabama, Florida, Georgia, and North and South Carolina were grouped together because of the similarity in warm, coastal climates, type of crops grown, and growing seasons. Tennessee was added to this group as record evidence indicated that the similarity between leafy green vegetable production in this State was more similar to the coastal States than its northern neighbors.

Similarly, the northeastern States stretching from Pennsylvania and New Jersey up through Maine were grouped because of similarities in crop types and growing seasons. According to the hearing record, the northeastern States produce a majority of the nation's cabbage, which is typically a colder weather crop that is harvested according to a crop cycle that is distinctly different from warm weather crops. Another example is the grouping of Arizona, New Mexico, Nevada and Utah. These States all represent warmer, drier climates with spring and summer growing and harvest seasons. These States also typically rely heavily on irrigation watering systems as rainfall is limited. Similar to the case of Tennessee, Colorado was included in the southwestern State grouping even though that State tends to have an overall cooler and wetter climate. However, according to the record, Colorado leafy green vegetable crops, growing and harvest seasons were more similar to those in Arizona and New Mexico than those in the other neighboring States of Nebraska, Wyoming, or Kansas.

States ranking among the top leafy green vegetable bearing acreage were identified so that each zone was anchored with a key leafy green vegetable producing State. This is consistent with the method applied by proponents.

In summary, the record supports increasing the number of proposed zones from 5 to 8. The zones would delineate smaller geographic areas that both reflect similarities in climate, geography, and crop production, and increase opportunity for participation of industry representative on the Board.

The zone structure would be as follows:

(1) *Zone 1* should include the States of California and Hawaii;

(2) *Zone 2* should include the States of Alaska, Idaho, Montana, Oregon, Washington, and Wyoming;

(3) *Zone 3* should include the States of Arizona, Colorado, Nevada, New Mexico, and Utah;

(4) *Zone 4* should include the States of Illinois, Iowa, Minnesota, Nebraska, North Dakota, South Dakota, and Wisconsin;

(5) *Zone 5* should include the States of Arkansas, Kansas, Louisiana, Missouri, Oklahoma, and Texas;

(6) *Zone 6* should include the States of Delaware, the District of Columbia, Indiana, Kentucky, Maryland, Michigan, Ohio, Virginia, and West Virginia;

(7) *Zone 7* should include the States of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, and Tennessee;

(8) *Zone 8* should include the States of Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont.

These zones, which were previously defined in § 970.28 of the Notice of Hearing, now appear in § 970.37.

The Board should have authority to recommend future modifications of the defined zones and to ensure proper geographic division of the production area over time. In making such a recommendation, the Board would be expected to consider factors similar to those used in deriving the zones proposed in this recommended decision.

Board Membership and Allocation of Member Seats Among Zones

Proponent witnesses advocated a Board membership of 23 members allocated among five zones, with the representation of each zone based on that zone's relative volume of leafy green vegetable production. Of the 23-member Board proposed by the proponents, 13 seats would be assigned to signatory handlers and 6 seats would be assigned to producers delivering to signatory handlers. The signatory handler and producer member seats would be allocated among the proposed five zones as follows: Four handlers and two producers from Zone 1; three handlers and one producer from Zone 2; two handlers and one producer from Zone 3; two handlers and one producer from Zone 4; and two handlers and one producer from Zone 5. In addition, the proponents' proposal would assign one seat to each of the following interest groups: Retailers, foodservice, importers (signatory handlers), and the public. As proposed by proponents, representation of signatory handlers, producers, and the other at-large members (retailer, foodservice, importer, and public) among the 23 seats would be as follows: 13 handler seats (57 percent), 6 producer seats (26 percent), and 4 at-large seats (17 percent).

Proponents testified that even though the proposed agreement would regulate signatory handlers, the inclusion of producers delivering product to those handlers as Board members was important given that they would also be impacted by any regulations in effect under the proposed agreement. The proponents testified that the importer, retailer, foodservice, and public members are needed to represent the diverse perspectives of the farm-to-consumer leafy green vegetable supply chain. They further stated that each of these stakeholders can address unique factors associated with their sector. Proponents stated that the public member seat was intended to provide consumer representation on the Board.

Proponents explained further that specific producer and signatory handler stakeholder groups should be assured representation on the Board and, therefore, proposed representation requirements for these groups. Specifically, the proposed requirements state the majority of producer members could not be engaged in the act of handling leafy green vegetables or manufacturing fresh-cut, packaged leafy green products. In addition, the Board would include at least two small producer business entities, and four signatory handler members would be manufacturers of fresh-cut leafy green vegetables.

Proponents explained that the proposal to include producers not engaged in handling or manufacturing leafy green vegetables or products would allow for representation of "pure" producer interests on the Board. Regarding Board seats allocated to small producer entities, proponents explained that the United States leafy green vegetable production industry is comprised of many different sizes of producer operations following varying production methods, and that each type of producer is faced with unique challenges when producing for the United States leafy green vegetable industry. For this reason, proponents stated that small producer entities should be assured representation on the administrative Board. Lastly, proponents explained that manufacturers of fresh-cut leafy green vegetables face unique challenges that are different from those faced by other sectors of the leafy green vegetable industry. For this reason, proponents

stated that their representation on the Board was important to understanding issues that are particular to that part of the United States leafy green vegetable industry.

Both witnesses who were opposed to the proponents' proposal and those who advocated improvements to the proposal stated that USDA should revise, as necessary, Board membership to ensure that diverse leafy green vegetable industry stakeholder groups are represented. Witnesses testified that the proponents' proposed Board membership, which resulted from their proposed zones, appeared to be based more on ensuring the strategic voting power for certain States. These witnesses asserted that the proposed zones and corresponding Board membership would provide inequitable representation of leafy green vegetable industry stakeholders, particularly small, diversified farm operations.

The record supports the establishment of an administrative Board to administer the proposed agreement and provide for its effective and efficient operation. The record also indicates that the membership of the administrative Board should represent signatory handlers, producers supplying such handlers, importers, retailers, foodservice, and the public.

Upon consideration of the record evidence, a 3-member increase in the total size of the Board would allow for greater industry representation yet would maintain a membership that is manageable and efficient. For these reasons, the Board membership should be increased from 23 to 26 members. Of that total, USDA recommends that 22 Board member seats be designated as producer and signatory handler seats, and the remaining 4 seats be designated as importer, retailer, foodservice, and public member seats. Each member should also have an alternate who would have the same qualifications as the member for whom he or she is an alternate.

In allocating handler and grower seats, each zone's combined share of national leafy green acreage and the national number of leafy green vegetable producing farms were considered. In instances where a zone represents a greater portion of leafy green vegetable acreage or a larger number of leafy green vegetable farms, additional producer or signatory handler members would be allocated. Additionally, record evidence supports assigning a minimum of one producer member and one signatory handler representative to each zone.

Based on the foregoing discussion, the following is the allocation of producer and signatory handler members:

(1) Zone 1 should have four signatory handlers and three producers;

(2) Zone 2 should have one signatory handler and one producer;

(3) Zone 3 should have one signatory handler and one producer;

(4) Zone 4 should have one signatory handler and one producer;

(5) Zone 5 should have one signatory handler and one producer;

(6) Zone 6 should have one signatory handler and one producer;

(7) Zone 7 should have two signatory handlers and one producer; and,

(8) Zone 8 should have one signatory handler and one producer.

In addition to the producer and signatory handler seats, four seats should represent the following four groups: Importers, retailers, foodservice, and the public. Representation of these stakeholders is needed to represent the diverse perspectives of the leafy green vegetable supply chain. The representation of the proposed 26-member Board for signatory handlers, producers, and the other members (importer, foodservice, retailer, and public) would be 12 seats (46 percent), 10 seats (39 percent), and 4 seats (15 percent), respectively.

This revised allocation represents an increase in producer representation on the Board from the proponents' proposed 26 percent to 39 percent, as well as a decrease in at-large representation from the proponents' proposed 17 percent to 15 percent. The revised signatory handler representation would result in 46 percent versus the proponents' 57 percent.

The proponents' recommendations that the majority of grower members not be engaged in handling, that at least two of the grower members represent small businesses and that at least four of the handler members be manufacturers of fresh-cut products should remain in § 970.40. Additionally, to the extent practicable, Board membership should include diversified farm producers and organic producers and handlers.

Section 970.40 of the proposed agreement is being revised as discussed above.

Proponents proposed including authority to reapportion Board member seats among zones, change the number of Board members, and revise composition (the relative number of signatory handler, producer and other seats). This authority appeared in the hearing notice under § 970.40 and is being moved to a new § 970.41.

In making any recommendation to revise membership, the Board would have to consider the geographic distribution of acreage and the number of leafy green vegetable farms among the zones. This differs somewhat from what the proponent group proposed—that the Board would need to consider shifts in production. Other criteria to consider would be the importance of new acreage, the equitable relationship between membership and zones, economies to result in promoting efficient administration of the program, and other relevant factors. The agreement should require that each zone be represented by at least one producer one signatory handler seat.

Eligibility

The proponents proposed eligibility requirements for the purpose of identifying persons who would be qualified to serve as members on the Board. Proponents proposed that in order for a signatory handler (including importers) or producer to be eligible to serve on the Board, each should be an owner, officer, or employee of a signatory handler or producer at the time of their selection and throughout their term of office in the zone for which selected.

Proponents proposed that the retail, foodservice, and public members and their respective alternate members not be engaged in the production or handling of leafy green vegetables. Additionally, the retail and foodservice members and their respective alternate members should be, at the time of their selection and throughout their term of office, an owner, officer, or employee of the firm represented by the seat selected. This would enable these members to represent all stakeholders involved in the supply chain for that sector.

Regarding the producer and signatory handler member seats, there was testimony presented at the hearing advocating that such members should be required to be a legal resident in the zone for which selected. However, record evidence supports that where a producer or handler conducts business is a more important criteria than the producer or handler's place of residence.

Multiple witnesses expressed concern that the proposed eligibility provisions could allow large leafy green vegetable producers and handlers—who often operate in multiple States—to have member seats in several zones. These witnesses testified that the agreement should limit the number of seats any one company could fill to maximize industry representation on the Board.

According to record evidence, limiting Board member representation to provide that no one company or its affiliates could be represented on the Board by more than one signatory

handler (including importer) or producer and their alternate member should provide more opportunities for diverse representation on the Board. As such, a provision is added to the proposed agreement to specify that company representation for such entities would be limited to one member seat and one alternate member seat.

Finally, the remaining members of the Board may be from any zone because they represent the production area at large. The eligibility requirements proposed in § 970.41 of the Notice of Hearing are revised as discussed above and redesignated as § 970.42.

Alternate Members

Proponents proposed that each Board member should be assigned an alternate member for the purpose of assuring continuity and stability of Board operations. Alternate members would act in the place and stead of the Board members they are alternates for when the Board members cannot fulfill their Board obligations. Alternate members would succeed their member in the event of that member's death, removal, resignation or disqualification. The alternate would then serve until a successor was selected and qualified.

According to proponents, alternate members would be subject to the same eligibility requirements as Board members and would be nominated in the same manner as Board members. Proponents explained that providing alternate Board members would ensure full representation of the industry, as well as full representation of their particular zone and group (producers, signatory handlers, or other stakeholder members).

The record supports the proponents' proposal regarding alternate members. This proposal appeared as § 970.44 of the Notice of Hearing and is redesignated as § 970.45. The last sentence of that section is removed as it is duplicative of language that appears in § 970.49.

Nominations

A nomination mechanism should be established through which members and alternate members of the Board would be nominated, selected, and appointed by the Secretary. Record evidence supports revising § 970.43 of the Notice of Hearing to improve transparency in the selection and appointment of Board members.

In their proposal, proponents described a nomination process to identify Board member nominees and to provide for their selection and appointment by USDA. Proponents explained that names of nominees would be collected by USDA (initially) and by the Board (for subsequent nominations) at producer and signatory handler meetings, by mail, or through any form of electronically verifiable communication. Names received as nominees for producer and signatory handler member seats would then be placed on a ballot and would be voted on by their peers, respectively. A list of nominees receiving the highest number of votes would be forwarded to USDA for selection and appointment by the Secretary. Proponents explained that once the producer and signatory handler members had been appointed, those members would nominate the retailer, foodservice, importer, and public members and their alternate members. Final selection and appointment of the retailer, foodservice operator, importer, and public member would be made by the Secretary.

Proponents further explained that, as part of the nomination process, nominees would be required to indicate in advance of selection their interest to serve as a member, alternate, or both, and that they are willing to accept the seat for which selected. According to the record, agreeing in advance to serve as a Board member or alternate member would avoid possible delays in the appointment of the Board.

According to proponents, the proposed agreement would provide, in times when nominations are not made in a timely manner and as specified, the Secretary authority to appoint members and alternates who meet the proposed eligibility requirements. Furthermore, proponents explained that in the event that any vacancy were to arise on the Board due to an individual's disqualification, removal, resignation, or death, a successor member or alternate member would be nominated and selected in accordance with the proposed nomination and acceptance procedures, or at the discretion of the Secretary.

A considerable number of witnesses, both those who were opposed to the establishment of the agreement, as well as those who supported the concept of a national program but suggested improvements to the proponents' proposal, raised concerns over the proposed nomination and selection process outlined by the proponents.

The primary concern among these witnesses focused on what was perceived as a closed nomination process. These witnesses stated that a peer nomination and ballot system, in combination with the proponents' proposed zones and limited number of Board member seats, would result in the inability of diverse stakeholders to successfully compete and receive nomination and appointment to the Board. Substantial concern was raised over the potential for large producer and signatory handler entities to control the nomination process and the resulting list of nominees forwarded to the Secretary for approval.

Additional concern was voiced over the process outlined by proponents for the nomination of the retailer, foodservice, importer, and public member seats. Witnesses argued that because the proponents' proposal allowed nominations for these positions to be made exclusively by appointed producer and signatory handler members to USDA, the proposed process lacked transparency or the opportunity for input from industry representatives not appointed to the Board.

Many witnesses testified that in the absence of proposed zones that better reflected regional differences and an increase in Board membership to allow for greater industry participation, all Board member selections should be made by the Secretary.

These witnesses advocated the establishment of a system under which a peer nomination voting process would be replaced by an industry-wide nomination process, with selection and appointment by the Secretary. Others suggested that nominations should be made by the general public, with selection and appointment by the Secretary. According to witnesses making these suggestions, their recommendations would lead to a transparent process for the identification and selection of Board members, and would improve the potential for diverse stakeholders to participate on the Board.

Record evidence supports that a process for Board member nominations is necessary. Further, record evidence supports that nominations for producer and signatory handler (including importer) member seats and their alternate member seats of the Board, should be made by their respective peers. As such, nominations for signatory handler member seats and their alternates only would be made by signatory handlers. Likewise, only producers supplying signatory handlers would be allowed to nominate eligible producers for producer member seats and their alternate seats.

Record evidence supports that the nomination process for the retailer, foodservice, and public member, and their alternates, should be revised to allow for nominations to be received at meetings, by mail, or by any form of electronically verifiable communication

from any person in the production area. This revision would allow for greater industry and public participation in the nomination of persons representing the retail, foodservice, and public communities and would allow for greater transparency in that process.

As part of the nomination process, nominees would be required to indicate in advance of selection their interest to serve as a member, alternate, or both, and that they are willing to accept the seat for which selected. This would avoid possible delays in the appointment of the Board.

The record evidence supports revising the proponents' nomination process by removing the industry vote on nominees received. Instead, all names received during the nomination period should be forwarded to the Secretary, together with necessary information concerning their eligibility.

The Secretary would appoint from those nominees the members and alternate members of the Board on the basis of the representation provided for in §§ 970.40 through 970.42 of this proposed agreement.

Finally, the record supports nomination provisions with regard to acceptance, failure to nominate, and vacancies. Sections 970.43(c), (d) and (e) as published in the Notice of Hearing are redesignated as § 970.44(c), (e) and (f).

Term of Office

The proponents proposed that the term of office for Board members and alternates should begin on April 1 and continue for two years. The record indicates that leafy green vegetables are produced year round and that a term of office beginning on April 1 corresponds to the beginning of the time period designated in the definition of crop year. This language was published in the Notice of Hearing as § 970.42 and is redesignated as § 970.43.

This decision recommends the two-year term of office as proposed by proponents for Board members and their alternates to increase industry participation in administering the proposed agreement. The two-year term of office would apply to all Board members, including those representing the public. The maximum number of terms that an individual would be allowed to serve as a member on the Board would be three consecutive two-year terms of office, or a maximum of six consecutive years. Thus, once a person has served as a Board member for six consecutive years, that person would not be eligible for re-nomination to the Board until after 12 consecutive months out of office. Such 6-year term limits would not apply to alternate members to ensure continuity in Board operations.

Compensation and Expenses

According to record evidence, Board members and alternate members, committee and subcommittee members, including those members serving on the Technical Review Committee and the Research and Development Committee, would necessarily incur some expenses while attending meetings, or performing other duties under the proposed agreement. Proponents propose that reasonable expenses, which could include expenses associated with travel, meals, and lodging, should be reimbursed. However, proponents explained these same members and alternate members would not receive any compensation for their time. No specific testimony was received in opposition to this proposal. A provision for compensation and expenses was proposed in the Notice of Hearing as § 970.47 and is redesignated as § 970.48.

Quorum and Voting Provisions

The proponents proposed that provisions establishing quorum and voting procedures would be necessary for the effective functioning of the proposed Board. In their proposal, proponents stated that having a quorum requirement would ensure a majority of Board members be present prior to the Board voting on any action. According to proponents, a quorum would be met when a majority of all Board members were present at a meeting, including at least one member from each zone. If a quorum were met, proponents stated that voting requirements for any action taken by the Board would require the concurrence of a majority of all the members present at the meeting.

The proponents identified three Board actions that would require more than a simple majority vote. Proponents proposed that a minimum concurrence of two-thirds of the Board members at a meeting be required for Board actions related to the acceptance of GAPs, GHPs, and GMPs, as well as changes in the assessment rate and termination of the agreement. Proponents explained that for these specific actions a ⅔ vote requirement would be needed due to the importance of changes to audit metrics, assessments, or termination.

One witness testifying in favor of the super-majority provision clarified that the original language proposed by the proponents and published in the Notice of Hearing erroneously referred to "acceptance of Good Agricultural, Handling, and Manufacturing Practices" instead of audit metrics. The witness explained that Good Agricultural, Handling, and Manufacturing Practices are guidelines that are independent of the proposed agreement and, therefore, would not be subject to recommended revisions proposed by the Board. The witness offered that approval of audit metrics would better capture the intent of the proponent group. Hearing record evidence supports replacing "acceptance of Good Agricultural, Handling, and Manufacturing Practices" with "approval of the audit metrics as provided in § 970.67" in § 970.49 of the proposed agreement.

In the event that a Board member were absent from a meeting, witnesses explained that that member's alternate could serve in the absent member's place and stead for the purpose of constituting a quorum and voting. Proponents further explained that if both the member and their alternate were unable to attend a meeting, the absent member or Board could designate any other alternate from the same zone and group who is present at the meeting to serve in the absent member's place and stead.

For example, Zone 7 is proposed to be allocated two signatory handler members. If one of the two Zone 7 signatory handler members were present at a meeting and both the other member and their alternate were both absent, the alternate for the first member could serve in the place and stead of the absent member because they would represent both the same zone and group as the absentee. In this scenario, the alternate member would be selected to serve in the place and stead of the absentee by either the absent Board member or the Board. In this same example, if an available alternate member was a signatory handler from a different zone or was an alternate producer for Zone 7, that alternate could not be designated to serve.

Proponent witnesses testified that meetings of the Board should be open to the public, and notice of meetings should be given to the Secretary in the same manner as is given to members of the Board. The record indicates that at Board meetings, members could cast their vote by voice, hand, or in writing.

Additionally, a member participating by telephone would need to confirm his or her vote in writing. According to the record, a videoconference would be considered an assembled meeting and all votes would be considered as cast in person without need for subsequent written confirmation.

The record supports the need to establish quorum requirements and voting procedures so that meetings are conducted in an orderly manner and

that adequate representation in Board decisions. However, the proposed language should be modified to state that a majority of all appointed members of the Board shall constitute a quorum. This would address situations in which a zone may not have any appointed members.

No specific testimony was received in opposition to this proposal. Accordingly, the provisions regarding quorum and voting procedures in § 970.48 would be revised as previously discussed above and redesignated as § 970.49.

Powers

Proponent witnesses testified that certain powers should be assigned to the Board in order for it to carry out its functions under the proposed agreement. Proponents indicated that these powers would enable the Board to make recommendations to the USDA that reflect the conditions in the industry based on their knowledge and experience. To this end, the proponents included six powers in their proposal:

(1) To administer the proposed agreement in accordance with its terms and provisions;

(2) To make such rules and regulations, with the approval of the Secretary, as may be necessary to effectuate the terms and provisions of the proposed agreement;

(3) To adopt, with the approval of the Secretary after notice and comment, audit metrics to administer the terms and provisions of the proposed agreement;

(4) To cooperate with existing State boards, commissions and agreements through memorandum of understanding to affect the purposes of the proposed agreement;

(5) To receive, investigate, and report to the Secretary complaints of violation of the provisions of the proposed agreement; and,

(6) To recommend to the Secretary amendments to the proposed agreement.

No specific testimony was received in opposition to this proposal.

Certain powers should be granted to the Board to enable it to properly administer the proposed program. Upon review, power 3 above is included in power 2 and is therefore duplicative, while power 4 is more appropriately included under Board duties. The section "Powers" originally was included in the Notice of Hearing as § 970.49 and is revised and redesignated as § 970.50.

Duties

Proponents stated that specific duties are necessary for the Board to fully execute its responsibilities under the proposed agreement. They pertain to specific activities authorized under the proposed agreement, such as investigating and compiling information regarding leafy green vegetables, and to the general administration of the proposed agreement including hiring employees, appointing officers, and keeping records of all Board transactions.

The specific duties of the Board proposed by the proponents are as follows:

(a) To act as intermediary between the Secretary and any signatory with respect to the operations of the agreement;

(b) To select from among its members a chairperson and such other officers as may be necessary, and to define the duties of such officers;

(c) To establish subcommittees and advisory boards to aid the Committee in the performance of its duties under the agreement;

(d) To adopt such bylaws for the conduct of its business as it may deem advisable;

(e) To keep minutes, books, and records which clearly reflect all the acts and transactions of the Committee and subcommittees, and these shall be subject to examination by the Secretary at any time;

(f) To appoint such employees or agents as it may deem necessary, and to determine the compensation and define the duties of each;

(g) To cause its financial statements to be audited by a certified public accountant at least once each crop year and at such other times as the Committee may deem necessary or as the Secretary may request. Such audit shall include an examination of the receipt of assessments and the disbursement of all funds. The Committee shall provide the Secretary with a copy of all audits and shall make copies of such audits, after the removal of any confidential information that may be contained in them, available for examination at the offices of the Committee;

(h) To investigate the production, handling and marketing of leafy green vegetables and to assemble data in connection therewith; and,

(i) To furnish such available information as may be deemed pertinent or as requested by the Secretary.

Record evidence indicates that, in addition to the duties proposed by the proponents, the duty to develop an annual budget for review and approval by the Secretary should be included. Witnesses testifying in favor of this addition stated that development of a budget is necessary to ensure proper financial planning of Board expected expenditures and anticipated receipts. In addition, the development of an annual budget would be instrumental in determining, along with production estimates, the annual assessment rate. The witness stated that the budget should be reviewed and approved by USDA to ensure the fiscal responsibility in the proposed agreement's administration.

At the hearing, some witnesses raised questions regarding the protection of confidential information, especially within the context of financial reports developed by the Board, and audit of Board annual financials, including receipt of assessments and the disbursement of all funds. Witnesses expressed concern over the need to maintain confidentiality of proprietary information when such reports are written or audits conducted.

The duties proposed by the proponents and listed above are reasonable and necessary. No specific testimony was received in opposition to this proposal. This proposal was included in the Notice of Hearing as § 970.50 and is revised as previously discussed and redesignated as § 970.51.

Material Issue Number 5(c)—Audit Metrics and Verification Audits

According to record evidence, the proposed agreement should provide that verification audits be conducted to verify that signatory handlers are complying with the provisions of the proposed program. This would include audits of signatory handler operations to ensure that GHP audit metrics are being adhered to, as well as producer operations delivering to those handlers to ensure that GAP audit metrics are being adhered to. Verification audits should also be conducted of manufacturer operations (for those manufacturers who are signatories to the proposed agreement) to ensure that GMP audit metrics are being adhered to. Proposed provisions for verification audits are provided for in § 970.66.

Record evidence supports providing the Board with the authority to recommend audit metrics. Audit metrics established under the proposed program would represent a set of auditable standards or process control that would allow an auditor to determine if a producer or handler is in compliance with the program. Provisions for the development of audit metrics are provided for in § 907.67.

In addition, a Technical Review Committee (TRC) should be established to assist the Board in the development of audit metrics. Members of the TRC would represent signatory handlers and

producers throughout the production area, as well as stakeholder interest groups including but not limited to organic and non-conventional agriculture, small business operations, members of the scientific community, and interested government agencies. Authority for the TRC would be provided for in § 970.46 (formerly § 970.45).

Provisions requiring traceability should be established under the proposed program. The ability to trace produce during all stages of production, handling, and distribution would be a key factor in ensuring compliance. Witnesses stated that traceability would also provide for increased information about the source and movement of produce within the leafy green vegetable industry in the event that a contamination incident was to occur. Provisions relating to traceability are provided for under § 970.68.

According to the hearing record, an official mark should be developed for the purposes of identifying compliant participants in the proposed program. The proposed mark would be used on bills of lading, manifests or other like documentation that is standard in pre-retail market transactions. In addition, the Board should have the authority to recommend other uses of the official mark. Any other such uses would require the approval of the Secretary. Provisions for the development and usage of the official mark are provided for under § 970.69.

The record also supports the establishment of provisions allowing for any financially interested person to request an administrative review if it is believed that the results of an audit are in error. These proposed provisions are included in § 970.70.

Provision for the Secretary to modify, suspend, or terminate regulations in effect under the proposed program should also be included in the proposed agreement. This is provided for in § 970.71.

Verification Audits

As explained in Material Issue 5(a), the term "verification audit" should be defined to mean an official audit conducted by the Inspection Service to verify and document that good agricultural, handling, and manufacturing practices are adhered to throughout the growing, harvesting, packing and transportation of leafy green vegetables. According to the record, a verification audit would include a physical visit to the farm or facility subject to audit while it is in operation, to the extent practicable, and would represent a snapshot in time based on documentation reviewed, persons interviewed and operations observed. Information gathered during the audit would reflect past and ongoing activities of the signatory handler or their supplying producer(s) to the Inspection Service.

Section 970.66 of the proponents' proposed language describes verification audit provisions for GAPs, GHPs and GMPs audits. Proponents stated that signatory handlers would be required to ensure that any leafy green vegetables handled by their operation have been subject to GAPs verification audits. Proponents further stated that the GAPs audits should reflect FDA production and harvest guidelines, referred to in proposed § 970.11, and should meet audit metrics provided for under proposed § 970.67.

Proponents also stated that all signatory handlers to the proposed program should be subject to GHPs or GMPs verification audits, whichever is applicable. Such audits would verify that signatory handlers operate under auditable conditions that meet general FDA guidelines referred to in § 970.11 or FDA manufacturing regulations referred to in § 970.13, and should meet audit metrics provided for under proposed § 970.67.

Proponents explained that audits were necessary to ensure the integrity of all leafy green vegetables handled under the program. Proponents stated that quality assurance of leafy green vegetables begins in the field where the produce is grown, but that the integrity of that quality should be maintained through all stages post-production through delivery to market. By ensuring that leafy green vegetables are consistently subject to GAPs, GHPs and GMPs, proponents asserted that the potential for microbial contamination of those vegetables would be minimized. These practices would support the delivery of quality products to the marketplace.

According to the hearing record, proponents further stated that signatory handlers of the proposed program should not be allowed to import leafy green vegetables produced or handled in foreign countries that have not been subject to GAPs, GHPs or GMPs verification audits by the Inspection Service or agencies approved to audit on its behalf. Proponents stated that any foreign leafy green vegetables that are imported should be subject to comparable requirements that would be in effect in the United States if this proposed program were implemented.

According to the hearing record, all audits should be conducted by the Inspection Service or any other such agency that is authorized to audit on its behalf. Proponents explained that audits should be conducted on a regular schedule that would ensure every handler is audited during their corresponding production season. In addition, unannounced audits of handlers and associated producers should be performed during the production season in each zone.

Finally, § 970.66 is revised for clarity.

Administrative Review

Under proposed § 970.70, any signatory handler denied the use of the official certification mark as a result of failing an audit should be allowed to petition for reconsideration of the results. Proponents proposed that such person could request an administrative review if it is believed that a material fact of the original verification audit was misinterpreted. Administrative reviews would be conducted in accordance with the USDA audit verification procedures for any audit program in effect.

The record evidence also supports that a financially interested person should have recourse if an auditing error is made. Witnesses also stated that the person requesting the review should pay the cost of the review, and would be subsequently provided a copy of the review results.

This section is revised for clarity.

Audit Metrics

According to the hearing record and as defined in Material Issue 5(a), "audit metric" refers to an auditable standard or requirement used to verify that a production, handling or manufacturing system intended to prevent, reduce or eliminate a microbiological hazard is being effectively and accurately followed. A collection of such standards is referred to as "audit metrics" and together establish the framework within which the process controls intended to ensure good agricultural, handling or manufacturing practices can be verified as being met.

One example of this is an audit metric that provides that water used in a production field to be verified as meeting a quality standard. However, the way that an individual producer may meet that standard would differ depending on whether the water was sourced from municipal or private wells, delivered via canal irrigation, applied to the crop in a foliar or non-foliar application, or was rain water. The applicable process control also would differ.

Each audit metric is a specific measure of GAPs, GHPs, or GMPs compliance. To the extent that production, handling and

manufacturing environments present different factors that need to be controlled during those processes, metrics may differ by zone or region. Moreover, according to the hearing record, the auditable actions taken by a producer, handler, or manufacturer to meet metric standards may also vary due to differences in business size, or cultural growing and handling practices. According to the record, audit metrics should incorporate current industry production, harvest and handling technologies, and should be based on scientific practices.

Section 970.67 of the proponents' proposed language describes the development and implementation of audit metrics under the proposed program. This language states that audit metrics may be recommended by the Board to USDA for approval after consultation with the Technical Review Committee. The Technical Review Committee, and any subcommittees established thereunder, would provide the Board with production and handling perspectives of the various regions, particular challenges of individual regions, as well as scientific review and food safety expertise.

The proponents' proposal contained a list of areas that may be addressed in establishing audit metrics for GAPs, GHPs, and GMPs. They are included in paragraphs (a) and (b), and those paragraphs are revised for clarity.

Hearing record evidence indicates concern over the method by which critical limits for process controls and quality factors would be identified and established under the proposed program. Witnesses stated that any proposed critical limits should be science-based, should reflect the broad spectrum of industry practices across the country, and should reflect or coordinate with FDA and other existing Federal or State regulation.

Portions of § 970.67(c) of the Notice of Hearing should be divided for clarity and redesignated as § 970.67(c), (d), and (e). Paragraph (c) should state that critical limits for process controls for each quality factor identified in GAPs, GHPs or GMPs audit metrics may be recommended by the Board, after consultation with the Technical Review Committee, for approval of the Secretary, or may be developed by USDA.

Paragraph (d) should state that USDA may consult with appropriate government entities and consider recommendations made by the Board after Board consultation with the Technical Review Committee.

Paragraph (e) should state that Board recommendations, including critical limits, shall incorporate current industry production, harvest and handling technologies, should be based on scientific practices.

Paragraph § 970.67(d) of the Notice of Hearing should be redesignated as a new § 970.67(f). This paragraph states that audit metrics may be developed and recommended to accommodate differences in production, harvest, and handling environments of different regions.

A new § 970.67(h) should be added to state that audit metrics may be developed and recommended to accommodate differences in production, harvest and handling environments of imported leafy green vegetables and their products.

Paragraph § 970.67(e) of the Notice of Hearing should be redesignated as a new § 970.67(g). This paragraph states that after consultation with the Technical Review Committee, the Board may, at any time, recommend changes to the audit metrics for approval by the Secretary.

According to the hearing record, the Board should be required to review audit metrics periodically. Witnesses explained that systematic reviews needed to occur to ensure that audit metrics continually reflect the best industry practices, scientific information, and industry knowledge. This review should occur at least every 3 years. This language was originally included in the Notice of Hearing as § 970.67(f) and should be redesignated as § 970.67(h).

Technical Review Committee

According to the proponent proposal, the audit metrics development process would require consultative sessions with a subcommittee, the Technical Review Committee. TRC membership would include industry representation, food safety professionals, members of the scientific community, and representatives from selected government agencies. Proponents stated that the proposed TRC and its members would ensure that current industry practices as well as current scientific research and technology were integrated into any proposed metrics. This subcommittee was originally identified as the Technical Review Board in the Notice of Hearing, and is being renamed the Technical Review Committee.

According to the proponents' proposal, the Technical Review Committee would have 14 members appointed by the Board. The 14 members would include: One representative from each of the five originally proposed zones; one food safety representative from a land grant university from within each zone; one representative of the USDA Natural Resources Conservation Service appointed by the Secretary; one representative of the U.S. Environmental Protection Agency designated by that agency's Administrator; and, two representatives of FDA appointed by that administration's Commissioner.

Proponents stated that it was their intent to provide an administrative structure and Technical Review Committee that would allow fresh leafy green vegetable industry stakeholders to proactively engage in the process of recommending audit metrics for approval and implementation by USDA.

Proponents explained that their proposal provided authority for additional subcommittees under both the Board and the Technical Review Committee to be established. Through these subcommittees, industry stakeholders could work cooperatively to develop and recommend uniform, auditable, science-based production and handling audit metrics that also incorporated any necessary specific measures to accommodate differences in size of operation, geographic location, or other environmental challenges for a given region. Also, recommendations would be addressed by the full Board, would require Secretary approval, and would be subject to a public rulemaking process.

During the hearing, several witnesses raised concerns over the proposed structure of the Technical Review Committee. In particular, witnesses stated that producer interests, especially those of small producers, diversified farm operations, and organic farms, were not given adequate representation. Moreover, witnesses stated that the Technical Review Committee, as proposed by the proponents, did not provide adequate involvement of local, State, and other Federal government interests in the development of metrics. These witnesses explained that any metrics established under the proposed program could impact existing regulation or areas of shared jurisdiction by those entities.

Areas of particular stakeholder concern noted during the hearing include: Water quality and usage, conservation practices, wildlife and habitat management, and natural resource management. Regulatory jurisdiction over some of these topics is shared by multiple Federal, State, and local government bodies. Witnesses concerned over the audit metric development process argued the need to include input and information from representatives of these regulatory

bodies to mitigate the potential for conflicting requirements being placed on producers or handlers.

Lastly, witnesses who voiced concerns over the initial proposal's five geographic zones also voiced concerns over the Board's ability to appoint members of the Technical Review Committee. Opponents stated that without more appropriate stakeholder representation on the Board, the placement of members on the Technical Review Committee would not be reflective of the industry's diversity.

On the last day of the hearing, proponents submitted a modified Technical Review Committee structure. Proponents presenting modified language explained that the revised language attempted to address opposing witness' concerns. The revised language outlined a new Technical Review Committee that would consist of 21 members to include: One handler and one producer representative from each of the initial zones elected by the Board members of that zone; one producer representative considered a small business entity under the SBA guidelines and one organic producer elected by all Board members; one produce safety expert from a land grant university within each of the initial zones elected by the producer and handler members from the corresponding zone; one representative of the USDA Natural Resources Conservation Service appointed by the Secretary; one representative of the United States Environmental Protection Agency designated by that agency's Administrator; and, two representatives of FDA appointed by that administration's Commissioner. Proponents explained that their proposed modifications would improve producer representation on the TRC. Moreover, the addition of seats designated for small businesses and organic operations would ensure that these stakeholder interests were represented in the audit metric development process.

The alternative Technical Review Committee structure would improve the representation of stakeholder interests, but needs to be revised to reflect the modified zone definitions.

Each of the eight zones, as recommended in § 970.37, would have one signatory handler, one producer, and one food safety expert. One of the eight producer seats would have to be filled by a producer meeting the SBA definition of small agricultural producer, and one must be filled by a certified organic producer. In addition, the Secretary would appoint one representative from the USDA Natural Resources Conservation Service. The Technical Review Committee would therefore consist of 25 members. This proposed language is presented in § 970.46.

Additionally, the Secretary would have authority to appoint such USDA representation on the Committee as deemed appropriate. Record evidence indicates that this may include representatives of the National Organic Program, Agricultural Research Service, and National Institute of Food and Agriculture.

Further, USDA may consult with other Federal agencies, as appropriate, whose interests may be affected by audit metrics identified in §§ 970.66 and 970.67, and may allow for representatives of those agencies to participate in the work of the Technical Review Committee. Agencies identified as potentially having a collaborative interest include, but are not limited to: United States Environmental Protection Agency, FDA Center for Food Safety and Applied Nutrition, and Department of Interior Fish and Wildlife Service.

The proponent proposal did not include specific nomination procedures for TRC members. However, record evidence supports a process that would allow for broad industry participation in Committee nominations. Accordingly, TRC nomination procedures are being added that are similar to those for Board members.

For the purposes of establishing the initial TRC, nominations would be conducted by the Secretary by means of meetings of producer and signatory handler representatives, by mail, or by any other form of electronically verifiable communication (such as fax, videoconference, conference call). The Secretary would then select and appoint the members from such nominations.

Subsequent to the nomination of the initial members, all successor members would be nominated by producers and signatory handlers. In addition, the Board could recommend nominees to USDA. The Board would forward the entire list of nominees received to USDA for final selection and appointment by the Secretary.

Authority should be added for the Board to recommend modifications to the membership of the TRC. Any such recommendations by the Board would require approval of the Secretary. This authority would provide flexibility to recommend adjustments or changes to the structure of the TRC over time.

Finally, the TRC should have the authority to appoint subcommittees as necessary to facilitate the development of audit metrics specific to regions, or production, handling, or manufacturing environments that produce, handle, or manufacture leafy green vegetables. Subcommittees may consist of producers, handlers, and other interested parties as deemed appropriate by the TRC.

USDA recommends that § 970.45 of the Notice of Hearing be revised as previously discussed and redesignated as § 970.46.

Traceability

According to proponents of the proposed program, the ability to trace a product during production, processing, and distribution would be a key factor in increasing information and communication within the market, as well as ensuring compliance.

In the case of a contamination event, timely communication about the scope of the contamination is essential to addressing consumer concerns and reducing the economic impact of the event on the industry and removing contaminated product from the market. For this reason, proponents recommended including authority to implement traceability requirements under the proposed program. These requirements would allow for a more efficient recall of contaminated product if a contamination event were to occur.

Proponents explained that information required under a traceability system would allow for a more rapid and accurate identification of both the source location of the contamination, and the distribution of product coming from that source. Signatory handlers would need to have in place systems and procedures that will allow them to track their products.

Official Certification Mark

According to the hearing record, an official mark or trademark should be developed for the purposes of identifying compliant participants in the proposed program. Evidence presented during the hearing also supports that any such mark should be developed through the use of funds collected under proposed § 970.56 and according to the provisions of proposed § 970.55. The mark would be the property of the United States Government as represented by the Board and would be used for the benefit of the Board, its signatories and their affiliated producers.

Proponents explained that the proposed mark would be used on bills of lading, manifests and other like documentation that is standard in pre-retail market transactions. Proponents indicated that use of the mark would lead to buyer confidence in producer, handler, and manufacturer transactions

because it would indicate that the product being sold met program standards. Proponents also stated that use of the mark would facilitate traceability.

Proponents stated that their intention was to not use the official certification mark on retail or consumer packaging. While some proponents suggested that the mark could be used in literature or informational campaigns designed to inform participants of the fresh produce industry about the scope and mission of the proposed program, proponent testimony did not anticipate the use of the mark at the consumer level for marketing purposes.

Many witnesses who were opposed to the proposed program were also opposed to the development of the mark and stated that the proponents' proposed language did not clearly prohibit the use of such mark on consumer packaging. These witnesses stated that if the mark were used on consumer packaging, its use would lead to an unfair marketing advantage for participants of the program over those opting not to participate.

The proposed agreement should provide authority for the Board to recommend, subject to approval of the Secretary, alternative uses of the official certification mark is important to ensuring flexibility of the proposed provisions and their application under the proposed program. However, based on record evidence, the use of the mark on consumer packages would be prohibited. The authority to recommend alternative uses would allow the Board to address unanticipated circumstances that may present themselves in the future.

Lastly, hearing record evidence demonstrates that a signatory handler's compliance with the proposed program would be a condition precedent and subsequent to the signatory handler's use of the mark. As discussed under Material Issue 5(f), use of the mark would also be subject to verification, suspension and revocation provisions of the proposed program.

In summary, the record supports authority for the development of a registered certification mark. The proposed regulatory text published in the Notice of Hearing under § 970.69 is revised to reflect the change discussed above and for clarification.

Modification, Suspension and Termination

The Secretary may modify, suspend, or terminate regulations in effect under the proposed program based on Board recommendations or otherwise. This would allow changes in any regulations established under the program. This provision appears in § 970.71.

Material Issue Number 5(d) Expenses, Assessments, Accounting and Contributions

The Board should be authorized to incur reasonable and necessary expenses and to collect assessments to fund such expenses. Further, the proposed agreement should provide for handling of excess assessments collected and should authorize the Board to accept voluntary contributions.

Expenses

The record evidence supports that the Board should be authorized, under § 970.55 of the proposed agreement, to incur such expense as the Secretary finds are reasonable and likely to be incurred during each crop year. Necessary expenses for the maintenance and functioning of the Board would generally include, but would not be limited to, administrative expenses such as employee salaries and benefits; establishment of an office and equipping that office; telephone and mail services; and business and travel-related expenses for the Board staff. As discussed previously, expenses incurred by Board members and alternate members, committee members, and subcommittee members in attending meetings or performing other official duties should also be reimbursable expenses. According to the hearing record, the proposed agreement should also authorize the Board to incur expenses related to research, development, and education activities pursuant to § 970.75. The types of activities that could be funded under this authority are discussed under Material Issue 5(h).

According to the hearing record, the Board should also pay for GAP audit fees for verification audits conducted on producers delivering to signatory handlers as well as GHP audit fees for those signatory handlers. Having uniform assessments pay for such audit costs should alleviate concerns raised about the relative costs of audits for operations of varying size and in different locations. Having the Board pay audit fees could also result in more efficiencies for the program.

The record evidence is that the Board would pay for direct audit costs. Any additional costs related to inspection service travel would be borne by the signatory first handler. Specifics as to which costs would be paid out of assessment funds could be included in any memorandum of understanding between the Board and the Inspection Service.

The record evidence is that GHP and GMP audits conducted on second signatory handlers should not be paid for by the Board. This is because those handlers would not be required to pay assessments on the leafy green vegetables that they handle or manufacture.

Minor clarifying changes have been made to § 970.55.

Assessments

The proponents testified that funds to cover the Board's administrative expenses should be obtained through the collection of assessments from signatory first handlers who handle leafy green vegetables in the production area. These assessments would reflect each signatory first handler's proportional share of the volume of leafy green vegetables subject to regulation under the proposed agreement. As such, assessments would be based on the total amount of leafy green vegetables handled by each signatory first handler.

According to the hearing record, prior to the beginning of each crop year and as necessary thereafter, the Board should prepare and recommend to USDA an estimated budget of expenses including a rate of assessment calculated to adequately cover the cost of such projected expenditures. Proponents stated that any such assessment rate could include a supplemental assessment rate if it was determined beneficial to the administration of the program. A supplemental assessment rate could be used to address a specific problem. An example would be the need to fund a research project that only affects cabbage. In this example, the Board could assess a supplemental assessment rate on cabbage, which would be in addition to the regular administrative assessment rate. Funds derived from these supplemental assessment rates would then be specifically earmarked to pay for the cabbage research project in this example.

Testimony indicates that the preparation of a budget prior to the beginning of each crop year would provide a basis for the Board's assessment rate formulation. Once approved at the Board level, the annual budget and assessment rate recommendations would be submitted to USDA for review and approval.

As supported by the record, the proposed agreement contains a maximum assessment rate limit of $0.05 per 24-pound carton of leafy green vegetables or equivalent (including any supplemental assessment rate). According to the hearing record, lettuce

has traditionally been shipped in 24-pound cartons and is widely considered a standard of measurement for the leafy green vegetable industry. For leafy green vegetables not typically shipped in 24-pound cartons, the Board would recommend appropriate formulas to calculate equivalent units of measurement for assessment purposes.

The intent of the maximum limit on the assessment rate is to assure signatory handlers that program expenses would be kept within specified limits. Proponents stated that the maximum limit is based on experience with the State marketing agreement programs in California and Arizona. They testified that the initial California assessment level was two cents per 24-count carton equivalent, and it was lowered to a penny and a half per carton equivalent after the second year. Given this experience, the proponents anticipate that the actual cost of the proposed agreement, if implemented, would be covered by an assessment rate below the proposed maximum limit.

Should a signatory first handler fail to timely pay assessments, record evidence indicates that such handler should be required to pay the Board, in addition to the overdue assessments, an interest or late payment charge, or both, on any outstanding balance. The time period in which assessments should be paid to the Board, the rate of interest, and any late payment charge would be recommended by the Board and approved by the Secretary through the public rulemaking process.

According to hearing record evidence, late payment charges and interest on unpaid balances are reasonable to encourage timely payment of assessments and to compensate the Board for expenses incurred in collecting unpaid assessments. Witnesses stated that timely collection of assessments would be important in order to efficiently and effectively administer the provisions of this proposed agreement.

The proponents testified that the Board may accept, but not require, advance payments of assessments, which would be credited toward assessments levied against that signatory first handler for the crop year. In addition, the Board would be authorized to borrow money to cover operating expenses when assessment and reserve funds are not sufficient.

Revisions have been made to § 970.56 and paragraph (c) of that section has been deleted as unnecessary.

Excess Funds

The proponents proposed procedures for accounting of excess funds in § 970.57 of the proposed agreement. They indicated that such procedures would be necessary to assure signatory handlers and the industry that there would be proper disposition of excess funds, and that a detailed accounting would be made of such disposition. This section would allow the Board, with the approval of the Secretary, to establish an operating monetary reserve. This would permit the Board to carry over to subsequent crop years any excess funds in a reserve, if funds already in the reserve do not exceed approximately two years' expenses. If reserve funds exceed that amount, the assessment rate should be reduced to bring the reserve to a more reasonable level. These reserve funds could be used to defray expenses during any crop year before assessment income is sufficient to cover such expenses; to cover deficits incurred during any crop year when assessment income is less than expenses; to fulfill any obligations under § 970.75; and, to cover necessary expenses of liquidation in the event of termination of the program.

In lieu of depositing excess funds in a monetary reserve, the proponents proposed that § 970.57 would also provide the Board with the necessary authority to credit each handler's account, or to refund each handler directly, with a proportionate share of any excess assessment funds at the end of each crop year.

Clarifying changes have been made to § 970.57.

Voluntary Contributions

The proponents testified that in addition to assessment and other income, such as interest, the Board should be able to receive voluntary contributions for the conduct of research, development, and education activities authorized under § 970.75 of the proposed agreement. Testimony supported having such contributions free from any encumbrances by the donor, and that the Board should retain complete control of the use of such funds. This authority appears in § 970.58.

Material Issue Number 5(e)—Reporting and Recordkeeping

The proposed agreement should provide that signatory handlers periodically submit reports and other information to the Board and to maintain records regarding the handling of leafy green vegetables. Further, to ensure compliance with the Act, the proposed agreement should provide that all reports and other information submitted by signatory handlers remain in the custody of employees or authorized agents of the Board at all times. Finally, the proposed agreement should authorize agents or employees of USDA and the Board to access the premises of signatory handlers during reasonable business hours to verify compliance with the proposed agreement.

Reports and Recordkeeping

The record indicates that the Board should have the authority, with the approval of the Secretary, to require under § 970.80(a) that signatory handlers submit to the Board such reports and information as the Board may need to perform its functions and fulfill its responsibilities under the proposed agreement. The Board would require reports and information for such purposes as collecting assessments; analyzing leafy green vegetable markets and marketing trends with the objective of preparing and evaluating research and development projects; developing and recommending rules and regulations; and determining whether signatory handlers are complying with the requirements of the proposed agreement.

Hearing testimony includes witness statements that reports potentially required under the proposed agreement could include production, inventory, and sales data; customer and supplier lists; and testing and audit reports. This should not be construed as a complete list of information the Board might require, nor all of the information necessary for the proper conduct of Board operations under the proposed agreement. Therefore, the Board should have the authority, with the approval of the Secretary, to require each signatory handler to furnish such information as it finds necessary to perform its duties under the proposed agreement.

Under § 970.80(b), proponents testified that signatory handlers should be required to maintain records of all receipts and acquisitions of leafy green vegetables as may be necessary to verify the reports that are submitted to the Board. This would also include all documentation relating to audit reports. All records would be maintained for at least two years after the end of the crop year of their applicability. The records maintained should be sufficient to document and substantiate each signatory handler's compliance with the proposed agreement. Witnesses testified that these records may be needed to assist in compliance investigations.

Paragraphs (a) and (b) of § 970.80 are revised for clarification, and paragraph (c) is deleted as it is not necessary.

Confidential Information

As required by the Act and supported through testimony provided by witnesses at the hearing, § 970.81 would require that all reports and information submitted by signatory handlers be received by, and at all times be in the custody of, employees or authorized agents of the Board. Information submitted by signatory handlers affecting the trade position, financial condition, or business operation of such handlers could not be disclosed by the employees of the Board, or by any agents authorized by the Board, to any person or entity other than the Secretary. Witnesses testified that reports and information that contain proprietary market and business information could affect the trade position, financial condition, or business operation of the affected signatory handler, and that confidentiality would be necessary to protect the businesses submitting the information. The Board would also confidentially hold any data or information obtained or extracted from reports or information submitted by signatory handlers. The proponents also stated that, although information from reports and information may be combined and made available in the form of general reports, the identities of the individuals furnishing the information should not be disclosed. Combined information in general reports could be helpful to the Board and to the leafy green vegetable industry.

Minor revisions have been made to § 970.81 for clarification.

Verification of Reports

In § 970.82, the proponents proposed procedures for verifying that reports filed by signatory handlers are in compliance with the requirements of the proposed agreement. For this purpose, the hearing record indicates that authorized agents or employees of the Board, and the Secretary, should have access to the premises of all signatory handlers during reasonable business hours. In addition to having access to a signatory handler's premises to verify that all reports have been submitted accurately, the proponents indicated that authorized agents or employees of the Board, and the Secretary, should also have access to check GAPs audit verification records for compliance with the proposed agreement.

Record evidence indicates that authorized agents or employees of the Board, as well as the Secretary, should have reasonable access to any signatory handler's premises during regular business hours (those hours when the signatory is actually engaged in growing, harvesting, packing, or transporting leafy green vegetables). The record verification should be conducted through a visit to the signatory handler's facility, where documentation would be reviewed and personnel interviewed to ascertain compliance with this part.

In regards to the general issue of reporting and recordkeeping, evidence indicates that handlers of leafy green vegetables and products already collect and maintain much of the information proposed for submission to the Board under the proposed agreement provisions. Furthermore, hearing testimony suggests that the proposed agreement would be beneficial to the industry by helping to standardize how information is collected, maintained, and disseminated. An additional benefit to the reporting and recordkeeping requirements of the proposed agreement would be enhanced traceability and identification of product due to the more consistent and generally available nature of the digitized information likely required by handlers.

Although some small and organic producers and handlers currently not associated with any food quality verification program expressed concerns about the additional personnel and cost possibly required for adherence to the proposed reporting and recordkeeping requirements, others currently associated with a food quality verification program of some kind testified that good recordkeeping has helped adhere to the food quality verification program and been beneficial to overall farm operation. These witnesses also expressed the belief that the reporting requirements herein proposed would not constitute an undue burden on leafy green vegetable businesses.

Section 970.82 is modified slightly for clarification.

Material Issue Number 5(f)—Compliance

The proposed agreement should provide the Board and USDA with the authority to withdraw audit services, withdraw the use of the official certification mark, or seek remedies or penalties should signatory handlers be in non-compliance with the proposed agreement. In addition, the proposed agreement should provide that any immediate threat to public health be reported to appropriate health officials. This is necessary for the program to be effective and to help ensure that it is administered fairly to all participants.

Under § 970.83, proponents testified that compliance of the proposed agreement would be overseen by the Board and USDA. The Board would establish a policy in the form of a compliance program under which non-compliance actions would be identified either by the Inspection Service or by Board compliance staff. Non-compliance actions may be identified during scheduled or unscheduled audits, visits to a farm or facility, or from anonymous complaints. Proponents and other witnesses supported the proposal that any signatory handler not in compliance with the proposed agreement could be subject to withdrawal of audit services, could lose the privilege of the use of the official certification mark, or be subject to misbranding or trademark violations, depending on the level of non-compliance. It was further proposed by proponents under § 970.83(c) that failure to comply with the provisions of this proposed agreement may also result in additional remedies or penalties.

According to the hearing record, signatory handlers would be obligated to adhere to program requirements. Such requirements would include such things as acquiring only leafy green vegetables that have been grown in accordance with GAPs; receiving successful audits verifying that GHPs and GMPs (if applicable) are being adhered to; filing reports and maintaining records; and paying assessments. Failure to comply with these requirements could result in action against the signatory handlers.

The record shows that the intent of the program would be to improve vegetable quality by reducing the risk of contamination. As such, the focus would be to establish and maintain best practices. If a signatory handler were found to be out of compliance with the audit metrics established under the program, the first step would be to require that handler to take appropriate corrective action to address and correct any non-conformities.

According to record evidence, non-compliance by signatory handlers would be identified and classified at various levels from minor to flagrant violations of the proposed agreement. Other than in cases of immediate threat to public health, any signatory handler found in violation of the proposed agreement would be allowed to address and correct any actions that led to non-compliance of the proposed agreement. If a signatory handler were to fail to take appropriate verifiable corrective, the signatory handler could be subject to

withdrawal of audit services or lose the use of the official certification mark.

According to the hearing record, the status of a signatory handler's compliance would be public information and may be posted on a Web site.

The Notice of Hearing also contained a provision in § 970.83(b) that any detection of an S threat to public health should be reported to FDA. Record evidence supports notification of any appropriate health officials, not just FDA.

Section 970.83 of the proposed agreement is revised for clarification and to remove unnecessary language.

Material Issue Number 5(g)—Exemptions

USDA recommends that the Board should have the authority to exempt small quantities of leafy green vegetables from any or all program requirements.

Section § 970.72, "Exemptions," of the Notice of Hearing stated in part: "The [Board], with the approval of the Secretary, may establish such rules, regulations, and safeguards that exempt from any and all requirements pursuant to this part, such quantities of leafy green vegetables or products as do not interfere with the objective of this part."

While the proponents' proposal would have permitted the Board to exempt a given quantity of leafy green vegetables from the requirements of the agreement, during the hearing sessions, both proponents and the opponents of this agreement opposed that any quantity of leafy green vegetables should become exempt from the agreement. Witnesses' rationale for this opposition was that any quantity of exempt leafy green vegetables, be it from a small, organic, or large farm, may jeopardize the ultimate goal of this program which is to make the production and handling of leafy green vegetables safer.

While the objectives of the program should not be compromised, the agreement should authorize an exemption if an unforeseen circumstance arises which would make such an exemption reasonable. Furthermore, the Board should have authority to recommend rules and regulations to ensure that such leafy green vegetables are handled and used only as authorized under the agreement.

Clarifying changes are made to § 970.72.

Material Issue Number 5(h)—Research, Development, and Education

The proposed agreement should authorize the Board to conduct research, including market research, development projects, and to develop and implement educational and outreach programs intended to facilitate the adoption, implementation, and administration of the agreement. In addition, the proposed agreement should establish a Research and Development Committee to assist the Board in carrying out the aforementioned programs.

Research, Development, Education and Outreach

Proponent witnesses testified that the proposed agreement should provide the Board authority to establish marketing research and development projects, and or promotional activities, including paid advertising, to assist or promote the efficient adoption, implementation, and marketplace acceptance of the agreement and leafy green vegetables. As proposed by proponents, such projects and activities would require approval by the Secretary, and would be funded by collected assessments and voluntary contributions as specified in proposed §§ 970.56 and 970.58, respectively.

Proponent witnesses testified that the authority for market research was necessary to better understand and communicate with key leafy green vegetable industry audiences—such as buyers. The authority for the conduct of market research and development projects generally was supported by witnesses. However, some witnesses suggested the types of research specified under the proposed agreement should be expanded beyond market research. Specifically, these witnesses stated the proposed agreement should authorize food safety research such as best practices in production, handling, and manufacturing of leafy green vegetables, contamination risk management including reducing the risk of cross-contamination in the food supply chain, and identification of measures to reduce microbial contamination. While proponents supported research associated with quality in areas such as production, handling, and manufacturing practices for leafy green vegetables, they did not support the use of collected funds for generic research on risks associated with leafy green vegetables.

Several witnesses who expressed concern about the potential impact audit metrics could have on small business entities suggested the proposed agreement should provide authority to the Board to develop and implement educational and outreach programs. This recommendation was supported by the proponents of the proposed agreement.

Witnesses supporting the authority for educational and outreach programs stated the programs should be designed to assist small businesses comply with the proposed agreement. They asserted these programs could be effective tools for providing training to entities, particularly small entities, about the proposed agreement, its audit metrics and other requirements. Such programs, the witnesses asserted, also could be used to increase awareness of the proposed agreement within the leafy green vegetable industry supply chain.

Witnesses supporting inclusion of a training component explained that training should be made available to producers, handlers, and persons conducting verification audits under the proposed agreement. According to these witnesses, training for producers and handlers would assist in program compliance and ensure a clear understanding of the proposed agreement and its requirements. Witnesses advocating training for auditors stated that such would provide consistency and accuracy in audit verifications.

Additionally, in implementing educational and outreach programs under the proposed agreement, witnesses advocated cooperation with existing state, local, and Federal agencies, universities, or other organizations already successfully operating such programs within their regions or communities.

Based on the record evidence, the proposed agreement should authorize the Board to conduct research (including market research), development projects, and education and outreach programs. The proposed programs would help to expand knowledge about the leafy green vegetable industry, the proposed agreement, its audit metrics, and requirements. The programs also would assist in increasing awareness on the proposed agreement among leafy green vegetable stakeholders. Lastly, the programs should allow the proposed agreement to become more accessible to small entities, organic, diversified, and unconventional operations within the leafy green vegetable industry.

Record evidence establishes that the proposed agreement should authorize the Board to provide for the conduct of market research and development projects as proposed by proponents. These projects would allow the Board to compile information related to the leafy green vegetable industry to better understand the industry, facilitate communications with industry stakeholders, and evaluate the proposed agreement. This authority also would

help ensure the proposed agreement is functioning properly and meeting its intended purpose.

The record evidence further establishes that authority to conduct research under the proposed agreement should be expanded beyond market research. The record evidence supports authority for the conduct of research projects designed to assist or improve the development of audit metrics related to the production, handling, and manufacturing of leafy green vegetables. The broader research authority would allow for the conduct of research that is applicable to various production environments and practices, spanning from conventional, to organic, to others. The proposed authority also would allow research concerning contamination risk management as well as other relevant areas. Record evidence supports providing broad research authority to ensure relevant areas related to leafy green vegetables could be researched, if deemed necessary and appropriate.

Record evidence supports the inclusion of authority for the development and implementation of educational and outreach programs under the proposed agreement. Record evidence indicates that these programs would be critical to facilitate awareness and education of the proposed agreement.

As supported by record evidence, the proposed educational and outreach authority would allow the Board to develop tools that aid growers and handlers, particularly small entities, comply with program requirements. According to record evidence, these tools could include templates to aid producers and handlers with recordkeeping requirements, and how-to guides to assist with complying with audit metrics and implementing best practices. Additionally, record evidence indicates that the proposed authority for educational and outreach programs would allow for the development and implementation of training programs for persons responsible for conducting audit verifications to ensure consistency and accuracy. As supported by the record, the proposed authority would allow the Board to coordinate with local, State, and Federal agencies, and other organizations in designing and implementing educational and outreach programs.

Record evidence supports that the educational and outreach programs should be funded by authorized receipts of the Board, including assessment income, voluntary contributions, and miscellaneous income such as interest. As provided in the proposed agreement, the expenses for the activities described above would be budgeted and paid from funds collected pursuant to §§ 970.56 and 970.58, both assessments and contributions.

Based on the record evidence, all research, development projects, and education and outreach programs to be conducted under the proposed agreement in a given fiscal period should be required to be submitted by the Board to the Secretary for approval prior to being undertaken. The amount of funds to be spent on research, development projects, and education and outreach programs would be included in the annual budget required to be submitted to the Secretary for review and approval. Additionally, the Board would be required to report to the Secretary at least annually on the progress of each project and at the conclusion of each project. These are common USDA program requirements to ensure the effective conduct of authorized projects and the proper use of collected funds.

Promotion and Advertising

Regarding the proponents' proposed authority for the conduct of promotion and advertising activities, proponent witnesses testified that the intended target audience for outreach and promotion of the proposed agreement was buyers and others within the leafy green vegetable industry. Proponent witnesses stated that they fundamentally believed funds collected under the proposed agreement should not be used for consumer advertising or other marketing campaigns designed to promote food safety and or leafy green vegetables.

Several witnesses—those in support of the proposed agreement and those opposed to it—expressed concern regarding the authority to engage in promotion and advertising activities. These witnesses opposed any marketing efforts targeted to consumers. The witnesses further contended that such marketing of the proposed agreement would imply that leafy green vegetables covered under the proposed agreement were safer than those that were not covered under the agreement, thus creating a competitive advantage for entities associated with the proposed agreement.

The testimony of a witness supported the conduct of generic promotional activities under the proposed agreement. However, testimony of the proponents indicated the proposed agreement was not designed to use collected assessments to fund the generic promotion of leafy green vegetables to consumers.

Based on record evidence, the proposed agreement should not provide for the conduct of promotion and advertising activities. The record clearly demonstrates a lack of support for the inclusion of such authority.

As detailed above, § 970.75 "Research and Promotion", as proposed by proponents, should be revised and included in the proposed agreement as "Research, Development, and Education."

Research and Development Committee

The proponents proposed that a "Market Review Board" as specified in § 970.46 of their proposal be established to advise the administrative body on retail, foodservice, and consumer issues to maximize consumer confidence through market acceptance and recognition of the proposed agreement. Proponent witnesses explained that the Market Review Board would assist with promotion and acceptance of the proposed agreement throughout the leafy green vegetable supply chain.

As proposed by proponents, the Market Review Board would be appointed by the administrative body and would consist of a minimum of nine members as follows: Two representatives of retail grocers, two representatives of foodservice operations, three consumers, and two representatives from land grant universities with expertise in fresh vegetable marketing, economics, or consumer acceptance. Under the proponents' proposal, the administrative body also would have the authority to appoint additional representatives from consumer, retail, and foodservice organizations.

Several witnesses expressed concerns over the potential role of the proposed Market Review Board relating to the promotion of the proposed agreement to maximize consumer acceptance through market acceptance of the proposed agreement. These witnesses believed that marketplace acceptance of the proposed agreement related to promotion of the program to consumers. These witnesses were opposed to the proposed marketing and promotion authorities, including paid advertising, that were outlined in § 970.75 "Research and Promotion" of the proponents' proposal.

Based on the record evidence, the proponents' proposed Market Review Board should be removed from the proposed agreement and, in its place, a Research and Development Committee should be established. The name of the committee reflects the role and responsibilities of the committee as described below.

As supported by record evidence, the Research and Development Committee should be established for the purpose of assisting the Board in the oversight and management of research, development projects, and education and outreach activities under the proposed agreement, as authorized under proposed § 970.75. The record evidence also indicates that the membership structure proposed by proponents for the Market Review Board should be adopted for the proposed Research and Development Committee and modified slightly for clarity. However, based on record evidence, the nomination and selection process for this committee should be expanded to ensure broader participation by interested parties as detailed below.

Record evidence indicates that persons appointed to this committee should have expertise in certain areas to aid them in performing the committee's roles and responsibilities. As such, the proposed agreement should specify that persons should have expertise in one of, but not limited to, the following areas: The production, handling, and marketing of leafy green vegetables; small, diversified, or organic production practices; agricultural economics; or educational outreach in the specified or related areas.

The expanded nomination and selection process would address concerns raised by witnesses regarding the selection of members to this Committee. Witnesses expressed concerns that the proponents' proposal limited the persons that could be identified and, thus, selected to be members of this Committee. The broader process offered in this recommended decision would allow for more participation from interested persons in the nomination process, and would provide that selections be made by the Secretary.

Record evidence supports that nominations for the Research and Development Committee should be received from producers and signatory handlers at meetings, by mail, or by any form of electronically verifiable communication. In addition, the Board also would be allowed to recommend nominees to the Secretary. The Secretary would select and appoint the members from such nominations or from other qualified persons. Record evidence also supports providing authority for the appointment of additional members to this Committee by the Secretary. This provision is consistent with the proponents' proposal, which would have allowed for the appointment of additional representatives of retailers, consumers, and foodservice companies.

As supported by record evidence, the membership of the Research and Development Committee could be modified based on recommendations by the Board and approval of the Secretary, or as otherwise deemed appropriate by USDA. Additionally, the Research and Development Committee should be allowed to appoint subcommittees as necessary to assist it in carrying out its roles. Subcommittees could be comprised of producers, signatory handlers, and other interested parties such as representatives of consumers, retailers, and foodservice organizations as deemed appropriate by the Research and Development Committee. The above described proposed language should be included in the proposed agreement as § 970.47 "Research and Development Committee", and should take the place and stead of the proponents' proposed Market Review Board.

Material Issue Number 5(i)—Common Terms

The provisions of proposed §§ 970.85 through 970.96 are common to marketing agreements and orders now operating. All such provisions are necessary to effectuate the other provisions of the marketing agreement and to effectuate the declared policy of the Act. The record evidence supports inclusion of each provision. These provisions are identified by the section number and heading as follows: § 970.85 Effective time; § 970.86 Rights of Secretary; § 970.87 Personal liability; § 970.88 Separability; § 970.89 Derogation; § 970.90 Duration of immunities; § 970.91 Agents; § 970.92 Suspension or termination; § 970.93 Proceedings upon termination; § 970.94 Effect of termination or amendment; § 970.95 Amendments and § 970.96 Counterparts. Minor changes to these sections are made for clarification.

Material Issue Number 6—Handler Sign-up and Withdrawal

Based on a review of the hearing record, the proposed agreement should provide for two handler sign-up phases to facilitate initial implementation of the program, including the nomination and selection of the initial Board. Also, the agreement should provide for handler withdrawal from the agreement.

Handler Sign-Up

A two-phase approach to the handler sign-up process would be used. An initial phase of at least 60 days would be established. This would allow for the nomination of producer and signatory handler members and alternate members of the Board, and the selection of an initial Board by the Secretary. The specific time frame would be established at the time the agreement becomes effective.

Handlers who sign up during this initial sign-up period would be eligible to serve as initial members of the Board. Proponent witnesses explained that the initial sign-up period should be for a specified period of time so that handlers know in what time frame they may sign-up for this agreement to be eligible to serve on the initial Board. After this initial sign-up period, a handler may become a signatory to this agreement at any time.

Section 970.97 has been changed to add an initial sign-up phase and change the title of the section from "Additional parties" to "Handler Sign-up".

Handler Withdrawal From the Agreement

The agreement should also provide that signatory handlers may withdraw from the program. Record evidence supported a process wherein a signatory handler could file a written notice of withdrawal with the Board during any crop year. The withdrawal would become effective at the beginning of the subsequent crop year. The signatory handler would remain responsible for any obligations (including payment of assessments) incurred during the period that handler was a signatory handler.

In addition, a signatory handler could receive immediately withdrawal from the program if they cease to be a handler of leafy green vegetables and give notice to the Board in writing. Again the signatory handler would be responsible for any obligations incurred during the period of participation in the program.

Section 970.98 has been revised for clarity, including the addition of language to state that upon withdrawing from the agreement, the withdrawing party would no longer be permitted to use any official certification mark developed under the agreement.

Small Business Consideration

Pursuant to the requirements set forth in the Regulatory Flexibility Act (5 U.S.C. 601–612) (RFA), AMS has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions so that small businesses will not be unduly or disproportionately burdened. Small agricultural service firms, which include handlers that would be eligible to be signatories under the proposed

agreement, have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $7,000,000. According to data published in the Blue Book, there are over 2,200 handlers, which include approximately 300 importers and over 100 fresh cut processors, of leafy green vegetables in the U.S. As noted earlier, there may be additional small handler businesses, specifically producers who are engaged in handling, not included in this total.

While the hearing record does not contain data to estimate average annual sales for handlers, the majority of handlers who testified at the hearing indicated they had annual sales of leafy green vegetables in excess of the SBA definition for a small agricultural service firm.

The hearing record indicates that, according to the latest Census of Agriculture, 8,216 farms harvested leafy green vegetables from 433,023 acres for the fresh market in 2007. Statistics for the leafy green industry presented at the hearing show that the total value for leafy green vegetable crops was approximately $2.5 billion in 2008.

Small agricultural producers have been defined by the SBA as those with annual receipts of less than $750,000. Based on the information presented at the hearing, 89 percent of farms producing leafy green vegetables in the United States would be considered small businesses as defined by the SBA.

In addition to handlers and producers, other persons including retailers, food service representatives, food safety experts, and other members of the public could nominate or serve on the boards or committees as appropriate. The reporting burden on such persons is discussed in the Paperwork Reduction Act section that follows.

In 2007, 69 percent of leafy green vegetable farms had annual gross sales under $100,000, 12 percent had annual gross sales between $100,000 and $299,000, 8 percent had annual gross sales between $300,000 and $749,000, with the remaining 11 percent of farms producing leafy green vegetables in the United States having annual gross sales over $750,000.

Since the spinach outbreak in 2006, large and small leafy green vegetable producers and handlers in all parts of the country have had to become more knowledgeable about produce contamination. This has led many of them to initiate or increase good agricultural, handling and manufacturing practices and programs. Other initiatives include the implementation of the California and Arizona State marketing agreement programs which are designed to minimize the potential of contamination from leafy green vegetables produced within the respective States.

An economist with a science-based consulting firm (Intertox) testified as a proponent witness. This witness presented evidence that a majority of the volume of leafy green vegetables production is currently being produced under the California or Arizona State marketing agreements. In California, which accounts for 75 percent of U.S. leafy green vegetables production, 99 percent of this production is covered under the LGMA. Arizona represents 15 percent of U.S. production; 90 percent of that volume is covered by the Arizona agreement. For those producers and handlers, implementation of a national marketing agreement would not likely cause significant additional costs.

If adopted, the proposed agreement would authorize the development and implementation of audit metrics that are consistent with FDA GAPs and GMPs, and current USDA GHPs. While the proposed program would be voluntary, handlers who choose to become signatories would be required to comply. Many of the farms that produce leafy green vegetables would be subject to certain requirements under the proposed marketing agreement if they opt to sell to signatory handlers.

Evidence provided at the hearing indicates that large farms almost always sell to handlers under seasonal contracts and that these relationships are usually long-term. These large farms produce most of the volume of leafy green vegetables in the U.S., and are quite likely to supply handlers who would be signatories under the proposed agreement.

A key economic issue to examine in considering the proposed agreement is the benefits and costs to signatory handlers, and to producers supplying such handlers.

Benefits of the Proposed Program

The record evidence from handlers and producers who handle and produce a vast majority of the volume of leafy green vegetables in the U.S. is that although the proposed program would impose some additional costs on signatory handlers and the growers who sell to them, those costs would be outweighed by the benefits expected to accrue to the U.S. leafy green vegetable industry.

A primary benefit of the proposed agreement is the reduced likelihood of food contamination outbreaks in leafy green vegetables and products handled in the United States. Two witnesses presented estimates of the impacts of food contamination outbreaks in terms of lost sales. A measure of the benefit of the proposed program is the avoidance of lost sales.

An economist on the faculty at Arizona State University testifying as a proponent witness stated that, based on his research, the cost of a food contamination outbreak is high and borne by all producers in that industry. He estimated that a food contamination outbreak event could lead to a 10 percent long-term reduction in demand for leafy green vegetables. In addition, the witness stated that without intervention, such as a national agreement, the leafy green vegetable industry could face a major food contamination incident, on average, every 10 years, leading to significant financial losses.

Record testimony indicates that producers and handlers can derive some benefit from their investments to minimize food contamination but the value of that investment is diminished if others do not similarly invest. The record further indicates that a collective action program with government oversight, such as a marketing agreement, can be used to intervene in a market system if the market is not producing enough of a public good; in this case investment to minimize food contamination outbreaks.

In the absence of collective action, individual producers may not have sufficient incentive to invest in food quality verification programs since it is not a tangible food characteristic for their buyers or final consumers. The witness noted that producers who do not invest, or who under-invest, in such quality or best practices programs create a “free rider” problem, since they do not pay their fair share of the production cost for what consumers expect to buy—a fresh leafy green product that is not contaminated.

Additional evidence about sales and price impacts to producers and handlers from the 2006 spinach outbreak was presented by a witness from California State University-Fresno. The witness stated that although the contaminated spinach was grown in California, producer sales throughout the nation were affected. Even after the source was isolated and consumers were assured that eating fresh spinach was again safe, sales lagged for a significant period of time and the commodity may have experienced long term loss of goodwill. Due to reduced shipments and lower prices from August through December 2006, the farm level loss in U.S. spinach sales was estimated at $12 million; the estimated loss at the retail level was $63 million.

The record testimony indicates that the benefits to a producer of implementing a best practices or food safety plan can include higher prices received by producers, maintaining and growing sales, reducing liability costs and improving operational efficiency. The witness also noted that the benefits tend to accrue over time and are uncertain.

The proposed program has the potential to increase the number of producers, including small producers, following standard GAPs. This could result in handlers buying leafy green vegetables from more small producers.

The proposed agreement also has the potential to reduce the redundancy of multiple audit verifications to which many handlers are currently subjected due to specific buyer requirements. Reducing multiple audit verifications will reduce costs and improve efficiency for both signatory handlers and their supplying producers.

Evidence was presented at the hearing that, due to food contamination outbreaks in recent years, producers of the vast majority of leafy green vegetable production currently have contracts that stipulate production standards that need to be met to deliver their leafy green vegetables to handlers. These standards are generally mandated to handlers by retail and food service buyers, but consequently have an impact on producers who must also conform to the standards in order to sell to handlers.

A USDA Economic Research Service and University of Arizona research report was submitted at the hearing regarding the fresh-cut vegetable industry. Fifteen lettuce and bagged salad shippers were interviewed in 1999–2000. This research indicated that most leafy greens shippers were diversified mixed-vegetable shippers and many engaged in some degree of processing. In 1999, 80 percent of these shippers had requests from retailers for, and were providing, third-party food safety certification.

Evidence was presented at the hearings that the lack of one set of production and handling standards in the leafy green vegetable industry often results in producers having to comply with different sets of standards for different customers.

Based on record testimony by those who favor the proposed agreement, support was expressed for a government program that would become an industry standard. If this proposal is implemented, supporters of the proposed agreement believe that the multiplicity of private standards would be replaced or minimized with a science-based, consistent, and scalable program that standardizes GAPs, GHPs, and GMPs throughout the industry. The leafy green vegetable industry also may benefit from the proposed agreement's ability to make timely adjustments to GAP and GHP audit metrics, as appropriate, through the mechanisms of the agreement.

The record evidence shows that the proposed agreement would likely result in some cost increases for producers and handlers, especially in the short run (both start-up costs and ongoing annual costs), but in the long run there could be some cost decreases from streamlining of differing buyer standards and being subject to fewer audits.

Compliance Cost Estimates

Based on record evidence, the proposed agreement would result in total one-time modification costs at the farm level for all leafy green acreage outside of California and Arizona estimated to range between $1.2 and $3.0 million, and an estimated average range of $14–$34 per acre for modification costs. The record evidence indicates that this modification costs estimate is in addition to an estimated $6.1–$14.7 million already expended at the farm level for producers under State marketing agreement programs.

Under the proposed agreement, total seasonal (annual) cost increases at the farm level for all leafy green acreage outside of California and Arizona are estimated to range from $2.7 to $4.4 million, which is an estimated average range of $30–$50 per acre annual compliance costs. These annual cost estimates would be in addition to the estimated $13.0–$21.7 million being expended at the farm level for producers under State marketing agreement programs. We are relying primarily on cost estimates published in a University of California report submitted at the hearing. However, a wider range of cost estimates was submitted by a proponent witness and is included subsequently in Table 2.

Based on record data, annual handler assessments that would be collected under the proposed agreement are estimated to range between $5.7 and $28.6 million. Annual per acre compliance costs, not including assessments, for handlers who also are producers are estimated to range between $48 and $105 per acre.

Producer Cost Impact Estimates

Under the proposed agreement, signatory handlers would be required to ensure that producers that supply them with leafy green vegetables are producing in accordance with a set of "best" practices. The most immediate and significant changes for producers, especially small ones, would be the increased expenses of supplying signatory handlers. While some producers may currently be applying and implementing GAPs, many producers would have to make physical modifications in their operations, add to their current recordkeeping requirements, and increase their administrative oversight over certain aspects of their farming enterprise.

Record evidence supports a program where the costs resulting from participation are proportional to the size of businesses involved and do not unduly or disproportionately impact small entities.

Witnesses at the hearing provided evidence of the cost of compliance with food quality verification requirements that were used in this document to compute producer cost estimates of implementation of the proposed program. Cost per acre data was combined with estimates of the number of acres to provide overall national cost estimates.

Data derived from the 2007 Census of Agriculture (2007 Census), which was presented at the hearing, showed that the total number of U.S. acres of leafy greens outside of California and Arizona was 88,572, representing 20 percent of total U.S. acres. Combined acres for California and Arizona total 344,451.

	Acres	Percentage of U.S. acres
United States	433,023	.....
California	271,040	63
Arizona	73,411	17
All other States	88,572	20

Source: NASS, USDA

Two reports submitted as evidence at the hearing (the "UC report" and the "Intertox report") included estimates of compliance cost per acre.[1] The cost impact estimates are summarized in three tables, two of which focus on producer costs, and a third one covers first handler assessment costs.

Table 1 presents computations of producer costs using cost data from the UC report and acreage data from the 2007 Census. The $14 per acre figure appearing in the 2nd column of Table 4 was rounded off from a $13.60 cost estimate in the UC Report.[2] The standard deviation was rounded off to

[1] Exhibit 43 "Producers' Compliance Costs for the Leafy Greens Marketing Agreement and Other Food Safety Programs", by S. Hardesty and Y. Kusunose, UC Davis; and Exhibit 34A "Marketing Data and Cost Overview" by Diane Wetherington, Intertox.

[2] "Cost per acre of leafy greens" on the bottom row of Table 4 of the UC Report.

$20[2] and added to the mean cost to give an upper range estimate of $34 per acre.

Multiplying the cost figures of $14 and $34 per acre by 88,572 acres yields a range of estimated farm modification costs of $1.2 to $3.0 million for all leafy green acreage outside of California and Arizona.

To provide an estimate of the total cost for modifications for the industry as a whole, the fourth column adds the costs in column three to an estimated cost expended by producers in California and Arizona. However, additional California and Arizona farm modification costs for compliance would likely be minimal, since most acreage is already participating in the leafy green marketing agreements in those two States and/or have already completed modifications in response to contractual GAPs and audit verification cost obligations from buyers.

TABLE 1—RANGE OF FARM MODIFICATION COST ESTIMATES FOR PRODUCER COMPLIANCE WITH THE PROPOSED PROGRAM

[one time expenditures, not seasonal]

	Per acre cost in California*	Total modification cost for farms outside of CA, AZ***	Total modification cost for farms in the U.S.***
		– – – – – – $ million – – – – – –	
Mean cost of producers in survey	$14	$1.2	$6.1
Mean cost plus $20 per acre* *	34	3.0	14.7

*Farm modification cost based on 2009 UC report of impact of California LGMA by S. Hardesty, presented at the hearing in Monterey.
**Approximately one standard deviation from the mean cost of producers surveyed in the 2009 UC report.
***To get Total Modification Cost, per acre cost is multiplied by acreage data from 2007 Census (88,572 acres of leafy greens outside of CA and AZ; total U.S. leafy green acres of 433,023 is the sum of 344,451 acres in California and Arizona plus 88,572 outside of those two States).

The most common changes in leafy green farming operations made by respondents (to the survey that was the basis of the UC report) were installing or improving fencing and bathroom/hand-washing facilities. The total cost of the investments/modifications for LGMA compliance averaged $21,490, or $13.60 per acre, with a range from $0 to $150,500. The cost for modifications reported by small farms was $14.82 per acre. The figures for medium and large farms were $18.05 and $8.29 per acre, respectively. In the UC report, a small farm was defined as a farm with annual gross revenue from leafy green vegetables of under $1 million. Revenue of $1 million to $10 million was defined as medium, and a large farm had leafy green revenues over $10 million annually.

The survey results indicated that one-third of respondents reduced production area under cultivation, averaging a 1.5 percent reduction, to meet buffer zone requirements. Evidence presented at the hearing indicates small producers tend to have numerous small plots of land. Buffer zone land loss, if required under the proposed agreement, could be a much larger percent for those producers with small, scattered plots.

Another key impact to examine is the increased seasonal cost that would be incurred every year by producers for compliance with the proposed program. A range of compliance cost increases is presented in Table 2, based on cost data drawn from the UC and Intertox reports.[3] Table 2 presents a range of per acre of cost increases for producer compliance—four cost levels at $20 increments: $10, $30, $50, and $70.[4] Individual producer costs could vary substantially from these estimates of mean costs per acre.

TABLE 2—RANGE OF SEASONAL COST INCREASE ESTIMATES FOR PRODUCER COMPLIANCE WITH THE PROPOSED PROGRAM

Increased cost per acre		Seasonal cost increases for farms outside of CA, AZ*	Seasonal cost increases for farms in the U.S.*
		$ million	
$10	* * *	$0.9	$4.3
30	* *	2.7	13.0
50	* *	4.4	21.7

[3] In table 5 in the UC report, the bottom rows show that the mean food safety costs per acre were $24.04 and $54.63. The difference between those figures ($30.59, rounded to $30) represents one estimate of increased California producer expenditure on food safety after the California LGMA went into effect in 2007, compared to seasonal food safety expenses already incurred prior to the LGMA. In table 6 of the UC report, mean per acre costs of $36.46 and $84.36 appear in the bottom rows. The difference between them is $47.90, which is rounded to $50. The $30 and $50 costs represent a range of estimates of the cost impact of the additional requirements to comply with the California LGMA. Since cost data from other regions of the U.S. were not submitted at the hearing, it is assumed that a similar range of additional expenditures would be likely in other states under the proposed program.

[4] Table 13 on page 13 of the Intertox report indicates costs of $35 and $45 for a producer growing 200 acres of leafy greens. Table 14 on page 14 presents per acre cost estimates of $20, $30 and $50 for a 10,000-acre producer. Tables 15 and 16 (on page 16 of the Intertox report) present costs for producer-handlers. For a producer-handler shipping 200,000 cartons annually, the per acre cost estimates were $67 and $95. For an operation shipping 9.5 million cartons, the food safety costs were $48 and $105. The cost elements in the tables included personnel, water testing, third party audits, recordkeeping, training, equipment, and a category called "ranch care, pest control, chlorine." Given this range of total costs from the Intertox report, it is assumed that a range of cost increases (averaged over all producers) could range from $10 to $70 per acre.

TABLE 2—RANGE OF SEASONAL COST INCREASE ESTIMATES FOR PRODUCER COMPLIANCE WITH THE PROPOSED PROGRAM—Continued

Increased cost per acre		Seasonal cost increases for farms outside of CA, AZ*	Seasonal cost increases for farms in the U.S.*
70	* * *	6.2	30.3

* Acreage data from 2007 Census, 88,572 acres of leafy greens outside of CA and AZ plus 271,040 acres of leafy greens in CA and AZ equals U.S. leafy green acres of 433,023.

** In the UC report, a producer survey yielded a mean estimated increase of about $30. A separate estimate of "Seasonal Food Safety Losses and Activities" showed increased per acre expenditure of about $48, which is rounded to $50 in the table above.

*** The Intertox report included producer food safety costs from ranging from $20 to $50 per acre, and for producer/handlers, from $48 to $105 per acre, for all food safety expenses, not just those incurred for compliance. Given this range of total costs, it is assumed that a range of net increased costs (averaged over all producers) could range from $10 to $70 per acre. Individual producer costs could vary substantially from these estimates of mean costs per acre.

Multiplying the cost figures of $30 to $50 per acre by 88,572 acres yields a range of seasonal cost increase estimates for program compliance of $2.7 to $4.4 million for all leafy green acreage outside of California and Arizona. Adding Intertox submitted estimates increases the range to $900,000 to $6.2 million. Just as with modification costs discussed above, it is assumed that California and Arizona farm seasonal cost increases for program compliance would be minimal, since most acreage is already participating in the leafy green marketing agreements in those two States and/or have already undertaken seasonal GAPs or audit verification expenditures in response to contractual obligations from buyers. However, to provide an estimate of the total seasonal costs for the industry as a whole, the fourth column adds the costs in column three to an estimated cost expended by producers in California and Arizona, most of who are covered by State marketing agreements.

Results of the UC report included per acre seasonal (annual) food safety cost estimates of $0 to $200 in 2007. This estimate includes requirements of private standards audits in addition to LGMA compliance. The average increase in seasonal compliance cost for producers of all sizes was $30.59 per acre. Total seasonal compliance costs reported by small farms were $38.57 per acre. The figures for medium and large farms were $85.89 and $33.22 per acre, respectively. Taking all costs into consideration, average compliance costs totaled 1.0–1.3 percent of producers' leafy green vegetable revenues.

A researcher on the faculty at California State University at Fresno testified as a proponent witness. The witness reported results of a survey taken on the costs of complying with the LGMA. Three significant cost increases as a result of the LGMA were $400–500 per audit per farm for compliance audits, one additional employee for food quality and best practices procedures, and increased water testing averaging a total of $3,657 per month.

Record evidence indicates that a large proportion of commercial leafy green vegetable production is already complying with the California and or Arizona marketing agreements, therefore, the proposed agreement would not cause these producers to incur significant cost increases since they have already invested in food quality verification and related compliance.

Record evidence indicates that, based on a 2008 survey of LGMA participants, the types of costs associated with the agreement included additional personnel costs, additional water and soil amendment tests, traceability processes and increased recordkeeping. According to the record evidence, small producers reported costs associated with the LGMA of $35 to $45 per acre; for large producers, costs were $20 to $50 per acre. Small producers in the survey had made little investment prior to the LGMA. In the absence of specific buyer or program requirements, such as the National Organic Program, costs were small and/or not broken out from other operating expenses in the survey.

The costs cited in the Intertox testimony represent 1–2 percent of total operating costs and include all food quality and best practices procedure costs, not just those associated with the LGMA. Numerous proponent witnesses testified that these costs were representative of their costs as a producer or handler.

Evidence provided at the hearing indicates that most, if not all, large producers have initiated some food quality and best practices procedures even if they were not regulated under either of the two State marketing agreements currently in effect.

Some small producers testified that they had initiated good agricultural practices in recent years, including some which increased cash costs, such as new or added testing of the growing environment. Many stated that they were spending more of their time on food safety issues, including attending training. Most small producers testifying were concerned with potential recordkeeping requirements that they believed would be burdensome under the proposed agreement. Evidence presented at the hearing suggested that most producers are spending time and/or money trying to reduce the potential for food contamination, but the efforts are not consistent and vary from producer to producer. It is anticipated that the proposed agreement would have minimal impact on small producers that market directly through local farmers' markets or similar community outlets, because these handling entities would likely not be signatories to the proposed agreement.

Producer/Handler Cost Impact Estimates

According to record evidence, a large producer who also is a large handler would have food quality and best practices procedure costs ranging from $48 to $105 per acre. The evidence indicates the largest cost increase for large producers was hiring or assigning food safety personnel to manage food quality and best practices procedure compliance. Further evidence indicates that a small handler who is also a small producer would have audit verification or compliance related costs ranging from $67 to $95 per acre. This is based on a representative farm growing and shipping 200,000 cartons of leafy green vegetables per year (approximately 950 acres).

Assessment Cost Impacts on Handlers

Under the proposed agreement, signatory first handlers would be assessed based on their volume of leafy green vegetables handled for the fresh market. These assessments would cover

the administrative costs of the proposed program as well as audit verification fees for signatory first handlers and their producers. Additionally, signatory handlers other than first handlers would pay costs associated with the conduct of audit verifications. The record evidence indicates that USDA's current rate is $92 per hour per auditor.

Table 3 shows alternative assessment rates and a computation illustrating the total cost to all U.S. leafy green vegetable signatory handlers of the California and Arizona marketing agreements, and signatory first handlers under the proposed agreement. An assessment rate of one cent per carton is equivalent to $13.04 per acre. This computation is based on a carton weight of 24 pounds and an average yield. The three-year average U.S. yield (2007–2009) for the 5 major leafy greens is 313 hundredweight (cwt.) per acre.

Multiplying $13.04 per acre times California and Arizona acreage of 344,451 yields an estimate of $4.5 million in total assessments for those two States. The $4.5 million assessment figure represents an approximation of the average of annual payments by handlers since the State LGMAs were implemented in 2007; those States would therefore likely not see a significant change in assessment payments if the rate was approximately one cent per carton. At one cent per carton, the total assessment cost to handlers in all other States is estimated at $1.2 million, based on 88,172 acres, if all producers in those States sold their entire leafy green production to signatory handlers.

In 2009, 167.7 million pounds of fresh lettuce, spinach and cabbage were imported in the U.S. Record evidence indicates that some of the leafy green vegetables imported into the United States are produced and/or shipped by large U.S. companies. Assessments on the quantity of imports are estimated to add $70,000 to potential total assessments at the assessment rate of one cent per carton.

TABLE 3—ESTIMATE OF POTENTIAL HANDLER ASSESSMENTS UNDER ALTERNATIVE PAYMENT RATES

Assessment rates		Total assessments **				
Per carton	Per acre equivalent *	California and Arizona	All other states	Assessments on domestic production	Imports ***	Total assessments
$	$ per acre	– – – – – – – – $ million – – – – – – – –				
0.01	13.04	4.49	1.16	5.65	0.07	5.72
0.03	39.13	13.48	3.47	16.94	0.21	17.15
0.05	65.21	22.46	5.78	28.24	0.35	28.59

* Computation of per acre equivalent: $0.05 per carton/24 lbs. per carton = $0.002083 per pound, or $0.2083 per cwt; Average yield for 5 major leafy greens (2007–2009) = 313 cwt. per acre; $0.2083 per cwt. × 313 cwt. per acre = $65.21 per acre.
** Computed by multiplying Per Acre Equivalent Assessment Rate by Acres (California and Arizona = 344,451; all other States = 88,172).
*** Imports are assumed to be 167.7 million pounds.

If the rate were five cents per carton, the per-acre equivalent rate would be $65.21. California and Arizona handlers would pay $22.5 million, an increase of $18 million from the estimated $4.5 million that they have been paying in recent years to their respective State LGMAs. Handlers in all other States would pay $5.8 million. If all U.S. producers sold their entire leafy green production to signatory first handlers under the proposed agreement, if imports were equal to 2009 levels and if the assessment rate were five cents per carton, the estimate of total assessment payments would be $28.6 million. The three cent per carton rate shown in the table represents an intermediate level of assessment.

Concerns of Small Handlers and Producers

Hearing evidence indicates that participants representing small businesses and organic operations were concerned about the potential costs associated with any proposed best practices resulting from the implementation of this proposed agreement. A number of those who testified at the hearing expressed concern that, if implemented, the proposed agreement might have a disproportionate impact on small producers relative to larger producers. The cost to producers of implementing GAPs requirements is likely to be highly variable, based on individual farm situations, and may or may not be disproportionately different for small producers in relation to their larger counterparts.

In AMS's analysis of the proposed agreement, consideration was given to its potential impact on small producers. In particular, this proposed rule broadens Board representation and membership of the proposed Technical Review Committee, provides for coordination with programs and other independent entities, and would include the addition of education and outreach authority to support the transition of small businesses into compliance with the proposed agreement.

In response to comments received during the hearing, AMS is recommending changes to the proposal to make the Board and Committee more fully representative of the varied business sizes and diverse production cultures which comprise the domestic leafy green vegetables industry. The changes to representation on the Board and Technical Review Committee would ensure that the interests of small entities would be considered in the establishment of the audit metrics under the agreement.

The proposed modifications are intended to ensure representation in the process so that the audit metrics developed would be scale-appropriate and would not disproportionately burden small entities. As recommended in this proposed rule, the Secretary would have final approval of audit metrics.

The establishment of audit metrics would include considering the recommendations in a public forum. A super majority vote by the Board is required for recommendations to be forwarded to the Secretary for approval through the informal rulemaking process. That process would include public notice, the opportunity for public comment, and final approval by USDA.

Since audits paid for by the Board with assessment funds are based on volume handled, small handlers should not be at a disadvantage in participating in the proposed program in relation to large handlers. In addition, since producers within the production area (U.S. grown) would not be required to pay either assessments or auditing costs, small producers should not be at a

disadvantage in relation to larger producers for these costs.

The hearing record indicates support for moving forward with the proposed agreement as revised to ensure that concerns of small, organic and diversified operations are addressed.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), AMS announces its intention to request an approval of a new information collection for the proposed National Marketing Agreement Regulating Leafy Green Vegetables.

Title: National Marketing Agreement Regulating Leafy Green Vegetables.

OMB Number: 0581–NEW.

Expiration Date of Approval: Three years from approval date.

Type of Request: New information collection.

Abstract: The information collection requirements in this request are essential to carry out the intent of the Act, to provide the respondents the type of service they request, and to administer the proposed National Marketing Agreement Regulating Leafy Green Vegetables.

The proposed agreement for leafy green vegetables would authorize the development and implementation of production and handling regulations (audit metrics). Such audit metrics would reflect GAPs, GHPs, and GMPs. AMS is the agency that would provide oversight of the proposed agreement, and any administrative rules and regulations issued under the proposed program.

Upon implementation of the proposed agreement or during amendatory proceedings, handlers would be offered the opportunity to sign an agreement to indicate their willingness to comply with the provisions of the new or amended agreement. The proposed agreement would be voluntary in that only handlers who sign the proposed agreement would become signatory handlers who are subject to its requirements. AMS also would provide a certificate of resolution for each signatory handler organization to sign, documenting the handler's approval of the proposed agreement.

If the proposed agreement is established, nomination forms for signatory handlers and producers and background information forms would be used to nominate and appoint Board members and alternates. Producer, signatory handler, and importer members would be nominated to serve as representatives on the Board by their peers who also are subject to the National Marketing Agreement Regulating Leafy Green Vegetables. The general public would nominate three additional members and their alternates to represent one from each of the following: Retailers, foodservice operators, and the public. Each producer, signatory handler, importer, retailer, foodservice operator, and person of the general public would be allowed to nominate oneself to the Board as a member or alternate. Each person nominated would be required to complete a background information form. All nominations would be submitted to the Secretary for selection and appointment as Board members and alternate members.

Following the selection of the Board, committee nomination forms and background information forms would be used to nominate and appoint members to the Technical Review Committee and the Research and Development Committee. Each producer and signatory handler would have the opportunity to submit a nomination form with the names of persons to be considered for nomination to these committees. Persons who are nominated would be required to complete a background information form. All nominations would be submitted to the Secretary for selection and appointment as committee members.

The forms covered under this information collection request would be for the submission of minimum information necessary to ascertain handler support for the proposed agreement, to appoint Board members and their alternates, and appoint members to specific committees of the Board. Additional reporting and recordkeeping requirements may subsequently be recommended by the Board for its use in administering the proposed agreement. The burden imposed by any additional requirements would be submitted for approval by the OMB.

The information collected would be used only by authorized representatives of USDA, including AMS, Fruit and Vegetable Programs' regional and headquarters staff, and authorized employees of the Board, if established. Section 608(d)(2) of the Act provides for confidential treatment of information.

Total Annual Estimated Burden

The total burden for the information collection request under the proposed agreement is as follows:

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .25 hours per response.

Estimated Number of Respondents: 2,370 (2,200 handlers, 140 producers, 30 public).

Estimated Number of Annual Responses: 4,790.

Estimated Number of Responses per Respondent: 2.02.

Estimated Total Annual Burden on Respondents: 522 hours.

Estimated Annual Burden for Each Form

For each new form, the proposed request for approval of new information collections under the proposed agreement are as follows:

FV–307 National Marketing Agreement Regulating Leafy Green Vegetables. Handlers would use this form to indicate their willingness to comply with the provisions of the proposed agreement. The proposed National Marketing Agreement Regulating Leafy Green Vegetables form would be completed if the proposed agreement is implemented and in any future amendment of the agreement.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 5 minutes per response.

Respondents: Handlers of leafy green vegetables.

Estimated Number of Respondents: 2,200.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 183.26 hours.

FV–308A Certificate of Resolution. This form would document corporate handlers' support for the proposed agreement. The certificate of resolution would be completed if the proposed agreement is implemented and in any future amendment of the agreement.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 5 minutes per response.

Respondents: Incorporated handlers of leafy green vegetables.

Estimated Number of Respondents: 2,100.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 174.93 hours.

FV–309 Nomination Form by Producers/Signatory Handlers. Producers and signatory handlers of leafy green vegetables would use this form to nominate themselves or other producers and signatory handlers to serve on the Board. This form also would include the nomination of the importer member and their alternate. For the purpose of this calculation, it is estimated that 70 producers and 70

signatory handlers would offer nominations.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 10 minutes per response.

Respondents: Producers and signatory handlers of leafy green vegetables.

Estimated Number of Respondents: 140.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 23.38 hours.

FV–310 Nomination Form by General Public. Any person located in the production area would use this form to nominate themselves or other persons from the public to serve as a retailer, foodservice representative, and public member or alternate member on the Board. For the purpose of this calculation, it is estimated that 30 persons would offer nominations.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 10 minutes per response.

Respondents: General Public.

Estimated Number of Respondents: 30.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 5.10 hours.

FV–311 Background Information. This proposed rule recommends the Board be comprised of 26 members and 26 alternates. This form would be used by nominated candidates to provide their qualifications to serve on the Board. For the purpose of this calculation, it is estimated that 170 persons would agree to be candidates to serve on the Board.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 30 minutes per response.

Respondents: Signatory handlers, importers, producers, retailers, foodservice representatives, and general public nominees.

Estimated Number of Respondents: 170.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 85.0 hours.

FV–312 Committee Nomination Form. Producers and signatory handlers of leafy green vegetables would use this form to nominate persons to serve on the Technical Review Committee or the Research and Development Committee. For the purpose of this calculation, it is estimated that 40 producers and 35 signatory handlers would offer nominations.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 10 minutes per response.

Respondents: Producers and signatory handlers of leafy green vegetables, and the Board.

Estimated Number of Respondents: 75.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 12.75 hours.

FV–313 Committee Background Information. This recommended decision proposes that the Technical Review Committee consist of a minimum of 10 members and the Research and Development Committee consist of a minimum of 9 members. This form would be used by candidates that have been nominated to provide their qualifications to serve on the Technical Review Committee or the Research and Development Committee. For the purpose of this calculation, it is estimated that 20 producers, 15 signatory handlers, and 40 other persons would agree to be candidates to serve on these committees.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 30 minutes per response.

Respondents: Producers and signatory handlers of leafy green vegetables, retailers, foodservice representatives, food safety experts, and other persons.

Estimated Number of Respondents: 75.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 37.50 hours.

If this proposed agreement is established by USDA, the Board could recommend to the Department other forms (such as monthly assessment report, contact information form, withdrawal form, *etc.*) which would be needed to administer the proposed agreement. All such forms would be subject to USDA and OMB review and approval.

Comments: Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments should reference OMB No. 0581–NEW and the Proposed National Marketing Agreement Regulating Leafy Green Vegetables, and be sent to USDA in care of the Docket Clerk at the previously-mentioned address. All comments received will be available for public inspection during regular business hours at the same address.

All responses to this notice will be summarized and included in the request for OMB approval of the above-described forms. All comments will become a matter of public record.

AMS is committed to complying with the E–Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Civil Justice Reform

The marketing agreement proposed herein has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of marketing agreements issued under the Act.

Rulings on Briefs of Interested Persons, Proposed Findings and Conclusions

Briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth in this recommended decision. To the extent that the suggested findings and conclusions filed by interested persons are inconsistent with the findings and conclusions of this recommended decision, the requests to make such findings or to reach such conclusions are denied.

General Findings

1. The proposed agreement and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

2. The proposed agreement regulates the handling of leafy green vegetables grown in the production area in the same manner as, and is applicable only to, persons in the respective classes of commercial and industrial activity specified in the proposed agreement upon which a hearing has been held;

3. The proposed agreement prescribes, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the

production and marketing of leafy green vegetables in the production area; and

4. All handling of leafy green vegetables grown in the production, or handled as imported product from outside the production area, as defined in the proposed agreement, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

A 90-day comment period is provided to allow interested persons to respond to this proposal. All written exceptions timely received will be considered. After consideration of any comments received, the Secretary will issue a Secretary's Decision which, if warranted, would include a handler sign-up period.

List of Subjects in 7 CFR Part 970

Marketing agreements, Reporting and recordkeeping requirements, Vegetables.

Title 7, Chapter IX is proposed to be amended by adding Part 970 to read as follows:

PART 970—NATIONAL MARKETING AGREEMENT REGULATING LEAFY GREEN VEGETABLES

Subpart—Agreement Regulating Signatory Handlers

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970.11 Good agricultural and handling practices.
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970.20 Manufacturer.
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970.39 Purpose.

National Leafy Green Vegetable Board

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970.98 Withdrawal.
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Authority: U.S.C. 601–674.

Subpart—Agreement Regulating Signatory Handlers

Definitions

§ 970.1 Act.

Act means Public Act No. 10, 73rd Congress (May 12, 1933), as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (48 Stat. 31, as amended; 7 U.S.C. 601–674).

§ 970.2 Audit metric.

Audit metric means an auditable standard or requirement within a process control prescribed pursuant to § 970.67.

§ 970.3 Audit.

Audit means an official review conducted by the Inspection Service to verify and document that good agricultural, handling, and manufacturing practices are adhered to throughout the growing, harvesting, packing, manufacturing, and transportation of leafy green vegetables. The audit includes a physical visit to the farm or facility subject to audit while it is in operation, where practicable, and represents a "snapshot in time" based on documentation reviewed, persons interviewed, and operations observed, and is intended to reflect past and ongoing activities.

§ 970.4 Broker.

Broker means a person who coordinates the sale and transportation of leafy green vegetables for retail or foodservice operators, without taking ownership of such leafy green vegetables.

§ 970.6 Critical limit.

Critical limit means a maximum or minimum value that is assigned to a process control when a biological, chemical, or a physical parameter must be controlled to prevent or minimize the occurrence of a food safety hazard.

§ 970.7 Crop year.

Crop year is synonymous with *fiscal year* and means the 12-month period beginning on April 1 of any year and ending on March 31 of the following year, or any other period recommended by the Board and approved by the Secretary.

§ 970.8 Foodservice operator.

Foodservice operator means a business (including but not limited to an industrial caterer or hospital) that receives or purchases leafy green vegetables from handlers and delivers such vegetables to consumers, either by sale or by offering for direct consumption.

§ 970.9 Fresh.

Fresh means any leafy green vegetable in the raw or natural form.

§ 970.10 Fresh-cut.

Fresh-cut is synonymous with *products* and means leafy green vegetables that have been altered from

their fresh form by cutting, dicing, peeling, slicing, chopping, shredding, coring, or trimming, with or without washing prior to being packaged for use by the consumer, foodservice industry, or a retail establishment.

§ 970.11 Good agricultural and handling practices.

Good agricultural practices or GAPs and *Good handling practices or GHPs* refer to general practices to reduce microbial food safety hazards in leafy green vegetables, as described in sections of the current FDA "Guide to Minimize Microbial Food Safety Hazards for Fresh Fruits and Vegetables" and the current FDA "Guide to Minimize Microbial Food Safety Hazards for Fresh-cut Fruits and Vegetables" that are applicable to the production and harvesting activities of leafy green vegetables, or any other revised or modified versions thereof, or any other documents or regulations, as recommended by the Board and approved by the Secretary for use in audits conducted by the Inspection Service under this part.

§ 970.13 Good manufacturing practices or GMPs.

Good manufacturing practices or GMPs means any FDA regulations that appear in 21 CFR Part 110 or as otherwise amended, which describe the methods, equipment, facilities, and controls required for producing fresh-cut processed food, including packaged leafy green vegetables, or FDA guidance documents, regulations, or any other documents recommended by the Board and approved by the Secretary for use in audits conducted by the Inspection Service under this part.

§ 970.14 Handle.

Handle means to receive, acquire, sell, process, ship, distribute, or import leafy green vegetables: Provided, that handle does not include brokering, retail sales, or foodservice sales of leafy green vegetables.

§ 970.15 Handler.

Handler means any person who handles leafy green vegetables: Provided, that, this definition does not include a retailer, foodservice operator, or a broker, except to the extent such person is otherwise engaged in handling.

§ 970.16 Importer.

Importer means a handler located in the production area who imports leafy green vegetables that are produced or handled outside of the production area."

§ 970.17 Inspection Service.

Inspection Service means the Fruit and Vegetable Programs, Agricultural Marketing Service, USDA, its designees, or any other entity approved or recognized by USDA to conduct audits on leafy green vegetables.

§ 970.18 Leafy green vegetables.

(a) *Leafy green vegetables* means the mature and immature leafy portions of any of the following vegetables and any varieties thereof that are for human consumption in their fresh or fresh-cut form: arugula, cabbage (red, green, and savoy), chard, cilantro, cress, dandelion, endigia, endive (escarole), kale, lettuce (head, leaf, and romaine), mâche, mizuna, parsley, radicchio, spinach, tat soi, winter purslane, or any other leafy green vegetable recommended by the Board and approved by the Secretary. The Board may recommend, subject to the approval of the Secretary, the removal of any leafy green vegetable from this definition.

(b) Combinations of the above listed leafy green vegetables are covered by the requirements established under this part. This includes spring mix.

(c) All non-leafy green vegetables or non-produce ingredients commingled with fresh-cut leafy green vegetables in packaged products (*e.g.,* salad kits which may contains carrots, meat, cheese, and/or dressings) are not covered by this part.

§ 970.19 Manufacture.

Manufacture is synonymous with process and means to change fresh leafy green vegetables to fresh-cut leafy green vegetables: Provided, that manufacture does not include leafy green vegetables packed in the field or apply to retailing, foodservice operators, or brokering, except to the extent that a retailer, foodservice operator, or broker is other wised engaged in manufacturing for non-retail purposes.

§ 970.20 Manufacturer.

Manufacturer means any person who manufactures: Provided, that, this definition does not include a retailer, a foodservice operator, or broker, except to the extent that such a person is otherwise engaged in handling.

§ 970.22 National Leafy Green Vegetable Board or Board.

National Leafy Green Vegetable Board or Board means the administrative board established pursuant to § 970.40, or as affected pursuant to § 970.41.

§ 970.23 Packaged.

Packaged is synonymous with containerized and means leafy green vegetables that are uniformly wrapped or sealed, such as cellophane, clamshells, cartons or totes.

§ 970.24 Part.

Part means the marketing agreement regulating the handling of leafy green vegetables by signatory handlers and all rules, regulations and supplementary subparts issued thereunder.

§ 970.25 Person.

Person means an individual, partnership, corporation, association, or any other business unit.

§ 970.26 Process control.

Process control means a step or point within a production, harvesting, handling, manufacturing, or transportation process at which the potential for microbiological contamination can be reduced.

§ 970.27 Producer.

Producer is synonymous with *grower* and means any person engaged in a proprietary capacity in the production of leafy green vegetables for sale or delivery to a signatory handler.

§ 970.28 Production area.

Production area means all fifty States and the District of Columbia of the United States of America.

§ 970.29 Region.

Region means a production or growing area distinguished by common environmental or growing conditions including, but not limited to, geography, climate, production practices, water sources and distribution systems, or wildlife. Regions are not synonymous with zones.

§ 970.30 Retailer.

Retailer means any person that sells leafy green vegetables directly to the consumer.

§ 970.31 Secretary.

Secretary means the Secretary of Agriculture of the United States or any officer or employee of the United States Department of Agriculture who is, or who may hereafter be, authorized to act in his or her stead.

§ 970.32 Signatory first handler.

Signatory first handler means the person located in the production area that first handles leafy green vegetables and who is party to this part.

§ 970.33 Signatory handler.

Signatory handler means a handler located in the production area who is party to this part.

§ 970.35 United States Department of Agriculture or USDA.

United States Department of Agriculture or USDA means any officer, employee, service, program or branch of the Department of Agriculture, or any other person acting as the Secretary's agent or representative in connection with any provisions of this part.

§ 970.36 United States Food and Drug Administration or FDA.

United States Food and Drug Administration or FDA means the government agency within the United States Department of Health and Human Services.

§ 970.37 Zone.

Zone means the applicable one of the following described subdivisions of the production area or such other subdivisions as recommended by the Board and approved by the Secretary:

(a) *Zone 1* shall include the States of California and Hawaii.

(b) *Zone 2* shall include the States of Alaska, Idaho, Montana, Oregon, Washington, and Wyoming;

(c) *Zone 3* shall include the States of Arizona, Colorado, Nevada, New Mexico, and Utah;

(d) *Zone 4* shall include the States of Illinois, Iowa, Minnesota, Nebraska, North Dakota, South Dakota, and Wisconsin;

(e) *Zone 5* shall include the States of Arkansas, Kansas, Louisiana, Missouri, Oklahoma, and Texas;

(f) *Zone 6* shall include the States of Delaware, District of Columbia, Indiana, Kentucky, Maryland, Michigan, Ohio, Virginia, and West Virginia;

(g) *Zone 7* shall include the States of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, and Tennessee; and,

(h) *Zone 8* shall include the States of Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont.

Purpose

§ 970.39 Purpose.

The purpose of this agreement is to: Implement a uniform, auditable, science-based food quality verification program conducted by the USDA; enhance the quality of leafy green vegetables available in the marketplace through the application of good agricultural production, handling, and manufacturing practices; foster greater cooperation with local, State, and Federal agencies and other organizations; and, improve consumer confidence in leafy green vegetables.

National Leafy Green Vegetable Board

§ 970.40 Establishment and membership.

(a) A National Leafy Green Vegetable Board is hereby established to administer the terms and provisions of this part. Such Board shall consist of twenty-six members, each of whom shall have an alternate who shall have the same qualifications as the member for whom he or she is an alternate. Board membership shall be allocated as follows:

(1) Four signatory handlers and three producers from Zone 1;

(2) One signatory handler and one producer from Zone 2;

(3) One signatory handler and one producer from Zone 3;

(4) One signatory handler and one producer from Zone 4;

(5) One signatory handler and one producer from Zone 5;

(6) One signatory handler and one producer from Zone 6;

(7) Two signatory handlers and one producer from Zone 7;

(8) One signatory handler and one producer from Zone 8;

(9) One importer representative from the production area;

(10) One retailer representative from the production area;

(11) One foodservice representative from the production area; and,

(12) One public member representative from the production area.

(b) A majority of the producer members of the Board shall not be engaged in the handling of leafy green vegetables or the manufacturing of fresh-cut products, and two producers must be small producers. Further, at least four handler members must be engaged in the manufacturing of fresh-cut leafy green products.

(c) To the extent practicable, Board membership shall include representation of the following stakeholder groups:

(1) Producers that meet the Small Business Administration's (SBA) definition small agricultural producers.

(2) Diversified farm producers who produce a variety of crops or animals, or both, on one farm, as distinguished from specialization of a single commodity. For the purposes of this subpart, variety of crops means any crop in addition to those included in the definition of leafy green vegetables.

(3) Producers and signatory handlers representing certified organic businesses meeting the SBA definition of small business entity.

(4) Producers and signatory handlers representing certified organic businesses that exceed the SBA definition of small business entity.

§ 970.41 Reallocation of membership.

The Board may recommend, subject to the approval of the Secretary, reallocation of Board members among zones, changes in the number of Board members, and changes in the composition of the Board by revising the number of members representing various industry sectors, *Provided,* that each zone must be represented by at least one producer and one signatory handler. In making such recommendations, the Board shall consider the following factors:

(a) Shifts in acreage and number of producers within zones;

(b) The importance of new acreage in its relation to existing zones;

(c) The equitable relationship between membership and zones;

(d) Economies to result in promoting efficient administration due to reallocation or changing the composition of membership; and,

(e) Other relevant factors.

§ 970.42 Eligibility.

(a) Each signatory handler member (including importer) and his or her alternate member at the time of his or her selection and throughout his or her term of office shall be a signatory handler (including importer), or an officer or employee of a signatory handler in the zone for which selected.

(b) Each producer member and his or her alternate member at the time of his or her selection and through his or her term of office shall be a producer, or an officer or employee of a producer in the zone for which selected.

(c) No signatory handler (including importer) or producer shall be represented on the Board by more than one member and one alternate member.

(d) The retailer, foodservice, and public members and their alternate members may not be engaged in the production or handling of leafy green vegetables. The retailer and foodservice members and their alternates shall be, at the time of their selection and throughout their term of office, an owner, officer or employee for the seat selected.

§ 970.43 Term of office.

Members and alternate members of the Board shall serve for terms of two (2) years beginning on April 1 and ending on March 31. Each member and alternate member shall continue to serve until a successor is selected and has qualified. Members shall not serve more than three (3) consecutive two-year terms of office or for a total of six (6) consecutive years.

§ 970.44 Nominations.

Nomination of Board members and alternate members shall follow the procedure set forth in this section, or such other procedure as may be recommended by the Board and approved by the Secretary.

(a) *Producer and signatory handler (including importer) nominations.* Nominations for the producer and signatory handler (including importer) members and alternate members shall be received at meetings, by mail, or by any form of electronically verifiable communication. Only persons eligible to serve on the Board as producers and signatory handlers shall be eligible to nominate producer and signatory handler (including importer) members and alternate members.

(b) *Retailer, foodservice and public member nominations.* Nominations for the retailer, foodservice, and public members and their alternate members shall be received at meetings, by mail, or by any form of electronically verifiable communication. Any person from the production area shall be eligible to nominate the retailer, foodservice, and public members and their alternate members.

(c) *Acceptance.* Each nominee shall qualify by advising the Secretary that, if selected, such person agrees to serve in the seat and position appointed.

(d) *Selection.* A report shall be provided to the Secretary detailing all nominations prior to the beginning of each two- year term of office, together with all necessary data and other information as requested by the Secretary. The Secretary shall appoint from those nominees or from other qualified persons, the members and alternate members of the Board on the basis of the representation provided for in §§ 970.40 through 970.42.

(e) *Failure to nominate.* If nominations are not made within the time and manner specified in this part, the Secretary may, without regard to nominations, select the members and alternate members of the Board on the basis of the representation provided for in §§ 970.40 through 970.42.

(f) *Vacancies.* To fill a vacancy on the Board occasioned by the failure of any person selected as member or alternate member to qualify, or in the event of the death, removal, resignation, or disqualification of any member or alternate member, a successor for the unexpired term of such member or alternate member shall be nominated and selected in the manner specified in paragraphs (a) and (b) of this section. If the names of nominees to fill any such vacancy are not made available to the Secretary within a reasonable time after such vacancy occurs, the Secretary may appoint from other qualified persons without regard to nominations on the basis of representation provided for in §§ 970.40 through 970.42.

§ 970.45 Alternate members.

An alternate for a member shall act in the place and stead of such member during the member's absence or, in the event of the member's death, removal, resignation, or disqualification, until a successor for such member's unexpired term has been selected and has qualified.

§ 970.46 Technical Review Committee.

A Technical Review Committee is hereby established for the purpose of assisting the Board in developing audit metrics in § 970.67.

(a) The Technical Review Committee shall consist of one producer, one signatory handler, and one food safety expert from each zone. Of the producer members, at least one must be a small producer as defined by the Small Business Administration and one must be a certified organic producer. In addition, the Technical Review Committee shall include one representative from the USDA Natural Resources Conservation Service to be appointed by the Secretary.

(b) The Secretary may appoint additional representatives from USDA agencies including, but not limited to: National Organic Program, Agricultural Research Service, and National Institute of Food and Agriculture.

(c) USDA may consult with and invite representation from agencies outside of USDA including, but not limited to: the United States Environmental Protection Agency, FDA, and the United States Department of Interior Fish and Wildlife Service.

(d) *Nomination and selection.* Nominations for positions prescribed in paragraph (a) of this section shall be received from producers and signatory handlers at meetings, by mail, or by any form of electronically verifiable communication. In addition, the Board may recommend nominees to USDA. The Secretary may select and appoint the members from such nominations or from other qualified persons.

(e) The membership of the Technical Review Committee may be modified based on recommendations by the Board and approval of the Secretary, or as otherwise deemed appropriate by USDA.

(f) The Technical Review Committee may appoint subcommittees as necessary to facilitate the development of audit metrics. Subcommittees may consist of producers, signatory handlers, and other interested persons as deemed appropriate by the Technical Review Committee.

§ 970.47 Research and Development Committee.

The Research and Development Committee is hereby established for the purpose of providing advice to the Board on research, development, and educational and outreach programs as authorized under § 970.75.

(a) The Research and Development Committee shall consist of 9 members as follows: Two representatives of retailers; two representatives from foodservice companies; three public representatives, and two representatives from land grant universities with expertise in one, but not limited to, the following areas: The production, handling, and marketing of leafy green vegetables; small, diversified, or organic production and handling practices; agricultural economics; or educational outreach in the specified or related areas.

(b) *Nomination and selection.* Nominations shall be received from producers and signatory handlers at meetings, by mail, or by any form of electronically verifiable communication. The Board may recommend nominees to USDA. The Secretary shall select and appoint the members from such nominations or from other qualified persons.

(c) The membership of the Research and Development Committee may be modified based on recommendations by the Board and approval of the Secretary, or as otherwise deemed appropriate by USDA.

(d) The Research and Development Committee may appoint subcommittees as necessary. Subcommittees may consist of producers, signatory handlers, and other interested persons as deemed appropriate by the Research and Development Committee.

§ 970.48 Compensation and expenses.

All Board members, alternate Board members, committee members, and subcommittee members, shall serve without compensation, but shall be reimbursed for necessary and reasonable expenses incurred in the performance of their duties under this part.

§ 970.49 Procedure.

(a) A majority of all the appointed members of the Board shall constitute a quorum: *Provided,* That each zone with an appointed member shall be represented by at least one member or his or her alternate at any meeting of the full Board. Board action shall require the concurrence of a majority of present members except that recommendations

for the Secretary's approval of audit metrics, assessment rates, and termination of the agreement must be approved by a ⅔ vote of present members.

(b) In the event that a producer or signatory handler member of the Board and their alternate are unable to attend the meeting, the absent member or the Board may designate any other alternate from the same zone and group (signatory handler, producer) who is present at the meeting to serve in the member's place.

(c) The Board shall give to the Secretary the same notice of each meeting that is given to the members of the Board.

(d) The Board may vote by telephone or other means of communication, and any votes so cast shall be confirmed promptly in writing: *Provided,* That, if an assembled meeting is held, all members present shall cast votes in person. A videoconference shall be considered an assembled meeting and all votes shall be considered as cast in person.

§ 970.50 Powers.

The Board shall have the following powers:

(a) To administer this part in accordance with its terms and provisions;

(b) To make such rules and regulations, with the approval of the Secretary, as may be necessary to effectuate the terms and provisions of this part;

(c) To receive, investigate, and report to the Secretary complaints of violations of the provisions of this part; and

(d) To recommend to the Secretary amendments to the part.

§ 970.51 Duties.

The Board shall have, among others, the following duties:

(a) To select from among its members a chairperson and such other officers as may be necessary, and to define the duties of such officers;

(b) To adopt such bylaws for the conduct of its business as it may deem advisable;

(c) To keep minutes, books, and records which clearly reflect all the acts and transactions of the Board, committees, and subcommittees, and these shall be subject to examination by the Secretary at any time;

(d) To appoint such employees or agents as it may deem necessary, and to determine the compensation and define the duties of each;

(e) To submit a budget to the Secretary for each crop year;

(f) To cause its books to be audited by a certified public accountant at least once each crop year and at such other times as the Board may deem necessary or as the Secretary may request. Such audit shall include an examination of the receipt of income and the disbursement of all funds. The Board staff shall provide the Secretary with a copy of all audits and shall make copies of such audits available for examination at the office of the Board; *Provided,* That all confidential information is treated pursuant to § 970.81;

(g) To investigate the production, handling, and manufacturing of leafy green vegetables and to assemble data in connection therewith;

(h) To establish subcommittees to aid the Board in the performance of its duties under this part;

(i) To collaborate with existing State boards, commissions, and governing bodies of State agreements through memoranda of understanding to affect the purposes of this part;

(j) To recommend, after consultation with the Technical Review Committee, for approval of the Secretary audit metrics as provided for in § 970.67;

(k) To act as intermediary between the Secretary and any signatory handler with respect to the operations of this part; and

(l) To furnish such available information as may be deemed pertinent or as requested by the Secretary.

Expenses and Assessments

§ 970.55 Expenses.

The Board is authorized to incur such expenses as the Secretary finds are reasonable for the maintenance and functioning of the Board during each crop year, including the payment of audit fees, activities provided for under § 970.75, and for such other purposes as the Secretary may, pursuant to the provisions of this part, determine to be appropriate. Such expenses shall be paid from assessments received pursuant to § 970.56 and other funds available to the Board.

§ 970.56 Assessments.

(a) Each signatory first handler shall be responsible for paying the Board such handler's pro-rata share of the Board's expenses authorized by the Secretary for each crop year. The payment of assessments for the maintenance and functioning of the Board, as described in § 970.55, may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) Based upon recommendation of the Board, or other available data, the Secretary shall fix a base rate of assessment for all leafy green vegetables that signatory first handlers shall pay during each crop year. The Board may recommend and the Secretary may approve supplemental assessments, but no combination of assessment and supplemental assessments may exceed the cap established in paragraph (c) of this section.

(c) Based on the recommendation of the Board, or other available data, the Secretary may change or modify the base rate assessment. The assessment shall be set at the lowest rate practical to carry out the objectives of this part. The assessment rate shall not exceed $0.05 per 24-pound carton or equivalent of leafy green vegetables.

(d) Assessments not paid by a signatory first handler within a prescribed period of time may be subject to an interest or late payment charge, or both. The period of time, rate of interest, and late payment charge may be recommended by the Board and approved by the Secretary.

(e) In order to provide funds for the administration of this part, the Board may accept, but not require, advance payments of assessments, which shall be credited toward assessments levied against such signatory first handler during the crop year. The Board may also borrow money, subject to approval by the Secretary, for such purposes when assessment and reserve funds are not sufficient to cover Board expenses.

§ 970.57 Accounting.

If, at the end of a crop year, the assessments collected are in excess of expenses incurred, the Board, with the approval of the Secretary, may carry over such excess into subsequent crop years as an operating monetary reserve, except that total funds already in such reserve shall not exceed approximately two (2) crop years' budgeted expenses. Funds in such reserve shall be available for use by the Board for expenses authorized pursuant to § 970.55 and § 970.75, and to cover necessary expenses of liquidation in the event of termination of this part. If any such excess is not retained in a reserve, each signatory handler entitled to a proportionate refund shall be credited with such refund against the operations of the following crop year, or be paid such refund.

§ 970.58 Contributions.

The Board may accept voluntary contributions but these shall only be used to pay expenses incurred pursuant to § 970.75. Such contributions shall be free from any encumbrances by the donor and the Board shall retain complete control of their use.

Duties and Responsibilities of Signatory Handlers

§ 970.65 Signatory handlers.

No signatory handler to this part shall handle leafy green vegetables for human consumption unless such are verified as meeting the verification audit provisions of this part. Such verification shall take the form of an official audit conducted by the Inspection Service pursuant to § 970.66.

§ 970.66 Verification audits.

(a) *GAPs audits.* (1) Signatory handlers shall ensure that any leafy green vegetables handled by a handler's facilities have been subject to GAPs audits conducted by the Inspection Service. Such audits shall verify that the leafy green vegetables were produced under auditable conditions that meet production and harvest guidelines referred to in § 970.11 and any applicable audit metrics under § 970.67.

(2) No signatory handler subject to the provisions of this part shall receive leafy green vegetables produced outside the production area that have not been subject to GAPs audits conducted by the Inspection Service. Such audits shall verify that such product was produced under auditable conditions that meet production and harvest requirements referred to in § 970.11 and in applicable audit metrics under § 970.67.

(b) *GHPs or GMPs audits.* (1) All signatory handlers shall be subject to audits. Such audits shall verify that such handlers operate under auditable conditions that meet guidelines provided for in the GHPs or GMPs referred to in § 970.11 and § 970.13 and in applicable audit metrics under § 970.67.

(2) No signatory handlers subject to the provisions of this part shall receive leafy green vegetables from handlers outside the production area that have not been subject to GHPs or GMPs audits conducted by the Inspection Service. Such audits shall verify that the leafy green vegetables were produced under auditable conditions that meet production and harvest guidelines referred to in § 970.11 and applicable audit metrics provided for in § 970.67.

(c) Audits shall be conducted on a regular schedule that ensures every signatory handler is audited at least once a crop year. In addition, random unannounced audits of signatory handlers and associated producers shall be performed during the production season in each zone.

§ 970.67 Audit metrics.

After consultation with the Technical Review Committee, the Board may recommend audit metrics to the Secretary for approval.

(a) GAPs audit metrics. Audit metrics for GAPs may include verification of process controls related but not limited to: Water quality, soil amendments, machine harvest, hand harvest (including direct contact with soil during harvest), transfer of human pathogens by field workers, field sanitation, equipment-facilitated cross contamination, flooding, water usage to prevent dehydration, and production location concerns, including climatic conditions and environment, encroachment of animals of significant risk, and urban settings.

(b) GHPs and GMPs audit metrics. Audit metrics for GHPs and GMPS may include verification of process controls related but not limited to:

(1) Post-harvest handling processes: Cooling, water, reuse of field containers, bulk-bin modified atmosphere process, condition and sanitation of transportation vehicles, and employee hygiene.

(2) Handling and manufacturing processes: Wash water, wash system capacity, bulk-bin modified atmosphere process, condition and sanitation of transportation vehicles, employee hygiene, labeling of Raw Agricultural Commodity versus ready-to-eat products, and finished product packaging.

(3) Distribution handling processes: Condition and sanitation of transportation vehicles, condition and sanitation of distribution and cooler facilities, and temperature measurement of product.

(c) Critical limits for process controls for each step or point identified in GAPs, GHPs, or GMPs audit metrics may be recommended by the Board, after consultation with the Technical Review Committee, for approval of the Secretary, or may be developed by USDA.

(d) Technical Review Committee recommendations, including critical limits, shall incorporate current leafy green vegetable industry production, harvest and handling technologies, and be based on scientific practices.

(e) Audit metrics may be developed and recommended to accommodate differences in production, harvest, and handling environments of different regions and of different leafy green vegetables.

(f) After consultation with the Technical Review Committee, the Board may, at any time, recommend changes to audit metrics for approval by the Secretary.

(g) The Board shall review audit metrics a minimum of once every three years to ensure that they continually reflect the best leafy green vegetable industry practices, scientific information, and industry knowledge.

§ 970.68 Traceability.

(a) The traceability of leafy green vegetables by signatory handlers shall be established at production, handling, manufacturing, and distribution.

(b) Signatory handlers shall have the ability to track their leafy green vegetables from their supplier(s) to their customer(s) and shall have in place systems and procedures that allow for this information to be made available during an audit by the Inspection Service.

(c) Documents necessary for verification shall be maintained for two years.

§ 970.69 Official certification mark.

(a) Any registered certified mark developed under this part are the property of the United States Government as represented by the Board and shall inure to the benefit of the Board. This mark shall be used in accordance with this section and consistent with the mark's registration.

(b) The Board may license signatory handlers to affix the official certification mark to bills of lading or manifests, or any other such uses recommended by the Board and approved by the Secretary to carry out the purpose of this part, *Provided,* that such mark may not be used on consumer packages. The use of the official certification mark shall be subject to the verification, suspension, or revocation requirements of this part.

(c) A signatory handler's compliance with the regulations under this part is a condition precedent and subsequent to the signatory handler's entitlement to use the official certification mark.

§ 970.70 Administrative review of audits.

(a) Any financially interested person may request an administrative review of an audit if it is believed that the original audit is in error.

(b) Any signatory handler denied the use of the official certification mark may request an administrative review of an audit if it is believed that a material fact of the original audit was misinterpreted.

(c) Administrative reviews will be conducted in accordance with the USDA audit verification procedures for any audit program in effect under this part. The person requesting the review shall pay for the cost of the review. The review results shall be issued to the person making the request.

§ 970.71 Modification, suspension, or termination of regulations.

(a) In the event that the Board, at any time, finds that any regulations issued under this part should be modified or suspended, it shall, pursuant to § 970.49, so recommend to the Secretary.

(b) Whenever the Secretary finds from the recommendations and information submitted by the Board or from other available information, that any regulations issued under this part should be modified, suspended, or terminated in order to effectuate the declared policy of the Act, the Secretary shall modify, suspend or terminate such provisions. If the Secretary finds that a regulation obstructs or does not tend to effectuate the declared policy of the Act, the Secretary shall suspend or terminate such regulation.

§ 970.72 Exemptions.

With the approval of the Secretary, the Board may recommend rules, regulations, and safeguards that exempt leafy green vegetables from any or all requirements pursuant to this part. The Board may require reports or certifications, or impose other conditions as are necessary to ensure that such exempted leafy green vegetables are handled only as authorized.

Research and Development

§ 970.75 Research, development, and education.

The Board, with the approval of the Secretary, may establish or provide for the establishment of research, including market research, related to production, handling, and manufacturing leafy green vegetables, developments projects, and educational and outreach programs, designed to assist, improve, or promote the efficient adoption, implementation, and administration of this part. The expenses of such projects shall be budgeted and paid from funds collected pursuant to §§ 970.56 and 970.58.

Reports and Records

§ 970.80 Reports and recordkeeping.

(a) Each signatory handler shall report all receipts and acquisitions of all leafy green vegetables and such other reports or information as recommended by the Board and approved by the Secretary that may be necessary to enable the Board to carry out the provisions of this part.

(b) Each signatory handler shall maintain records of all receipts and acquisitions of leafy green vegetables and all documentation relating to audit reports. Such records shall be maintained for at least two years after the end of the crop year of their applicability. Such recordkeeping shall be sufficient to document and substantiate the signatory handler compliance with this part.

§ 970.81 Confidential information.

All reports and information submitted by signatory handlers pursuant to the provisions of this part shall be received by, and at all times be in the custody of, employees or authorized agents of the Board. No such employees or authorized agents shall disclose to any person, other than the Secretary upon request therefore, data, or information obtained or extracted from such reports and information which might affect the trade position, financial condition, or business operation of the particular signatory handler from whom received: *Provided,* That such data and information may be combined and made available in the form of general reports in which the identities of the individual persons furnishing the information is not disclosed.

§ 970.82 Verification of reports.

(a) For the purpose of checking and verifying reports filed by signatory handlers, the Board, through its authorized agents or employees, and the Secretary shall have access to any signatory handler's premises during regular business hours, and shall be permitted at any such time to:

(1) Examine such premises and any leafy green vegetables held by such signatory handler, and any and all records of the signatory handler with respect to such signatory handler's acquisition, sales, uses and shipments thereof; and

(2) Examine any and all records of such signatory handler with respect to activities carried out pursuant to § 970.66.

(b) Each signatory handler shall furnish all labor and equipment necessary.

§ 970.83 Compliance.

(a) A signatory handler may be subject to withdrawal of audit services or may lose the privilege of the use of the official certification mark if the signatory handler:

(1) Produces or acquires leafy green vegetables without an Inspection Service audit pursuant to §§ 970.66 and 970.67;

(2) Fails to obtain audit on the production, handling, or manufacturing of leafy green vegetables handled pursuant to § 970.66 and ships such leafy green vegetables for human consumption;

(3) Fails to successfully pass any audit conducted under this part, or fails to take appropriate verifiable corrective action to address non-conformities;

(4) Ships or places into the current of commerce leafy green vegetables for human consumption that fail to meet requirements under this part pursuant to §§ 970.66 and 970.67;

(5) Comingles leafy green vegetables that fail to meet the requirements of this part with leafy green vegetables and ships the comingled lot for human consumption;

(6) Fails to maintain and provide access to records pursuant to § 970.80; or

(7) Otherwise violates any of the provisions of this part.

(b) Any lot, or portion thereof, of leafy green vegetables that is deemed to be an immediate threat to public health by Inspection Service staff during the course of an audit shall be reported by USDA to appropriate health officials.

(c) Failure to comply with the provisions of this part may result in additional remedies or penalties.

Miscellaneous

§ 970.85 Effective time.

The provisions of this part, as well as any amendments, shall continue in force and effect until modified, suspended, or terminated.

§ 970.86 Rights of the Secretary.

Members and alternates of the Board, committees, subcommittees, and any agents, employees, or representatives thereof, shall be subject to removal or suspension by the Secretary at any time. Each and every decision, determination, or other act of the Board shall be subject to the continuing right of the Secretary to disapprove of the same at any time. Upon such disapproval, the disapproved action of the Board shall be deemed null and void.

§ 970.87 Personal liability.

No member or alternate member of the Board or the committees, and no employee or agent of the Board or the committees, shall be held personally responsible, either individually or jointly with others, in any way whatsoever, to any person for errors in judgment, mistakes, or other acts, either of commission or omission, as such member, alternate, employee, or agent, except for acts of dishonesty, willful misconduct, or gross negligence.

§ 970.88 Separability.

If any provision of this part is declared invalid or the applicability thereof to any person, circumstance, or thing is held invalid, the validity of the

remainder of this part or the applicability thereof to any other person, circumstance, or thing shall not be affected thereby.

§ 970.89 Derogation.

Nothing contained in this part is, or shall be construed to be, in derogation or in modification of the rights of the Secretary or of the United States to exercise any powers granted by the Act or otherwise, or, in accordance with such powers, to act in the premises whenever such action is deemed advisable.

§ 970.90 Duration of immunities.

The benefits, privileges, and immunities conferred upon any person by virtue of this part shall cease upon its termination, except with respect to acts done under and during the existence of this part.

§ 970.91 Agents.

The Secretary may, by designation in writing, name any officer or employee of the United States, or name any agency or program in the USDA, to act as the Secretary's agent or representative in connection with any of the provisions of this part.

§ 970.92 Suspension or termination.

(a) The Secretary may at any time terminate the provisions of this part.

(b) The Secretary shall terminate or suspend the operations of any or all of the provisions of this part whenever it is found that such provisions do not tend to effectuate the declared policy of the Act.

(c) The provisions of this part shall, in any event, terminate whenever the provisions of the Act authorizing them cease.

§ 970.93 Proceedings upon termination.

Upon the termination of this part, the then functioning members of the Board shall continue as joint trustees, for the purpose of liquidating the affairs of the Board. Action by such trustees shall require the concurrence of a majority of said trustees. Such trustees shall continue in such capacity until discharged by the Secretary, and shall account for all receipts and disbursements and deliver all property on hand, together with all books and records of the Board and the joint trustees, to such persons as the Secretary may direct; and shall upon the request of the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such person full title and right to all the funds, properties, and claims vested in the Board or the joint trustees, pursuant to this part. Any person to whom funds, property, or claims have been transferred or delivered by the Board or the joint trustees, pursuant to this section, shall be subject to the same obligations imposed upon the members of said Board and upon said joint trustees.

§ 970.94 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this part or any regulation issued pursuant thereto, or the issuance of any amendment to either thereof, shall not:

(a) Affect or waive any right, duty, obligation, or liability which shall have arisen or which may thereafter arise, in connection with any provisions of this part or any regulation issued thereunder;

(b) Release or extinguish any violation of this part or any regulation issued; or

(c) Affect or impair any rights or remedies of the Secretary, or of any other persons, with respect to such violation.

§ 970.95 Amendments.

Amendments to this part may be proposed from time to time by the Board, or by any interested person affected by its provisions, including the Secretary.

§ 970.96 Counterparts.

This part may be executed in multiple counterparts and, when one counterpart is signed by the Secretary, all such counterparts shall constitute, when taken together, one and the same instrument as if all signatures were contained in one original.

§ 970.97 Handler sign-up.

(a) After the effective date of this part, there shall be an initial sign-up period of a length to be determined by the Secretary for handlers to become signatories. Handlers who sign up during the initial sign-up period and their corresponding producers are eligible to serve as initial members of the Board pursuant to § 970.42.

(b) After the initial sign-up period ends, a handler may become a signatory at any time by executing a counterpart to this part and delivering it to the Secretary. This agreement shall take effect as to such new contracting party at the time such counterpart is delivered to the Secretary. The obligations, benefits, privileges, and immunities conferred by this agreement shall then be effective as to such new contracting party.

§ 970.98 Withdrawal.

Release from this agreement may be obtained under the following conditions:

(a) A signatory may file with the Board a written request for withdrawal at any time, but such withdrawal will become effective at the beginning of the next crop year.

(b) Immediate withdrawal may be effectuated when a signatory handler ceases to be a handler of leafy green vegetables and gives written notice thereof to the Board.

(c) A signatory handler's withdrawal does not relieve the signatory handler of any obligation incurred while a signatory to this agreement.

(d) A signatory handler that withdraws shall not use the official certification mark once no longer a signatory handler.

Dated: April 22, 2011.

Rayne Pegg,

Administrator, Agricultural Marketing Service.

[FR Doc. 2011–10199 Filed 4–26–11; 4:15 pm]

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S. 307/P.L. 112–11
To designate the Federal building and United States courthouse located at 217 West King Street, Martinsburg, West Virginia, as the "W. Craig Broadwater Federal Building and United States Courthouse". (Apr. 25, 2011; 125 Stat. 213)

S.J. Res. 8/P.L. 112–12
Providing for the appointment of Stephen M. Case as a citizen regent of the Board of Regents of the Smithsonian Institution. (Apr. 25, 2011; 125 Stat. 214)

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