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Contents

Federal Register

Vol. 76, No. 99

Monday, May 23, 2011

Agriculture Department
See Farm Service Agency
See Forest Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 29720

Alcohol, Tobacco, Firearms, and Explosives Bureau
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Firearms Transaction Record, Part 1, Over-the-Counter, 29791–29792

Census Bureau
NOTICES
Meetings:
Federal Economic Statistics Advisory Committee, 29724

Centers for Disease Control and Prevention
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 29754–29755
Meetings:
Advisory Committee on Immunization Practices, 29755
Advisory Committee to the Director, Ethics Subcommittee, 29755–29756
Disease, Disability, and Injury Prevention and Control Special Emphasis Panel, 29756
Healthcare Infection Control Practices Advisory Committee, 29756

Children and Families Administration
NOTICES
Meetings:
Advisory Committee on Head Start Research and Evaluation, 29756–29757

Coast Guard
RULES
Safety Zones:
Big Rock Blue Marlin Air Show; Bogue Sound, Morehead City, NC, 29647–29649
Newport River; Morehead City, NC, 29645–29647
Special Local Regulations for Marine Events:
Chester River, Chestertown, MD, 29640–29642
Special Local Regulations:
Miami Super Boat Grand Prix, Miami Beach, FL, 29642–29645

Commerce Department
See Census Bureau
See Foreign-Trade Zones Board
See International Trade Administration
See National Oceanic and Atmospheric Administration

Commodity Futures Trading Commission
PROPOSED RULES
Further Definition of Swap, Security-Based Swap, and Security-Based Swap Agreement; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 29818–29900
NOTICES
Meetings; Sunshine Act, 29727

Defense Department
NOTICES
Meetings:
Military Family Readiness Council, 29727

Drug Enforcement Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Controlled Substances Import/Export Declaration, 29793–29794
Reports of Suspicious Orders or Theft-Loss of Listed Chemicals-Machines, 29792–29793

Election Assistance Commission
NOTICES
Meetings; Sunshine Act, 29727–29728

Employment and Training Administration
NOTICES
Amended Certifications Regarding Eligibility To Apply for Worker Adjustment Assistance:
International Automotive Components, North America, et al., Lebanon, VA, 29797
WestPoint Home, Inc., 29797–29798
Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance, 29798–29800
Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance, 29800–29801
Investigations Regarding Certifications of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance, 29801–29802

Energy Department
See Energy Efficiency and Renewable Energy Office
See Federal Energy Regulatory Commission
NOTICES
Environmental Impact Statements; Availability, etc.:
FutureGen 2.0 Program, 29728–29732
Meetings:
Environmental Management Site-Specific Advisory Board, Oak Ridge Reservation, 29732–29733

Energy Efficiency and Renewable Energy Office
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 29733
Energy Conservation Program for Certain Industrial Equipment; Petitions for Waivers:
LG Electronics, Inc., 29733–29739

Environmental Protection Agency
RULES
Approval and Promulgation of Air Quality Implementation Plans:
Pennsylvania; Adoption of Control Techniques Guidelines for Paper, Film, and Foil Surface Coating Processes, 29649–29652

Determination of Attainment of the 1997 Annual Fine Particle Standard:
Saint Louis Nonattainment Area; Illinois and Missouri, 29652–29656
PROPOSED RULES
Approval and Disapproval and Promulgation of State Implementation Plan Revisions:
Wyoming; Infrastructure Requirements for the 1997 8-Hour Ozone National Ambient Air Quality Standards, 29680–29686
Approval and Promulgation of Air Quality Implementation Plans:
Indiana; Redesignation of the Evansville Area to Attainment of the Fine Particulate Matter Standard, 29695–29706
Virginia; Permits for Major Stationary Sources and Major Modifications Locating in Prevention of Significant Deterioration Areas, 29686–29688
Approval and Promulgation of State Implementation Plan Revisions:
Utah; Infrastructure Requirements for the 1997 8-Hour Ozone National Ambient Air Quality Standards, 29688–29695
NOTICES
Meetings:
Science Advisory Board Mercury Review Panel, 29746–29747
State Program Requirements:
Proposal to Approve Maine's Base National Pollutant Discharge Elimination System Permitting Program, 29747–29748

Farm Service Agency
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Volunteer Programs, 29720–29721

Federal Aviation Administration
PROPOSED RULES
Airworthiness Directives:
Airbus Model A330–200 and –300 Series Airplanes, and Model A340–200 and –300 Series Airplanes, 29673–29675

Federal Communications Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 29748–29750

Federal Election Commission
NOTICES
Filing Dates for the Nevada Special Election in the 2nd Congressional District, 29750–29751

Federal Emergency Management Agency
RULES
Final Flood Elevation Determinations, 29656–29665
NOTICES
Major Disaster Declarations:
Alabama; Amendment No. 11, 29776
Arkansas; Amendment No. 2, 29776
Kentucky; Amendment No. 2, 29775
Kentucky; Amendment No. 3, 29776
Mississippi; Amendment No. 2, 29777

Federal Energy Regulatory Commission
NOTICES
Applications:
Duke Energy Carolinas, LLC, 29740–29742
Questar Gas Co., 29739–29740
Combined Filings, 29742–29743
Filings:
Monongahela Power Co., West Penn Power Co., Potomac Edison Co. and PJM Interconnection LLC, 29744
Preliminary Permit Applications:
Reliable Storage 2, LLC, 29744–29745
Requests Under Blanket Authorizations:
Transcontinental Gas Pipe Line Co., LLC, 29745–29746

Federal Housing Finance Agency
RULES
Freedom of Information Act Implementation, 29633–29640

Federal Reserve System
PROPOSED RULES
Electronic Fund Transfers, 29902–29962
NOTICES
Change in Bank Control; Acquisitions of Shares of a Bank or Bank Holding Company, 29751

Fish and Wildlife Service
RULES
Migratory Bird Permits; Raptor Propagation, 29665–29670
NOTICES
Environmental Assessments; Availability, etc.:
Hakalau Forest National Wildlife Refuge, Hawai'i County, HI, 29782–29783

Food and Drug Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Antiparasitic Resistance and Combination New Animal Drugs Survey, 29762–29763
Data to Support Food and Nutrition Product Communications, 29760–29762
Experimental Study on Consumer Responses to Nutrition Facts Labels With Various Footnote Formats, etc., 29758–29760
Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery, 29763–29764
Health and Diet Survey, 29757–29758
Manufacturer's Notification of the Intent to Use an Accredited Person, etc., 29764–29765
Determination of System Attributes for the Tracking and Tracing of Prescription Drugs, 29765–29766
Meetings:
Arthritis Advisory Committee, 29767
Pulmonary-Allergy Drugs Advisory Committee, 29766–29767
Preventive Controls for Registered Human Food and Animal Food/Feed Facilities, 29767–29769

Foreign-Trade Zones Board
NOTICES
Reorganizations and Expansions Under Alternative Site Framework:
Foreign-Trade Zone 50, Long Beach, CA, 29724–29725
Reorganizations under Alternative Site Framework:
Foreign-Trade Zone 244, Riverside County, CA, 29725

Forest Service
NOTICES
Environmental Impact Statements; Availability, etc.:
Lost River and Challis-Yankee Fork Ranger Districts, Salmon-Challis National Forest, ID; Withdrawal, 29721
Meetings:
Elko Resource Advisory Committee, 29722–29723
Lyon-Mineral Resource Advisory Committee, 29723–29724
Madera County Resource Advisory Committee, 29722
Northern New Mexico Resource Advisory Committee, 29722
Shasta County Resource Advisory Committee, 29721–29722
Southwest Montana Resource Advisory Committee, 29723
Tri-County Advisory Committee, 29723

General Services Administration
NOTICES
Meetings:
President's Management Advisory Board, 29752

Geological Survey
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
State of Ecosystem Services Implementation Survey, 29783–29784

Health and Human Services Department
See Centers for Disease Control and Prevention
See Children and Families Administration
See Food and Drug Administration
See Health Resources and Services Administration
See National Institutes of Health
RULES
Rate Increase Disclosure and Review, 29964–29988
NOTICES
In Vitro Test Methods:
Detection and Quantification of Botulinum Neurotoxins and Non-endotoxin Pyrogens, 29752–29754

Health Resources and Services Administration
NOTICES
Healthy Tomorrows Partnership for Children Program, 29769
Meetings:
National Advisory Council on the National Health Service Corps, 29769

Homeland Security Department
See Coast Guard
See Federal Emergency Management Agency
See U.S. Citizenship and Immigration Services
NOTICES
Meetings:
Critical Infrastructure Partnership Advisory Council, 29775

Housing and Urban Development Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Capacity Building for Sustainable Communities, 29781–29782

Interior Department
See Fish and Wildlife Service
See Geological Survey
See Land Management Bureau
See National Park Service
See Reclamation Bureau

International Trade Administration
NOTICES
Applications for Duty-Free Entry of Scientific Instruments, 29725

International Trade Commission
NOTICES
Complaints, 29790–29791
Investigations:
Bottom Mount Combination Refrigerator-Freezers From Korea and Mexico, 29791

Justice Department
See Alcohol, Tobacco, Firearms, and Explosives Bureau
See Drug Enforcement Administration
See Justice Programs Office
PROPOSED RULES
Assumption of Concurrent Federal Criminal Jurisdiction in Certain Areas of Indian Country, 29675–29680

Justice Programs Office
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Teen Dating Relationships; Opportunities for Youth to Define What's Healthy and Unhealthy, 29794–29795

Labor Department
See Employment and Training Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Examinations and Testing of Electrical Equipment Including Examinations, Testing, and Maintenance of High Voltage Longwalls, 29795–29796
Refuse Piles and Impounding Structures, Recordkeeping and Reporting Requirements, 29796–29797

Land Management Bureau
NOTICES
Conveyance of Public Lands for Airport Purposes in Clark County, NV; Correction, 29784
Realty Action:
Direct Sale of Public Lands in Jerome County, ID, 29784–29785
Recreation and Public Purposes Act Classification; Lease of Public Land in Canyon County, ID, 29785–29786

National Archives and Records Administration
NOTICES
Records Schedules; Availability, 29802–29804

National Institutes of Health
NOTICES
Meetings:
Center for Scientific Review, 29770–29771
National Cancer Institute, 29769–29770
National Center for Complementary and Alternative Medicine, 29773
National Heart, Lung, and Blood Institute, 29772–29773
National Human Genome Research Institute, 29772
National Institute of Diabetes and Digestive and Kidney Diseases, 29771–29772

National Institute of Environmental Health Sciences, 29772
National Institute of General Medical Sciences, 29773
Pillbox Patient-Safety Initiative, 29773–29775

National Oceanic and Atmospheric Administration
RULES
Fisheries of the Exclusive Economic Zone Off Alaska:
Reallocation of Pacific Cod in the Bering Sea and Aleutian Islands Management Area, 29671–29672
Fisheries of the Northeastern United States:
Summer Flounder Fishery; Quota Transfer, 29670–29671
PROPOSED RULES
Fishing Capacity Reduction Program for the Southeast Alaska Purse Seine Salmon Fishery, 29707–29717
Magnuson-Stevens Fishery Conservation and Management Act Provisions:
Fisheries of the Northeastern United States; Annual Catch Limits and Accountability Measures, 29717–29718
Western Pacific Pelagic Fisheries:
American Samoa Longline Gear Modifications to Reduce Turtle Interactions, 29718–29719
NOTICES
Meetings:
Gulf of Mexico Fishery Management Council, 29725–29726
New England Fishery Management Council, 29726–29727

National Park Service
NOTICES
Environmental Impact Statements; Availability, etc.:
Big Cypress National Preserve Addition, FL, 29786

Nuclear Regulatory Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 29804

Personnel Management Office
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Request for Information for Multi-State Plans, 29804–29805
Verification of Full-Time School Attendance, 29805
Revision of Standard Form 62, 29805–29806

Reclamation Bureau
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 29786–29790

Securities and Exchange Commission
PROPOSED RULES
Further Definition of Swap, Security-Based Swap, and Security-Based Swap Agreement; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 29818–29900
NOTICES
Self-Regulatory Organizations; Proposed Rule Changes:
Financial Industry Regulatory Authority, Inc., 29808–29809
New York Stock Exchange LLC, 29806–29808
NYSE Amex LLC, 29809–29810

Small Business Administration
NOTICES
Disaster Declarations:
Alabama, 29810
Minnesota, 29811
Mississippi, 29810
North Dakota, 29810–29811

Social Security Administration
NOTICES
Findings Regarding Foreign Social Insurance or Pension Systems:
St. Vincent and the Grenadines, 29811–29812

State Department
NOTICES
Designations as a Global Terrorist:
Army of Islam aka Jaish al-Islam aka Jaysh al-Islam, 29812
Designations as Foreign Terrorist Organizations:
Army of Islam aka Jaish al-Islam aka Jaysh al-Islam, 29812
Presidential Permits:
Border Crossing San Ysidro at the International Boundary Between the U.S. and Mexico, 29812–29814
Statutory Debarment and Reinstatement of BAE Systems plc, 29814–29815

Transportation Department
See Federal Aviation Administration

Treasury Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 29815

U.S. Citizenship and Immigration Services
NOTICES
Re-registration Procedures for Temporary Protected Status Beneficiaries Under the Extended TPS Designation of Haiti, 29777–29781

Separate Parts In This Issue

Part II
Commodity Futures Trading Commission, 29818–29900
Securities and Exchange Commission, 29818–29900

Part III
Federal Reserve System, 29902–29962

Part IV
Health and Human Services Department, 29964–29988

Reader Aids

Consult the Reader Aids section at the end of this page for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents LISTSERV electronic mailing list, go to http://listserv.access.gpo.gov and select Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings); then follow the instructions.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

12 CFR
1202 29633
Proposed Rules:
205 29902

14 CFR
Proposed Rules:
39 29673

17 CFR
Proposed Rules:
1 29818
240 29818

28 CFR
Proposed Rules:
50 29675

33 CFR
100 (2 documents) 29640, 29642
165 (2 documents) 29645, 29647

40 CFR
52 (2 documents) 29649, 29652
Proposed Rules:
52 (4 documents) 29680, 29686, 29688, 29695
81 29695

44 CFR
67 29656

45 CFR
154 29964

50 CFR
21 29665
648 29670
679 29671
Proposed Rules:
600 29707
648 29717
665 29718

Rules and Regulations

Federal Register
Vol. 76, No. 99
Monday, May 23, 2011

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1202

RIN 2590–AA44

Freedom of Information Act Implementation

AGENCY: Federal Housing Finance Agency.

ACTION: Interim Final Regulation with request for comments.

SUMMARY: The Federal Housing Finance Agency (FHFA) is issuing this interim final regulation with a request for comments on changes to its existing Freedom of Information Act (FOIA) regulation. The changes to the existing FOIA regulation provide the procedures and guidelines under which FHFA and FHFA Office of Inspector General (FHFA–OIG) will implement FOIA. The interim final regulation describes the policies and procedures for public disclosure of information required to be disclosed under FOIA, and procedures to protect from disclosure business confidential and trade secret information, as appropriate.

DATES: The interim final regulation is effective May 23, 2011. FHFA will accept written comments on the interim final regulation on or before July 22, 2011. For additional information, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: You may submit your comments on the interim final regulation, identified by "RIN 2590–AA44," by any of the following methods:

- *E-mail:* Comments to Alfred M. Pollard, General Counsel, may be sent by e-mail to *RegComments@fhfa.gov.* Please include "RIN 2590–AA44" 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 sent it by e-mail to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by FHFA. Include the following information in the subject line of your submission: "Comments/RIN 2590–AA44."
- *U.S. Mail Service, United Parcel Service, Federal Express, or other commercial delivery service to:* Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA44, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. Please note that all mail sent to FHFA via the U.S. Mail service is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks. For any time-sensitive correspondence, please plan accordingly.
- *Hand Delivery/Courier to:* Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA44, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The package must be logged at the Guard Desk, First Floor, on business days between 9 a.m. and 3 p.m.

FOR FURTHER INFORMATION CONTACT: David A. Lee, Chief FOIA Officer, telephone (202) 414–3804 (not a toll free number), Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The telephone number for the Telecommunications Device for the Deaf is (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Comments

FHFA is issuing a revision to 12 CFR part 1202 to include language concerning FOIA requests as they relate to FHFA–OIG, as well as to clarify and update the existing regulation. FHFA invites comments on all aspects of the interim final regulation and will take all relevant comments into consideration before issuing the final regulation. All submissions received must include the agency name or Regulatory Information Number (RIN) for this rulemaking. Copies of all comments received will be posted without change on the FHFA Internet Web site, *http://www.fhfa.gov,* and will include any personal information provided. In addition, copies of all comments received will be available for examination by the public on business days between the hours of 10 a.m. and 3 p.m. at the Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. To make an appointment to inspect comments, please call the Office of General Counsel at (202) 414–3751.

II. Effective Date and Request for Comments

FHFA has concluded that good cause exists, under 5 U.S.C. 553(b)(B) and (d)(3), to waive the notice-and-comment and delayed effective date requirements of the Administrative Procedure Act and to proceed with this interim final regulation. The changes to part 1202 primarily cover how FHFA–OIG will implement FOIA and make clarifying and general updates to the existing regulation, but do not fundamentally change the regulation's nature or scope. Further, in light of the significant need for immediate guidance regarding FHFA–OIG's role in the FOIA process, FHFA has determined that notice-and-comment rulemaking is impracticable and contrary to public policy. Nevertheless, FHFA is providing the public with a 60-day period following publication of the interim final regulation to submit comments. Any comments received will be considered prior to issuing a final regulation.

III. Background

A. Establishment of the Federal Housing Finance Agency

The Housing and Economic Recovery Act of 2008 (HERA), Public Law 110–289, 122 Stat. 2654, amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act) (12 U.S.C. 4501 *et seq.*) and the Federal Home Loan Bank Act (12 U.S.C. 1421–1449) to establish FHFA as an independent agency of the Federal Government to ensure that the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Federal Home Loan Banks (collectively, the regulated entities) are capitalized adequately; foster liquid, efficient, competitive and resilient national housing finance markets; operate in a safe and sound manner; comply with the Safety and Soundness Act and all rules, regulations, guidelines and orders issued under the Safety and Soundness Act, and the regulated entities' respective authorizing statutes; carry out their missions through activities consistent with the aforementioned

authorities; and the activities and operations of the regulated entities are consistent with the public interest.

In 2009 FHFA issued a final regulation on FOIA at 12 CFR part 1202 (74 FR 2342 (January 15, 2009)). This final regulation provided the procedures and guidelines under which FHFA would implement FOIA. FHFA–OIG did not exist when it was issued, but came into existence the following year (2010). This interim final regulation updates FHFA's 2009 FOIA regulation to provide how FHFA–OIG will implement FOIA as well as to clarify and update the existing regulation.

B. Establishment of the Office of Inspector General for the Federal Housing Finance Agency

Section 1105 of HERA amended the Safety and Soundness Act and the Inspector General Act of 1978, as amended, by specifying that there shall be established an Inspector General within FHFA. *See* 12 U.S.C. 4517(d). Among other duties, FHFA–OIG is responsible for conducting audits, evaluations, and investigations of FHFA's programs and operations; recommending policies that promote economy and efficiency in the administration of FHFA's programs and operations; and preventing and detecting fraud, waste, and abuse in FHFA's programs and operations.

IV. Section-by-Section Analysis

Section 1202.1 Why did FHFA issue this regulation?

This section describes the purposes of the regulation, which are to implement FOIA and explain general policies and procedures for disclosing information under FOIA. In addition, there are minor editorial changes to the existing regulation for clarity and consistency purposes, as well as notification to the public that this regulation applies to FHFA–OIG.

Section 1202.2 What do the terms in this regulation mean?

This section sets forth definitions of many terms relevant to the regulation and includes new definitions as well as definitions related to FHFA–OIG.

Section 1202.3 What information can I obtain through FOIA?

This section is updated to explain the type of information that may be obtained under FOIA.

Section 1202.4 What information is exempt from disclosure?

This section describes records that FHFA and FHFA–OIG do not have to disclose, even if requested.

Section 1202.5 How do I request information from FHFA or FHFA–OIG under FOIA?

This section explains what a person must do to submit a valid request to FHFA or FHFA–OIG to disclose records. It describes the information to provide, to enable FHFA or FHFA–OIG to identify the records sought and determine whether they can be disclosed.

Section 1202.6 What if my request does not have all the information FHFA or FHFA–OIG requires?

This section explains that FHFA or FHFA–OIG will give requesters an opportunity to modify or amend a request that is incomplete or insufficient. It also explains how FHFA or FHFA–OIG will treat such requests until adequate information is received.

Section 1202.7 How will FHFA or FHFA–OIG respond to my FOIA request?

This section describes a multi-track method of processing requests and the times within which FHFA or FHFA–OIG will respond to requests. It also explains that FHFA or FHFA–OIG will grant or deny requests in writing, provide reasons if a request is denied in whole or in part, refer the request to another agency if it is appropriate to do so, and explain the right of appeal.

Section 1202.8 If the requested records contain confidential commercial information, what procedures will FHFA or FHFA–OIG follow?

This section explains how FHFA and FHFA–OIG comply with Executive Order No. 12600 and describes special procedures required before FHFA or FHFA–OIG disclose confidential commercial information in response to a FOIA request.

Section 1202.9 How do I appeal a response denying my FOIA request?

This section describes the process by which a requester whose request is denied in whole or in part may appeal. It explains when and how to appeal and how and within what time limits FHFA or FHFA–OIG will respond to appeals.

Section 1202.10 Will FHFA or FHFA–OIG expedite my request or appeal?

This section explains how a person can ask FHFA or FHFA–OIG to expedite a request or appeal. It describes the reasons that justify expediting a request or an appeal and the time within which FHFA or FHFA–OIG will notify the person that the request or appeal will or will not be expedited.

Section 1202.11 What will it cost to get the records I requested?

This section explains when FHFA or FHFA–OIG will charge for searching for and providing copies of records and how to identify the costs FHFA or FHFA–OIG will charge. In addition, language is being added regarding fee waivers.

Section 1202.12 Is there anything else I need to know about FOIA procedures?

This section explains that this regulation does not create any independent rights, but provides procedures for exercising rights granted by FOIA.

Regulatory Impacts

Paperwork Reduction Act

The regulations in this part do not contain any information collection requirement that requires the approval of OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation does not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)). FHFA has considered the impact of the regulation under the Regulatory Flexibility Act. FHFA certifies that the regulation is not likely to have a significant economic impact on a substantial number of small business entities because the regulation is applicable only to the internal operations and legal obligations of FHFA and FHFA–OIG.

List of Subjects in 12 CFR Part 1202

Appeals, Confidential commercial information, Disclosure, Exemptions, Fees, Final action, Freedom of Information Act, Judicial review, Records, Requests.

Authority and Issuance

Accordingly, for the reasons stated in the preamble, FHFA is revising part 1202 of Chapter XII of title 12 of the Code of Federal Regulations as follows:

PART 1202—FREEDOM OF INFORMATION ACT

Sec.
1202.1 Why did FHFA issue this regulation?
1202.2 What do the terms in this regulation mean?
1202.3 What information can I obtain through FOIA?
1202.4 What information is exempt from disclosure?
1202.5 How do I request information from FHFA or FHFA–OIG under FOIA?
1202.6 What if my request does not have all the information FHFA or FHFA–OIG requires?
1202.7 How will FHFA or FHFA–OIG respond to my FOIA request?
1202.8 If the requested records contain confidential commercial information, what procedures will FHFA or FHFA–OIG follow?
1202.9 How do I appeal a response denying my FOIA request?
1202.10 Will FHFA or FHFA–OIG expedite my request or appeal?
1202.11 What will it cost to get the records I requested?
1202.12 Is there anything else I need to know about FOIA procedures?

Authority: Pub. L. 110–289, 122 Stat. 2654; 5 U.S.C. 301, 552; 12 U.S.C. 4526; E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235; E.O. 13392, 70 FR 75373–75377, 3 CFR, 2006 Comp., p. 216–200.

§ 1202.1 Why did FHFA issue this regulation?

(a) The Freedom of Information Act (FOIA) (5 U.S.C. 552), is a federal law that requires FHFA and other Federal Government agencies to disclose certain Federal Government records to the public.

(b) This regulation explains the rules that FHFA and the FHFA Office of Inspector General (FHFA–OIG) both follow when processing and responding to requests for records under FOIA. It also explains what you must do to request records from FHFA or FHFA–OIG under FOIA. You should read this regulation together with FOIA, which explains in more detail your rights and the records FHFA or FHFA–OIG may release to you.

(c) If you want to request information about yourself under the Privacy Act (5 U.S.C. 552a), you should file your request using FHFA's Privacy Act regulations at part 1204 of this title. If you file a FOIA request for information about yourself, FHFA or FHFA–OIG will process it as a request under the Privacy Act regulation.

(d) FHFA and FHFA–OIG may make public information that they routinely publish or disclose when performing their activities without following these procedures.

(e) This regulation applies to both FHFA and FHFA–OIG.

§ 1202.2 What do the terms in this regulation mean?

Some of the terms you need to understand while reading this regulation are—

Appeals Officer or FOIA Appeals Officer means a person designated by the FHFA Director to process appeals of denials of requests for FHFA records under FOIA. For appeals pertaining to FHFA–OIG records, *Appeals Officer or FOIA Appeals Officer* means a person designated by the FHFA Inspector General to process appeals of denials of requests for FHFA–OIG records under FOIA.

Confidential commercial information means records provided to the Federal Government by a submitter that contain material exempt from release under Exemption 4 of FOIA, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

Days, unless stated as "calendar days," are working days and do not include Saturdays, Sundays, and federal holidays. If the last day of any period prescribed herein falls on a Saturday, Sunday, or federal holiday, the last day of the period will be the next working day that is not a Saturday, Sunday, or federal holiday.

Direct costs means the expenses, including contract services, incurred by FHFA or FHFA–OIG, in searching for, reviewing and/or duplicating records to respond to a request for information. In the case of a commercial use request, the term also means those expenditures FHFA or FHFA–OIG actually incurs in reviewing records to respond to the request. Direct costs include the cost of the time of the employee performing the work, the cost of any computer searches, and the cost of operating duplication equipment. Direct costs do not include overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

Employee, for the purposes of this regulation, means any person holding an appointment to a position of employment with FHFA or FHFA–OIG, or any person who formerly held such an appointment; any conservator appointed by FHFA; or any agent or independent contractor acting on behalf of FHFA or FHFA–OIG, even though the appointment or contract has terminated.

FHFA means the Federal Housing Finance Agency and includes its predecessor agencies, the Office of Federal Housing Enterprise Oversight (OFHEO) and the Federal Housing Finance Board (FHFB).

FHFA–OIG means the Office of Inspector General for FHFA.

FOIA Officer and Chief FOIA Officer are persons designated by the FHFA Director to process and respond to requests for FHFA records under FOIA.

FOIA Official is a person designated by the FHFA Inspector General to process requests for FHFA–OIG records under FOIA.

Office of Finance means the Office of Finance of the Federal Home Loan Bank System or any successor thereto.

Readily reproducible means that the requested record or records exist in electronic format and can be downloaded or transferred intact to a computer disk, tape, or another electronic medium with equipment and software currently in use by FHFA or FHFA–OIG.

Record means information or documentary material FHFA or FHFA–OIG maintains in any form or format, including electronic, which FHFA or FHFA–OIG—

(1) Created or received under federal law or in connection with the transaction of public business;

(2) Preserved or determined is appropriate for preservation as evidence of operations or activities of FHFA or FHFA–OIG, or because of the value of the information it contains; and

(3) Controls at the time it receives a request for disclosure.

Regulated entities means the Federal Home Loan Mortgage Corporation and any affiliate thereof, the Federal National Mortgage Association and any affiliate thereof, and the Federal Home Loan Banks.

Requester means any person seeking access to FHFA or FHFA–OIG records under FOIA.

Search time means the amount of time spent by or on behalf of FHFA or FHFA–OIG in attempting to locate records responsive to a request, whether manually or by electronic means, including but not limited to page-by-page or line-by-line identification of responsive material within a record or extraction of electronic information from electronic storage media.

Submitter means any person or entity providing confidential information to the Federal Government. The term "submitter" includes, but is not limited to corporations, state governments, and foreign governments.

Unusual circumstances means the need to—

(1) Search for and/or collect records from agencies, offices, facilities, or locations that are separate from the office processing the request;

(2) Search, review, and/or duplicate a voluminous amount of separate and

distinct records in order to process a single request; or

(3) Consult with another agency or among two or more components of FHFA or FHFA–OIG that have a substantial interest in the determination of a request.

§ 1202.3 What information can I obtain through FOIA?

(a) *General.* FHFA and FHFA–OIG prohibit employees from releasing or disclosing confidential or otherwise non-public information that FHFA or FHFA–OIG possesses, except as authorized by this regulation, by the Director of FHFA for FHFA records, or by the FHFA Inspector General for FHFA–OIG records, when the disclosure is necessary for the performance of official duties.

(b) *Records.* You may request that FHFA or FHFA–OIG disclose to you its records on a subject of interest to you. FOIA only requires the disclosure of records. It does not require FHFA or FHFA–OIG to create compilations of information or to provide narrative responses to questions or queries. Some information is exempt from disclosure.

(c) *Reading rooms.*—(1) FHFA maintains electronic and physical reading rooms. FHFA's physical reading room is located at 1700 G Street, NW., Fourth Floor, Washington, DC 20552, and is open to the public by appointment from 9 a.m. to 3 p.m. each business day. For an appointment, contact the FOIA Officer by calling (202) 414–6425 or by e-mail at *foia@fhfa.gov.* The electronic reading room is part of the FHFA Web site at *http://www.fhfa.gov.* FHFA–OIG also maintains electronic and physical reading rooms. FHFA–OIG's physical reading room is located at 1625 Eye Street, NW., Washington, DC 20006, and is open to the public by appointment from 9 a.m. to 3 p.m. each business day. For an appointment, contact FHFA–OIG by calling (202) 408–2577 or by e-mail at *bryan.saddler@fhfa.gov.* The electronic reading room is part of the FHFA–OIG Web site at *http://www.fhfaoig.gov.*

(2) Each reading room has the following records created after November 1, 1996, by FHFA or its predecessor agencies, or by FHFA–OIG, and current indices to the following records created by FHFA or its predecessor agencies or FHFA–OIG before or after November 1, 1996:

(i) Final opinions or orders issued in adjudication;

(ii) Statements of policy and interpretation that are not published in the **Federal Register**;

(iii) Administrative staff manuals and instructions to staff that affect a member of the public and are not exempt from disclosure under FOIA; and

(iv) Copies of records released under FOIA that FHFA or FHFA–OIG determines have become or are likely to become the subject of subsequent requests for substantially similar records.

§ 1202.4 What information is exempt from disclosure?

(a) *General.* Unless the Director of FHFA or his or her designee for FHFA records, the FHFA Inspector General or his or her designee for FHFA–OIG records, or any regulation or statute specifically authorizes disclosure, neither FHFA nor FHFA–OIG will release records that are—

(1) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and in fact is properly classified pursuant to such Executive Order;

(2) Related solely to FHFA's or FHFA–OIG's internal personnel rules and practices;

(3) Specifically exempted from disclosure by statute (other than 5 U.S.C. 552a), provided that such statute—

(i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Contained in inter-agency or intra-agency memoranda or letters that would not be available by law to a private party in litigation with FHFA or FHFA–OIG;

(6) Contained in personnel, medical or similar files (including financial files) the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information—

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution or an entity that is regulated and examined by FHFA that furnished information on a confidential basis, and, in the case of a record compiled by FHFA–OIG or a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual.

(8) Contained in or related to examination, operating, or condition reports that are prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(b) *Discretion to apply exemptions.* Although records or parts of them may be exempt from disclosure, FHFA or FHFA–OIG may elect under the circumstances of any particular request not to apply an exemption. This election does not generally waive the exemption and it does not have precedential effect. FHFA or FHFA–OIG may still apply an exemption to any other records or portions of records, regardless of when the request is received.

(c) *Redacted portion.* If a requested record contains exempt information and information that can be disclosed and the portions can reasonably be segregated from each other, the disclosable portion of the record will be released to the requester after FHFA or FHFA–OIG deletes the exempt portions. If it is technically feasible, FHFA or FHFA–OIG will indicate the amount of the information deleted at the place in the record where the deletion is made and include a notation identifying the exemption that was applied, unless including that indication would harm an interest protected by an exemption.

(d) *Exempt and redacted material.* FHFA and FHFA–OIG are not required to provide an itemized index correlating each withheld document (or redacted portion) with a specific exemption justification.

(e) *Disclosure to Congress.* This section does not allow FHFA or FHFA–OIG to withhold any information from, or to prohibit the disclosure of any information to, Congress or any

Congressional committee or subcommittee.

§ 1202.5 How do I request information from FHFA or FHFA–OIG under FOIA?

(a) *Where to send your request.* FOIA requests must be in writing. You may make a request for FHFA or FHFA–OIG records by writing directly to FHFA's FOIA Office through electronic mail, mail, delivery service, or facsimile. The electronic mail address is: *foia@fhfa.gov.* For mail or delivery service, the mailing address is: FOIA Officer, Federal Housing Finance Agency, 1700 G Street, NW., Washington, DC 20552. The facsimile number is: (202) 414–8917. Requests for FHFA–OIG records will be forwarded to FHFA–OIG for processing and direct response. You can help FHFA and FHFA–OIG process your request by marking electronic mail, letters, or facsimiles and the subject line, envelope, or facsimile cover sheet with "FOIA Request." FHFA's "Freedom of Information Act Reference Guide," which is available on FHFA's Web site, *http://www.fhfa.gov,* provides additional information to assist you in making your request.

(b) *Provide your name and address.* Your request must include your full name, your address and, if different, the address at which FHFA or FHFA–OIG is to notify you about your request, a telephone number at which you can be reached during normal business hours, and an electronic mail address, if any.

(c) *Request is under FOIA.* Your request must have a statement identifying it as being made under FOIA.

(d) *Your FOIA status.* If you are submitting your request as a "commercial use" requester, an "educational institution" requester, a "non-commercial scientific institution" requester, or a "representative of the news media" for the purposes of the fee provisions of FOIA, your request must include a statement specifically identifying your status.

(e) *Describing the records you request.* You must describe the records that you seek in enough detail to enable FHFA or FHFA–OIG personnel to locate them with a reasonable amount of effort. Your request should include as much specific information as possible that you know about each record you request, such as the date, title, name, author, recipient, subject matter, or file designations, or the description of the record.

(f) *How you want the records produced to you.* Your request must tell FHFA or FHFA–OIG whether you will inspect the records before duplication or want them duplicated and furnished without inspection.

(g) *Agreement to pay fees.* In your FOIA request you must agree to pay all applicable fees charged under § 1202.11, up to $100.00, unless you seek a fee waiver. When making a request, you may specify a higher or lower amount you will pay without consultation. Your inability to pay a fee does not justify granting a fee waiver.

(h) *Valid requests.* FHFA and FHFA–OIG will only process valid requests. A valid request must meet all the requirements of this part.

§ 1202.6 What if my request does not have all the information FHFA or FHFA–OIG requires?

If FHFA or FHFA–OIG determines that your request does not reasonably describe the records you seek, is overly broad, cannot yet be processed for reasons related to fees, or lacks required information, you will be informed in writing why your request cannot be processed. You will be given 15 calendar days to modify your request to meet all requirements. This request for additional information tolls the time period for FHFA or FHFA–OIG to respond to your request under § 1202.7.

(a) If you respond with the necessary information, FHFA or FHFA–OIG will process that response as a new request and the time period for FHFA or FHFA–OIG to respond to your request will start from the date the additional information is actually received by FHFA or FHFA–OIG.

(b) If you do not respond or provide additional information within the time allowed, or if the additional information you provide is still incomplete or insufficient, FHFA and FHFA–OIG will consider your request withdrawn and will notify you that it will not be processed.

§ 1202.7 How will FHFA and FHFA–OIG respond to my FOIA request?

(a) *Authority to grant or deny requests.* The FOIA Officer and the Chief FOIA Officer are authorized to grant or deny any request for FHFA records. For FHFA–OIG records, the designated FHFA–OIG FOIA Official is authorized to grant or deny any request for FHFA–OIG records.

(b) *Multi-Track request processing.* FHFA and FHFA–OIG use a multi-track system to process FOIA requests. This means that a FOIA request is processed based on its complexity. When FHFA or FHFA–OIG receives your request, it is assigned to a Standard Track or Complex Track. FHFA or FHFA–OIG will notify you if your request is assigned to the Complex Track as described in paragraph (f) of this section.

(1) *Standard Track.* FHFA and FHFA–OIG assign FOIA requests that are routine and require little or no search time, review, or analysis to the Standard Track. FHFA and FHFA–OIG respond to these requests within 20 days after receipt, in the order in which they are received. If FHFA or FHFA–OIG determines while processing your Standard Track request, that it is more appropriately a Complex Track request, it will be reassigned to the Complex Track and you will be notified as described in paragraph (f) of this section.

(2) *Complex Track.*—(i) FHFA and FHFA–OIG assign requests that are non-routine to the Complex Track. Complex Track requests are those to which FHFA or FHFA–OIG determines that the request and/or response may—

(A) Be voluminous;

(B) Involve two or more FHFA or FHFA–OIG units;

(C) Require consultation with other agencies or entities;

(D) Require searches of archived documents;

(E) Seek confidential commercial information as described in § 1202.8;

(F) Require an unusually high level of effort to search for, review and/or duplicate records;

(G) Cause undue disruption to the day-to-day activities of FHFA in regulating and supervising the regulated entities; or

(H) Cause undue disruption to the day-to-day activities of FHFA–OIG in carrying out its statutory responsibilities.

(ii) FHFA or FHFA–OIG will respond to Complex Track requests as soon as reasonably possible, regardless of the date of receipt.

(c) *Referrals to other agencies.* When FHFA or FHFA–OIG receives a request seeking records that originated in another Federal Government agency, FHFA or FHFA–OIG will refer the request to the other agency for response. You will be notified if your request is referred to another agency.

(d) *Responses to FOIA requests.* FHFA or FHFA–OIG will respond to your request by granting or denying it in full, or by granting and denying it in part. The response will be in writing. In determining which records are responsive to your request, FHFA and FHFA–OIG will conduct searches for records FHFA or FHFA–OIG possesses as of the date of your request.

(1) *Requests that FHFA or FHFA–OIG grants.* If FHFA or FHFA–OIG grants your request, the response will include the requested records or details about

how FHFA or FHFA–OIG will provide them to you and the amount of any fees charged.

(2) *Requests that FHFA or FHFA–OIG denies, or grants and denies in part.* If FHFA or FHFA–OIG denies your request in whole or in part because a requested record does not exist or cannot be located, is not readily reproducible in the form or format you sought, is not subject to FOIA, or is exempt from disclosure, the written response will include the requested releasable records, if any, the amount of any fees charged, the reasons for denial, and a notice and description of your right to file an administrative appeal under § 1202.9.

(e) *Format and delivery of disclosed records.* If FHFA or FHFA–OIG grants, in whole or in part, your request for disclosure of records under FOIA, the records may be made available to you in the form or format you requested, if they are readily reproducible in that form or format. The records will be sent to the address you provided by regular U.S. Mail or by electronic mail unless alternate arrangements are made by mutual agreement, such as your agreement to pay express or expedited delivery service fees or to pick up records at FHFA or FHFA–OIG offices.

(f) *Extensions of time.*—(1) In unusual circumstances, FHFA or FHFA–OIG may extend the Standard Track time limit in paragraph (b)(1) of this section for no more than 10 days and notify you of—

(i) The reason for the extension; and

(ii) The date on which the determination is expected.

(2) For requests in the Complex Track, FHFA or FHFA–OIG will provide you with an opportunity to modify or reformulate your request so that it may be processed on the Standard Track. If the request cannot be modified or reformulated to permit processing on the Standard Track, FHFA or FHFA–OIG will notify you regarding an alternative time period for processing the request.

§ 1202.8 If the requested records contain confidential commercial information, what procedures will FHFA or FHFA–OIG follow?

(a) *General.* FHFA or FHFA–OIG will not disclose confidential commercial information in response to your FOIA request except as described in this section.

(b) *Designation of confidential commercial information.* Submitters of commercial information must use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, those portions of the information they deem to be protected under 5 U.S.C. 552(b)(4) and § 1202.4(a)(4). Any such designation will expire 10 years after the records are submitted to the Federal Government, unless the submitter requests, and provides reasonable justification for, a designation period of longer duration.

(c) *Pre-disclosure notification.* Except as provided in paragraph (e) of this section, if your FOIA request encompasses confidential commercial information, FHFA or FHFA–OIG will, prior to disclosure of the information and to the extent permitted by law, provide prompt written notice to a submitter that confidential commercial information was requested when—

(1) The submitter has in good faith designated the information as confidential commercial information protected from disclosure under 5 U.S.C. 552(b)(4) and § 1202.4(a)(4); or

(2) FHFA or FHFA–OIG has reason to believe that the request seeks confidential commercial information, the disclosure of which may result in substantial competitive harm to the submitter.

(d) *Content of pre-disclosure notification.* When FHFA or FHFA–OIG sends a pre-disclosure notification to a submitter, it will contain—

(1) A description of the confidential commercial information requested or copies of the records or portions thereof containing the confidential business information; and

(2) An opportunity to object to disclosure within 10 days or such other time period that FHFA or FHFA–OIG may allow, by providing to FHFA or FHFA–OIG a detailed written statement demonstrating all reasons the submitter opposes disclosure.

(e) *Exceptions to pre-disclosure notification.* FHFA or FHFA–OIG is not required to send a pre-disclosure notification if—

(1) FHFA or FHFA–OIG determines that information should not be disclosed;

(2) The information has been published lawfully or has been made officially available to the public;

(3) Disclosure of the information is required by law, other than FOIA;

(4) The information requested is not designated by the submitter as confidential commercial information pursuant to this section; or

(5) The submitter's designation, under paragraph (b) of this section, appears on its face to be frivolous; except that FHFA or FHFA–OIG will provide the submitter with written notice of any final decision to disclose the designated confidential commercial information within a reasonable number of days prior to a specified disclosure date.

(f) *Submitter's objection to disclosure.* A submitter may object to disclosure within 10 days after date of the Pre-disclosure Notification, or such other time period that FHFA or FHFA–OIG may allow, by delivering to FHFA or FHFA–OIG a statement demonstrating all grounds on which it opposes disclosure, and all reasons supporting its contention that the information should not be disclosed. The submitter's objection must contain a certification by the submitter, or an officer or authorized representative of the submitter, that the grounds and reasons presented are true and correct to the best of the submitter's knowledge. The submitter's objection may itself be subject to disclosure under FOIA.

(g) *Notice of intent to disclose information.* FHFA or FHFA–OIG will carefully consider all grounds and reasons provided by a submitter objecting to disclosure. If FHFA or FHFA–OIG decides to disclose the information over the submitter's objection, the submitter will be provided with a written notice of intent to disclose at least 10 days before the date of disclosure. The written notice will contain—

(1) A statement of the reasons why the information will be disclosed;

(2) A description of the information to be disclosed; and

(3) A specific disclosure date.

(h) *Notice to requester.* FHFA or FHFA–OIG will give a requester whose request encompasses confidential commercial information—

(1) A written notice that the request encompasses confidential commercial information that may be exempt from disclosure under 5 U.S.C. 552(b)(4) and § 1202.4(a)(4) and that the submitter of the information has been given a pre-disclosure notification with the opportunity to comment on the proposed disclosure of the information; and

(2) A written notice that a notice of intent to disclose has been provided to the submitter, and that the submitter has 10 days, or such other time period that FHFA or FHFA–OIG may allow, to respond.

(i) *Notice of FOIA lawsuit.* FHFA or FHFA–OIG will promptly notify the submitter whenever a requester files suit seeking to compel disclosure of the submitter's confidential commercial information. FHFA or FHFA–OIG will promptly notify the requester whenever a submitter files suit seeking to prevent disclosure of information.

§ 1202.9 How do I appeal a response denying my FOIA request?

(a) *Right of appeal.* If FHFA or FHFA–OIG denied your request in whole or in part, you may appeal the denial by writing directly to the FOIA Appeals Officer through electronic mail, mail, delivery service, or facsimile. The electronic mail address is: *foia@fhfa.gov.* For mail or delivery service, the mailing address is: FOIA Appeals Officer, Federal Housing Finance Agency, 1700 G Street, NW., Washington, DC 20552. The facsimile number is: (202) 414–8917. You can help FHFA and FHFA–OIG process your appeal by marking electronic mail, letters, or facsimiles and the subject line, envelope, or facsimile cover sheet with "FOIA Appeal." For appeals of denials, whether in whole or in part, made by FHFA–OIG, the appeal must be clearly marked by adding "FHFA–OIG" after "FOIA Appeal." All appeals from denials, in whole or in part, made by FHFA–OIG will be forwarded to the FHFA–OIG FOIA Appeals Officer for processing and direct response. FHFA's "Freedom of Information Act Reference Guide," which is available on FHFA's Web site, *http://www.fhfa.gov,* provides additional information to assist you in making your appeal.

(b) *Timing, form, content, and receipt of an appeal.* Your appeal must be written and submitted within 30 calendar days of the date of the decision by FHFA or FHFA–OIG denying, in whole or in part, your request. Your appeal must include a copy of the initial request, a copy of the letter denying the request in whole or in part, and a statement of the circumstances, reasons, or arguments you believe support disclosure of the requested record(s). FHFA and FHFA–OIG will not consider an improperly addressed appeal to have been received for the purposes of the 20-day time period of paragraph (d) of this section until it is actually received by FHFA.

(c) *Extensions of time to appeal.* If you need more time to file your appeal, you may request, in writing, an extension of time of no more than 10 calendar days in which to file your appeal, but only if your request is made within the original 30-calendar day time period for filing the appeal. Granting such an extension is in the sole discretion of the FHFA or FHFA–OIG FOIA Appeals Officer.

(d) *Final action on appeal.* FHFA's or FHFA–OIG's determination on your appeal will be in writing, signed by the FHFA or FHFA–OIG FOIA Appeals Officer, and sent to you within 20 days after the appeal is received, or by the last day of the last extension under paragraph (e) of this section. The determination of an appeal is the final action of FHFA or FHFA–OIG on a FOIA request. A determination may—

(1) Affirm, in whole or in part, the initial denial of the request and may include a brief statement of the reason or reasons for the decision, including each FOIA exemption relied upon;

(2) Reverse, in whole or in part, the denial of a request in whole or in part, and require the request to be processed promptly in accordance with the decision; or

(3) Remand a request to FHFA or FHFA–OIG, as appropriate, for re-processing, stating the time limits for responding to the remanded request.

(e) *Notice of delayed determinations on appeal.* If FHFA or FHFA–OIG cannot send a determination on your appeal within the 20-day time limit, the designated Appeals Officer will continue to process the appeal and upon expiration of the time limit, will inform you of the reason(s) for the delay and the date on which a determination may be expected. In this notice of delay, the FHFA or FHFA–OIG FOIA Appeals Officer may request that you forebear seeking judicial review until a final determination is made.

(f) *Judicial review.* If the denial of your request for records is upheld in whole or in part, or if a determination on your appeal has not been sent at the end of the 20-day period in paragraph (d) of this section, or the last extension thereof, you may seek judicial review under 5 U.S.C. 552(a)(4).

§ 1202.10 Will FHFA or FHFA–OIG expedite my request or appeal?

(a) *Request for expedited processing.* You may request, in writing, expedited processing of an initial request or of an appeal. FHFA or FHFA–OIG may grant expedited processing, and give your request or appeal priority if your request for expedited processing demonstrates a compelling need by establishing one or more of the following—

(1) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(2) An urgency to inform the public about an actual or alleged Federal Government activity if you are a person primarily engaged in disseminating information;

(3) The loss of substantial due process or rights;

(4) A matter of widespread and exceptional media interest in which there exists possible questions about the Federal Government's integrity, affecting public confidence; or

(5) Humanitarian need.

(b) *Certification of compelling need.* Your request for expedited processing must include a statement certifying that the reason(s) you present demonstrate a compelling need are true and correct to the best of your knowledge.

(c) *Determination on request.* FHFA or FHFA–OIG will notify you within 10 days of receipt of your request whether expedited processing has been granted. If a request for expedited treatment is granted, the request will be given priority and will be processed as soon as practicable. If a request for expedited processing is denied, any appeal under § 1202.9 of that decision will be acted on expeditiously.

§ 1202.11 What will it cost to get the records I requested?

(a) *Assessment of fees, generally.* FHFA or FHFA–OIG will assess you for fees covering the direct costs of responding to your request and costs for duplicating records, except as otherwise provided in a statute with respect to the determination of fees that may be assessed for disclosure, search time, or review of particular records.

(b) *Assessment of fees, categories of requesters.* The fees that FHFA or FHFA–OIG may assess vary depending on the type of request or the type of requester you are—

(1) *Commercial use.* If you request records for a commercial use, the fees that FHFA or FHFA–OIG may assess are limited to FHFA's or FHFA–OIG's operating costs incurred for document search, review, and duplication.

(2) *Educational institution, noncommercial scientific institution, or representative of the news media.* If you are not requesting records for commercial use and you are an educational institution or a noncommercial scientific institution, whose purpose is scholarly or scientific research, or a representative of the news media, the fees that may be assessed are limited to standard reasonable charges for duplication in excess of 100 pages or an electronic equivalent of 100 pages.

(3) *Other.* If neither paragraph (b)(1) nor paragraph (b)(2) of this section applies, the fees assessed are limited to the costs for document searching in excess of two hours and duplication in excess of 100 pages, or an electronic equivalent of 100 pages.

(c) *Fee schedule.* The current schedule of fees is maintained on FHFA's Web site at: *http://www.fhfa.gov.*

(d) *Notice of anticipated fees in excess of $100.00.* When FHFA or FHFA–OIG determines or estimates that the fees chargeable to you will exceed $100.00,

you will be notified of the actual or estimated amount of fees you will incur, unless you earlier indicated your willingness to pay fees as high as those anticipated. When you are notified that the actual or estimated fees exceed $100.00, your FOIA request will not be considered received by FHFA or FHFA–OIG until you agree to pay the anticipated total fee.

(e) *Advance payment of fees.* FHFA or FHFA–OIG may request that you pay estimated fees or a deposit in advance of responding to your request. If FHFA or FHFA–OIG requests advance payment or a deposit, your request will not be considered received by FHFA or FHFA–OIG until the advance payment or deposit is received. FHFA or FHFA–OIG will request advance payment or a deposit if—

(1) The fees are likely to exceed $500.00. FHFA or FHFA–OIG will notify you of the likely cost and obtain from you satisfactory assurance of full payment if you have a history of prompt payment of FOIA fees to FHFA or FHFA–OIG;

(2) You do not have a history of payment, or if the estimate of fees exceeds $1,000.00, FHFA or FHFA–OIG may require an advance payment of fees in an amount up to the full estimated charge that will be incurred;

(3) You previously failed to pay a fee to FHFA or FHFA–OIG in a timely fashion, *i.e.,* within 30 calendar days of the date of a billing, FHFA or FHFA–OIG may require you to make advance payment of the full amount of the fees anticipated before processing a new request or finishing processing of a pending request; or

(4) You have an outstanding balance due from a prior request. FHFA or FHFA–OIG may require you to pay the full amount owed plus any applicable interest, as provided in paragraph (f) of this section, or demonstrate that the fee owed has been paid, as well as payment of the full amount of anticipated fees before processing your request.

(f) *Interest.* FHFA or FHFA–OIG may charge you interest on an unpaid bill starting on the 31st calendar day following the day on which the bill was sent. Once a fee payment has been received by FHFA or FHFA–OIG, even if not processed, FHFA or FHFA–OIG will stay the accrual of interest. Interest charges will be assessed at the rate prescribed by 31 U.S.C. 3717 and will accrue from the date of the billing.

(g) *FHFA or FHFA–OIG assistance to reduce costs.* If FHFA or FHFA–OIG notifies you of estimated fees exceeding $100.00 or requests advance payment or a deposit, you will have an opportunity to consult with FHFA or FHFA–OIG FOIA staff to modify or reformulate your request to meet your needs at a lower cost.

(h) *Fee waiver requests.* You may request a fee waiver in accordance with FOIA and this regulation. FHFA or FHFA–OIG may grant your fee waiver request if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Federal Government and is not primarily in the commercial interest of the requester. In submitting a fee waiver request, you must address the following six factors—

(1) Whether the subject of the requested records concerns the operations or activities of the Federal Government;

(2) Whether the disclosure is likely to contribute to an understanding of Federal Government operations or activities;

(3) Whether disclosure of the requested information will contribute to public understanding;

(4) Whether the disclosure is likely to contribute significantly to public understanding of Federal Government operations or activities;

(5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and

(6) Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(i) *Determination on request.* FHFA or FHFA–OIG will notify you within 20 days of receipt of your request whether the fee waiver has been granted. A request for fee waiver that is denied may only be appealed when a final decision has been made on the initial FOIA request.

§ 1202.12 Is there anything else I need to know about FOIA procedures?

This FOIA regulation does not and shall not be construed to create any right or to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under FOIA. This regulation only provides procedures for requesting records under FOIA.

Dated: May 12, 2011.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

[FR Doc. 2011–12485 Filed 5–20–11; 8:45 am]

BILLING CODE 8070–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2011–0126]

RIN 1625–AA08

Special Local Regulations for Marine Events; Chester River, Chestertown, MD

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing special local regulations during the reenactment portion of the "Chestertown Tea Party Festival," a marine event to be held on the waters of the Chester River, Chestertown, MD on May 28, 2011. These special local regulations are necessary to provide for the safety of life on navigable waters during the event. This action is intended to temporarily restrict vessel traffic in a portion of the Chester River during the event.

DATES: This rule is effective from 10 a.m. until 5 p.m. on May 28, 2011.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2011–0126 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0126 in the "Keyword" box, and then clicking "Search." This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail Mr. Ronald Houck, Sector Baltimore Waterways Management Division, Coast Guard; telephone 410–576–2674, e-mail *Ronald.L.Houck@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On March 21, 2011, we published a notice of proposed rulemaking (NPRM) entitled "Special Local Regulations for Marine Events; Chester River, Chestertown, MD" in the **Federal Register** (76 FR 54). We received no

comments on the proposed rule. No public meeting was requested, and none was held.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Due to the need for immediate action, the restriction of vessel traffic is necessary to protect life, property and the environment against the hazards associated with a large number of spectator vessels operating on navigable waters in the immediate vicinity of the event's participating vessels. Such hazards include injuries or death caused by vessel collisions, capsizings and sinkings, navigational obstructions, damage to watercraft and waterfront property, and oil pollution in the environment. Therefore, a 30-day notice is contrary to the public interest. Delaying the effective date would be contrary to the regulated area's intended objectives of protecting persons and vessels involved in the event, and enhancing public and maritime safety. In addition, delaying the effective date is unnecessary. This regulation has generated very little public interest and affects a very limited section of the waterway for less than a full day. During the comment period for this event (and a similar event in 2010, docket number [USCG–2010–0081]), zero comments were received.

Basis and Purpose

On May 28, 2011, the Chestertown Tea Party Festival will sponsor a reenactment in the Chester River at Chestertown, MD. The key component of the event consists of the Schooner SULTANA departing from its berth in Chestertown, transiting 200 yards to an anchorage location, embarking and disembarking Tea Party actors by dinghy, and then returning to its berth. Due to the need for vessel control during the event, the Coast Guard will temporarily restrict vessel traffic in the event area to provide for the safety of participants, spectators and other transiting vessels.

Discussion of Comments and Changes

The Coast Guard received no comments in response to the NPRM. No public meeting was requested and none was held.

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. Although this regulation will prevent traffic from transiting a portion of the Chester River during the event, the effect of this regulation will not be significant due to the limited duration that the regulated area will be in effect and the extensive advance notifications that will be made to the maritime community via the Local Notice to Mariners and marine information broadcasts, so mariners can adjust their plans accordingly. Additionally, the regulated area has been narrowly tailored to impose the least impact on general navigation yet provide the level of safety deemed necessary. Vessel traffic will be able to transit safely around the regulated area.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule may affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in the effected portions of the Chester River during the event.

Although this regulation prevents traffic from transiting a portion of the Chester River at Chestertown, MD during the event, this rule will not have a significant economic impact on a substantial number of small entities for the following reasons. This rule will be in effect for only a limited period. The regulated area is of limited size. Vessel traffic will be able to transit safely around the regulated area. Before the enforcement period, we will issue maritime advisories so mariners can adjust their plans accordingly.

Assistance for Small Entities

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and

Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(h), of the Instruction. This rule involves implementation of regulations within 33 CFR Part 100 applicable to organized marine events on the navigable waters of the United States that could negatively impact the safety of waterway users and shore side activities in the event area. The category of water activities includes but is not limited to sail boat regattas, boat parades, power boat racing, swimming events, crew racing, canoe and sail board racing. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

■ 2. Add a temporary section, § 100.35–T05–0126, to read as follows:

§ 100.35–T05–0126 Special Local Regulations for Marine Events; Chester River, Chestertown, MD.

(a) *Regulated area.* The following locations are regulated areas: All waters of the Chester River, within a line connecting the following positions: Latitude 39°12′27″ N, longitude 076°03′46″ W; thence to latitude 39°12′19″ N, longitude 076°03′53″ W; thence to latitude 39°12′25″ N, longitude 076°03′41″ W; thence to latitude 39°12′16″ N, longitude 076°03′48″ W; thence to the point of origin at latitude 39°12′27″ N, longitude 076°03′46″ W, located at Chestertown, Maryland. All coordinates reference Datum NAD 1983.

(b) *Definitions:* (1) *Coast Guard Patrol Commander* means a commissioned, warrant, or petty officer of the U.S. Coast Guard who has been designated by the Commander, Coast Guard Sector Baltimore.

(2) *Official Patrol* means any vessel assigned or approved by Commander, Coast Guard Sector Baltimore with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

(c) *Special local regulations:* (1) Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area.

(2) The operator of any vessel in the regulated area must:

(i) Stop the vessel immediately when directed to do so by the Coast Guard Patrol Commander or any Official Patrol.

(ii) Proceed as directed by the Coast Guard Patrol Commander or any Official Patrol.

(d) *Enforcement period:* (1) This section will be enforced from 10 a.m. until 5 p.m. on May 28, 2011.

(2) The Coast Guard will publish a notice in the Fifth Coast Guard District Local Notice to Mariners and issue marine information broadcast on VHF–FM marine band radio announcing specific event date and times.

Dated: May 4, 2011.

Mark P. O'Malley,

Captain, U.S. Coast Guard, Captain of the Port Baltimore, Maryland.

[FR Doc. 2011–12373 Filed 5–20–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2011–0289]

RIN 1625–AA08

Special Local Regulations; Miami Super Boat Grand Prix, Miami Beach, FL

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing special local regulations on the waters of the Atlantic Ocean east of

Miami Beach, Florida during the Miami Super Boat Grand Prix. The Miami Super Boat Grand Prix will consist of a series of high-speed boat races. The event is scheduled to take place on Sunday, June 5, 2011. These special local regulations are necessary to provide for the safety of life on navigable waters during the high-speed boat races. The special local regulations will temporarily restrict vessel traffic in an area east of Miami Beach. The special local regulations will establish the following two areas: A race area, where all persons and vessels except those persons and vessels participating in or conducting the race are prohibited from entering, transiting, anchoring, or remaining; and a spectator area, where all vessels are prohibited from anchoring.

DATES: This rule is effective from 10 a.m. until 4 p.m. on June 5, 2011.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–0289 and are available online by going to *http://www.regulations.gov*, inserting USCG–2011–0289 in the "Keyword" box, and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Lieutenant Paul A. Steiner, Sector Miami Prevention Department, Coast Guard; telephone 305–535–8724, e-mail *Paul.A.Steiner@uscg.mil*. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the Coast Guard did not receive necessary information about the event with sufficient time to publish an NPRM and to receive public comments prior to the event. Although this event occurs annually, and special local regulations for this event are in the Code of Federal Regulations at 33 CFR 100.701, this year the event host changed the date of the event from the third weekend in April to June 5, thereby rendering the special local regulations set forth in 33 CFR 100.701 inapplicable for this year's event. Any delay in the effective date of this rule would be contrary to the public interest because immediate action is needed to minimize the potential danger to the race participants, participant vessels, spectators, and the general boating public.

Background and Purpose

On June 5, 2011, Super Boat International Productions, Inc. is hosting the Miami Super Boat Grand Prix, a series of high-speed boat races. The event will be held on the waters of the Atlantic Ocean east of Miami Beach, Florida. Approximately 25 high-speed power boats will be participating in the races, and it is anticipated that at least 10 spectator vessels will be present in the area during the races. The high speed of the participant vessels poses a safety hazard to race participants, participant vessels, spectators, and the general public. The special local regulations are necessary to protect race participants, participant vessels, spectators, and the general public from the hazards associated with the high-speed boat races.

Discussion of Rule

The special local regulations will be enforced from 10 a.m. until 4 p.m. on June 5, 2011 on the waters of the Atlantic Ocean east of Miami Beach, Florida during the Miami Super Boat Grand Prix. The special local regulations establish the following two areas: (1) A race area, where all vessels except those vessels participating in or conducting the race are prohibited from entering, transiting, anchoring, or remaining unless authorized by the Captain of the Port Miami; and (2) a spectator area, where all vessels are prohibited from anchoring. Persons and vessels may request authorization to enter, transit through, anchor in, or remain within the race area by contacting the Captain of the Port Miami via telephone at 305–535–4472, or a designated representative via VHF radio on channel 16.

Regulatory Analyses

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

Executive Order 12866 and Executive Order 13563

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

The economic impact of this rule is not significant for the following reasons: (1) The special local regulations will be enforced for only six hours; (2) although persons and vessels will not be able to enter, transit through, anchor in, or remain within the race area without authorization from the Captain of the Port Miami or a designated representative, they may operate in the surrounding area, including the spectator area, while the special local regulations are enforced; (3) persons and vessels may still enter, transit through, anchor in, or remain within the race area if authorized by the Captain of the Port Miami or a designated representative; and (4) advance notification will be made to the local maritime community via Local Notice to Mariners and Broadcast Notice to Mariners.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule may affect the following entities, some of which may be small entities: The owners or operators of vessels intending to enter, transit through, anchor in, or remain within that portion of the Atlantic Ocean encompassed within the special local regulations from 10 a.m. until 4 p.m. on June 5, 2011. For the reasons discussed in the Regulatory Planning and Review section above, this rule will not have a

significant economic impact on a substantial number of small entities.

Assistance for Small Entities

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(h), of the Instruction. This rule involves special local regulations issued in conjunction with a marine event. Under figure 2–1, paragraph (34)(h), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this rule.

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

■ 2. Add a temporary § 100.T07–0289 to read as follows:

§ 100.T07–0289 Special Local Regulations; Miami Super Boat Grand Prix, Miami Beach, FL.

(a) *Regulated Area.* The following regulated areas are established as special local regulations. All coordinates are North American Datum 1983.

(1) *Race Area.* All waters of the Atlantic Ocean east of Miami Beach, FL encompassed within an imaginary line connecting the following points: starting at Point 1 in position 25°49′14″ N, 80°07′13″ W; thence east to Point 2 in position 25°49′13″ N, 80°06′48″ W; thence southwest to Point 3 in 25°46′00″ N, 80°07′26″ W; thence west to Point 4 in position 25°46′00″ N, 80°07′51″ W; thence northeast back to origin. All vessels except those vessels participating in or conducting the race

are prohibited from entering, transiting through, anchoring in, or remaining within the race area without authorization from the Captain of the Port Miami or a designated representative.

(2) *Spectator Area.* All waters of the Atlantic Ocean east of Miami Beach, FL encompassed within an imaginary line connecting the following points: Starting at Point 1 in position 25°49′13″ N, 80°06′48″ W; thence east to Point 2 in position 25°49′14″ N, 80°06′42″ W; thence southwest to Point 3 in 25°46′00″ N, 80°07′19″ W; thence west to Point 4 in position 25°46′00″ N, 80°07′26″ W; thence northeast back to origin. All vessels, including spectator vessels, are prohibited from anchoring in the spectator area. On-scene designated representatives will direct spectator vessels to the spectator area.

(b) *Definition.* The term "designated representative" means Coast Guard Patrol Commanders, including Coast Guard coxswains, petty officers, and other officers operating Coast Guard vessels, and Federal, state, and local officers designated by or assisting the Captain of the Port Miami in the enforcement of the regulated areas.

(c) *Regulations.*

(1) Persons and vessels desiring to enter, transit through, anchor in, or remain within the race area may contact the Captain of the Port Miami by telephone at 305–535–4472, or a designated representative via VHF radio on channel 16, to seek authorization. If authorization to enter, transit through, anchor in, or remain within the regulated area is granted by the Captain of the Port Miami or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the Captain of the Port Miami or a designated representative.

(2) The Coast Guard will provide notice of the regulated areas by Local Notice to Mariners, Broadcast Notice to Mariners, and on-scene designated representatives.

(d) *Effective Date.* This rule is effective from 10 a.m. until 4 p.m. on June 5, 2011.

Dated: April 22, 2011.

C.P. Scraba,

Captain, U.S. Coast Guard, Captain of the Port Miami.

[FR Doc. 2011–12376 Filed 5–20–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0184]

RIN 1625–AA00

Safety Zone, Newport River; Morehead City, NC

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone on the waters of the Newport River under the main span US 70/Morehead City—Newport River high rise bridge in Carteret County, NC. This safety zone is necessary to provide for safety of life on navigable waters during the establishment of staging for bridge maintenance. This rule will enhance the safety of the contractors performing maintenance as well as the safety of vessels that plan to transit this area.

DATES: This rule is effective from 10 a.m. to 4 p.m. on June 30, 2011.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2011–0184 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0184 in the "Keyword" box, and then clicking "Search." This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail BOSN3 Joseph M. Edge, Coast Guard Sector North Carolina, Coast Guard; telephone 252–247–4525, e-mail *Joseph.M.Edge@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On April 5, 2011, we published a notice of proposed rulemaking (NPRM) entitled Safety Zone, Newport River; Morehead City, North Carolina in the **Federal Register** (33 FR 165). We received no comments on the proposed rule. No public meeting was requested, and none was held.

Background and Purpose

The State of North Carolina Department of Transportation awarded a contract to Astron General Contracting Company of Jacksonville, NC to perform bridge maintenance on the US Highway 70 Fixed bridge crossing Newport River at Morehead City, North Carolina. The contract provides for cleaning, painting, and steel repair to begin on June 1, 2011 and will be completed by July 31, 2011. The contractor requires the main channel in the vicinity of the bridge to remain closed during mobilization on June 30, 2011 from 10 a.m. to 4 p.m. The Coast Guard will temporarily restrict access to this section of Newport River during the mobilization of the bridge maintenance equipment.

Discussion of Comments and Changes

There were no comments; no changes were made.

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

Although this regulation will restrict access to the area, the effect of this rule will not be significant because: (i) The safety zone will be in effect for a limited time, from 10 a.m. to 4 p.m., on June 30, 2011, (ii) the Coast Guard will give advance notification via maritime advisories so mariners can adjust their plans accordingly, and (iii) although the safety zone will apply to the section of the Newport River in the immediate vicinity of the US Highway 70 Fixed bridge, vessel traffic may use alternate waterways to transit safely around the safety zone. All Coast Guard vessels enforcing this regulated area can be contacted on marine band radio VHF–FM channel 16 (156.8 MHz).

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a

substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

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

This rule will affect the following entities, some of which may be small entities: The owners or operators of recreational and fishing vessels intending to transit the specified portion of Newport River from 10 a.m. to 4 p.m. on June 30, 2011.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons. This rule will only be in effect for six hours from 10 a.m. to 4 p.m. Although the safety zone will apply to the section of the Newport River in the vicinity of the bridge, vessel traffic may use alternate waterways to transit safely around the safety zone. Before the effective period, the Coast Guard will issue maritime advisories widely available to the users of the waterway.

Assistance for Small Entities

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves the establishment of a temporary safety zone to protect the public from bridge maintenance operations.

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

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping

requirements, Security measures, Waterways.

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add temporary § 165.T05–0184 to read as follows:

§ 165.T05–0184 Safety Zone; Newport River, Morehead City, North Carolina.

(a) *Definitions.* For the purposes of this section, Captain of the Port means the Commander, Sector North Carolina. *Representative* means any Coast Guard commissioned, warrant, or petty officer who has been authorized to act on the behalf of the Captain of the Port.

(b) *Location.* The following area is a safety zone: This zone includes the waters of Newport River directly under, latitude 34°43′15″ North, longitude 076°41′39″ West, and 100 yards on either side of the U.S. Highway 70 Fixed bridge at Morehead City, North Carolina.

(c) *Regulations.* (1) The general regulations contained in § 165.23 of this part apply to the area described in paragraph (b) of this section.

(2) Persons or vessels requiring entry into or passage through any portion of the safety zone must first request authorization from the Captain of the Port, or a designated representative, unless the Captain of the Port previously announced via Marine Safety Radio Broadcast on VHF Marine Band Radio channel 22 (157.1 MHz) that this regulation will not be enforced in that portion of the safety zone. The Captain of the Port can be contacted at telephone number (252) 247–4570 or by radio on VHF Marine Band Radio, channels 13 and 16.

(d) *Enforcement.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the zone by Federal, State, and local agencies.

(e) *Enforcement period.* This section will be enforced from 10 a.m. to 4 p.m. on June 30, 2011 unless cancelled earlier by the Captain of the Port.

Dated: May 6, 2011.

A. Popiel,

Captain, U.S. Coast Guard, Captain of the Port North Carolina.

[FR Doc. 2011–12378 Filed 5–20–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0168]

RIN 1625–AA00

Safety Zone; Big Rock Blue Marlin Air Show; Bogue Sound, Morehead City, NC

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary Safety Zone for the "Big Rock Blue Marlin Air Show," an aerial demonstration to be held over the waters of Bogue Sound, adjacent to Morehead City, North Carolina. This Safety Zone is necessary to provide for the safety of life on navigable waters during the event. This action is intended to restrict vessel traffic on the Intracoastal Waterway and Bogue Sound adjacent to Morehead City, North Carolina.

DATES: This rule is effective from 7 p.m. to 8 p.m. on June 11, 2011.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2011–0168 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0168 in the "Keyword" box, and then clicking "Search." This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail BOSN3 Joseph M. Edge, Prevention Department, Coast Guard Sector North Carolina; telephone 252–247–4525, e-mail *Joseph.M.Edge@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On April 5, 2011, we published a notice of proposed rulemaking (NPRM) entitled Safety Zone; Big Rock Blue Marlin Air Show; Bogue Sound, Morehead City, NC in the **Federal Register** (33 CFR part 165). We received no comments on the proposed rule. No public meeting was requested, and none was held.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date would be contrary to the public interest, since immediate action is needed to ensure the safety of the event participants, patrol vessels, spectator craft and other vessels transiting the event area. However, the Coast Guard will provide advance notifications to users of the effected waterways via marine information broadcasts, local notice to mariners, commercial radio stations and area newspapers.

Background and Purpose

On June 11, 2011 from 7 p.m. to 8 p.m., the Big Rock Blue Marlin Tournament will sponsor the "Big Rock Blue Marlin Air Show" consisting of an aerial demonstration to take place directly above the waters of Bogue Sounds including the waters of the Intracoastal Waterway adjacent to Morehead City, North Carolina. To provide for the safety of the spectators and other transiting vessels, the Coast Guard will temporarily restrict vessel traffic in the area during this event.

Discussion of Rule

The Coast Guard is establishing a temporary safety zone that will restrict vessel movement for one hour prior to the event on the specified waters of Bogue Sound, Morehead City, NC. During the enforcement period, while the Aerial Event is taking place, no vessel will be allowed to transit the waterway unless the vessel is given permission from the Patrol Commander to transit. This safety zone will be enforced from 7 p.m. to 8 p.m. on June 11, 2011.

Discussion of Comments and Changes

There were no comments; no changes were made.

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. Although this regulation prevents traffic from transiting waters of Bogue Sound during the event, the effect of this regulation will not be significant due to the limited duration that the regulated area will be in effect. Extensive advance notification will be made to the maritime community via marine information broadcast and local area newspapers so mariners can adjust their plans accordingly. Vessel traffic will be able to transit the regulated area before and after the event, when the Coast Guard Patrol Commander deems it is safe to do so.

Small Entities

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

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

This rule would affect the following entities, some of which might be small entities: The owners and operators of vessels intending to transit this section of the Bogue Sound from 7 p.m. to 8 p.m. on June 11, 2011. This safety zone would not have significant economic impact on a substantial number of small entities for the following reasons. This safety zone will be enforced for only 1 hour in the evening. Vessel traffic will be able to transit the area immediately prior to and immediately following the enforcement period. Before the activation of the zone, we would issue maritime advisories widely to users of the waterway.

Assistance for Small Entities

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves the necessity to provide for the safety of the general public and event participants from potential hazards associated with vessels present on or transiting upon this waterway. An environmental analysis checklist and a categorical exclusion determination are

available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add a temporary § 165.T05–0168 to read as follows:

§ 165.T05–0168 Safety Zone: Big Rock Blue Marlin Air Show, Bogue Sound, Morehead City, NC.

(a) *Regulated Area.* The following area is a safety zone: The specified waters of the Captain of the Port Sector North Carolina, as defined in 33 CFR 3.25–20, within the navigable waters of Bogue Sound in an area bound by a line drawn from the following points: latitude 34°43′09.9″ N, longitude 076°45′54.9″ W; thence east to latitude 34°43′09.75″ N, longitude 076°44′34.16″ W; thence south to latitude 34°42′52.64″ N, longitude 076°44′32.55″ W; thence west to latitude 34°42′50.7″ N, longitude 076°45′48.5″ W; thence to the point of origin, located approximately 400 yards south of the shoreline of Morehead City.

(b) *Definition:* For the purposes of this section, Captain of the Port means the Commander, Sector North Carolina. *Representative* means any U.S. Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port, Sector North Carolina to act on his behalf.

(c) *Regulations:* (1) In accordance with the general regulations in § 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port, Sector North Carolina or designated representatives.

(2) The operator of any vessel in the immediate vicinity of this safety zone shall:

(i) Stop the vessel immediately upon being directed to do so by any commissioned, warrant or petty officer on shore or on board a vessel that is displaying a U.S. Coast Guard Ensign.

(ii) Proceed as directed by any commissioned, warrant or petty officer on shore or on board a vessel that is displaying a U.S. Coast Guard Ensign.

(3) The Captain of the Port, Sector North Carolina can be reached through the Sector Duty Officer at Sector North Carolina in Atlantic Beach, North Carolina at telephone number (252) 247–4570.

(4) The Coast Guard Representatives enforcing the safety zone can be contacted on VHF–FM marine band radio channel 13 (165.65 MHz) and channel 16 (156.8 MHz).

(d) *Enforcement Period.* This section will be enforced from 7 p.m. until 8 p.m. on June 11, 2011.

Dated: May 6, 2011.

Anthony Popiel,

Captain, U.S. Coast Guard, Captain of the Port North Carolina.

[FR Doc. 2011–12377 Filed 5–20–11; 8:45 am]

BILLING CODE P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2011–0063; FRL–9309–3]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Adoption of Control Techniques Guidelines for Paper, Film, and Foil Surface Coating Processes

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the Commonwealth of Pennsylvania (Pennsylvania). This SIP revision includes amendments to Chapter 121—General Provisions and Chapter 129—Standards for Sources, of Title 25 of the Pennsylvania Code. Pennsylvania's SIP revision meets the requirement to adopt Reasonably Available Control Technology (RACT) for sources covered by the Control Techniques Guidelines (CTG) standards for paper, film, and foil surface coating processes. EPA is approving this revision concerning the adoption of the CTG requirements for paper, film, and foil surface coating processes in accordance with the requirements of the Clean Air Act (CAA).

DATES: *Effective Date:* This final rule is effective on June 22, 2011.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2011–0063. All documents in the docket are listed in the *http://www.regulations.gov* website. Although listed in the electronic docket, some information is not publicly available, i.e., 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 either electronically through *http://www.regulations.gov* or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Pennsylvania Department of Environmental Protection, Bureau of Air Quality Control, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

FOR FURTHER INFORMATION CONTACT: Irene Shandruk, (215) 814–2166, or by e-mail at *shandruk.irene@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 182(b)(2) of the CAA, 42 U.S.C. 7511a(b)(2), requires that States having moderate nonattainment areas for ozone revise their SIP to include provisions requiring the implementation of RACT for certain sources, including categories of volatile organic compound (VOC) sources covered by a CTG document issued by the Administrator between November 15, 1990 and the date of attainment. EPA originally developed CTG standards for paper, film, and foil surface coating processes in 1977 and revised them in 2007. Pennsylvania subsequently made changes to its SIP which adopted EPA's CTG standards for paper, film, and foil surface coating processes. The formal SIP revision was submitted by Pennsylvania to EPA on January 4, 2011. On March 4, 2011 (76 FR 11983), EPA published a notice of proposed rulemaking (NPR) for Pennsylvania. The NPR proposed approval of Pennsylvania's SIP revision for adoption of the CTG standards for paper, film, and foil surface coating processes. The formal SIP revision was submitted by Pennsylvania on January 4, 2011. One adverse comment was submitted on the March 4, 2011 NPR (76 FR 11983). A summary of the comment and EPA's response is provided in section III of this document.

II. Summary of SIP Revision

On January 4, 2011, the Pennsylvania Department of Environmental Protection (PADEP) submitted to EPA a SIP revision concerning the adoption of the EPA paper, film, and foil surface coating processes CTG. EPA develops CTGs as

guidance on control requirements for source categories. States can follow the CTGs or adopt more restrictive standards. Pennsylvania has adopted EPA's CTG standards for paper, film, and foil surface coating processes. Pennsylvania's regulations are in Chapter 121—General Provisions and in Chapter 129—Standards for Sources, in Title 25 of the Pennsylvania Code. Specifically, this revision amends the existing regulations at sections 121.1, 129.51, and 129.52, and adds a new section 129.52b. Several definitions were amended or added in section 121.1, and section 129.52 was amended to extend coverage to paper, film and foil surface coating processes. The new section 129.52b includes VOC emission limits, work practices, and recordkeeping and reporting requirements, all of which are consistent with EPA's CTG for paper, film, and foil surface coating processes. The requirements in section 129.52b supersede the requirements in 129.52 relating to control of VOC emissions from paper, film, and foil surface coating processes. The emission limits of VOCs for paper, film, and foil surface coatings are shown in Table 1. These emission limits apply if potential VOC emissions from a single line, prior to control, are 25 tons per year (tpy) or more.

TABLE 1—RECOMMENDED EMISSION LIMITS FOR PAPER, FILM, AND FOIL COATINGS

Units	RACT limits	
	Pressure sensitive tape and label surface coating	Paper, film, and foil surface coating (not including pressure sensitive tape and label)
Kilograms VOC/kilograms solids (pounds VOC/pounds solids)	0.20	0.40
Kilograms VOC/kilograms coating (pounds VOC/pounds coating)	0.067	0.08

Additionally, VOC emission limits for paper coatings only and the associated applicability criteria that were in section 129.52(a)(2) were added to section 129.52b in order to carry forward previously regulated paper coating sources and to eliminate the potential for backsliding. These VOC emission limits apply only to paper coatings if actual VOC emissions have exceeded 3 pounds per hour, 15 pounds per day, or 2.7 tpy in any year since January 1, 1987. The emission limits are shown in Table 2.

TABLE 2—EMISSION LIMITS OF VOCS FOR PAPER COATING

Units	RACT limit for paper coating
Pounds VOC/gallon coating solids	4.84
Kilogram VOC/liter coating solids	0.58

Other specific requirements concerning this rulemaking and the rationale for EPA's action are explained in the NPR and the Technical Support Document (TSD) and will not be restated here. As noted below, EPA received one comment on the NPR and it was not germane.

III. Summary of Public Comment and EPA Response

Comment: A commenter stated that "it is a travesty that the EPA is attempting to take action, in the name of the unproven theory of anthropogenic global warming, through regulations that will harm the economy of the United States," and asserts that EPA is attempting to take such action on the issue of global warming which Congress has "decided that no action was warranted." The commenter further states that "this is a blatant power grab by the EPA and the Obama administration to force their radical liberal ideas on the hard-working, decent people of the country without their consent."

Response: This comment is not relevant to this rulemaking action. This action concerns the control of VOCs for the purpose of attaining the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS) and does not concern the regulation of emissions for the purpose of addressing global warming.

IV. Final Action

EPA is approving Pennsylvania's adoption of the CTG requirements for paper, film, and foil surface coating processes as a revision to the Pennsylvania SIP.

V. Statutory and Executive Order Reviews

A. General Requirements

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.

B. Submission to Congress and the Comptroller General

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).

C. Petitions for Judicial Review

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 July 22, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action concerning Pennsylvania's adoption of a CTG for paper, film, and foil surface coating processes may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR part 52

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

Dated: May 9, 2011.

W.C. Early,

Acting Regional Administrator, Region III.

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 NN—Pennsylvania

■ 2. In § 52.2020, the table in paragraph (c)(1) is amended by revising the entries for Sections 121.1, 129.51 and 129.52; and adding an entry for Section 129.52b after the existing entry for Section 129.52. The amendments read as follows:

§ 52.2020 Identification of plan.

* * * * *

(c) * * *

(1) * * *

State citation	Title/subject	State effective date	EPA approval date	Additional explanation/§ 52.2063 citation
Title 25—Environmental Protection Article III—Air Resources Chapter 121—General Provisions				
Section 121.1	Definitions	11/20/10	5/23/11 *[Insert page number where the document begins]*.	Definition of "coating line" added. Revision of definitions for "coating" and "paper coating."
*	*	*	*	*
Chapter 129—Standards for Sources				
*	*	*	*	*
Sources of VOCs				
*	*	*	*	*
Section 129.51	General	11/20/10	5/23/11 *[Insert page number where the document begins]*.	Paragraph 129.51(a) is amended.
Section 129.52	Surface coating processes	11/20/10	5/23/11 *[Insert page number where the document begins]*.	Paragraph 129.52(j) is added.
Section 129.52b	Control of VOC emissions from paper, film, and foil surface coating processes.	11/20/10	5/23/11 *[Insert page number where the document begins]*.	New section is added.
*	*	*	*	*

* * * * *

[FR Doc. 2011–12513 Filed 5–20–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2010–0034; FRL–9309–6]

Approval and Promulgation of Air Quality Implementation Plans; Illinois; Missouri; Saint Louis Nonattainment Area; Determination of Attainment of the 1997 Annual Fine Particle Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action determining that the Saint Louis fine particle ($PM_{2.5}$) nonattainment area in Illinois and Missouri has attained the 1997 annual $PM_{2.5}$ National Ambient Air Quality Standard (NAAQS). This final determination of attainment is based upon quality assured, quality controlled, and certified ambient air monitoring data for the 2007–2009 monitoring period which show that the Saint Louis area has monitored attainment of the 1997 annual $PM_{2.5}$ NAAQS, as well as quality assured data for 2010 that are in EPA's Air Quality System (AQS), but not yet certified, that show that the Saint Louis area has continued to monitor attainment of the 1997 annual $PM_{2.5}$ NAAQS. Pursuant to EPA's $PM_{2.5}$ implementation regulations, this final determination suspends the states' obligation to submit a number of plans for this area including: An attainment demonstration, associated reasonably available control measures (RACM), including reasonably available control technology (RACT), a reasonable further progress plan, contingency measures, and other planning State Implementation Plan (SIP) revisions related to attainment of the 1997 annual $PM_{2.5}$ NAAQS for so long as the area continues to attain the 1997 annual $PM_{2.5}$ NAAQS.

EPA's determination that this area has attained the 1997 annual $PM_{2.5}$ NAAQS is not equivalent to redesignating the area to attainment. The designation of the area will remain nonattainment for the 1997 annual $PM_{2.5}$ NAAQS until such time as EPA determines that this area meets the Clean Air Act (CAA) requirements for redesignation to attainment.

DATES: This final rule is effective on May 23, 2011.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2010–0034. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., 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 either electronically through *www.regulations.gov* or in hard copy at the 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 Matt Rau, Environmental Engineer, at (312) 886–6524 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Matt Rau, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6524, *rau.matthew@epa.gov.* You may also contact Michael Jay, Air Planning and Development Branch, Environmental Protection Agency, Region 7, 901 North Fifth Street, Kansas City, Kansas 66101, (913) 551–7460, *jay.michael@epa.gov.*

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 action is EPA taking?
II. What is the background of this action?
III. What is EPA's analysis of the relevant air quality data?
IV. What are EPA's responses to public comments?
V. What are the effects of this action?
VI. When is this rule effective?
VII. Statutory and Executive Order Reviews

I. What action is EPA taking?

EPA is making a final determination that the Saint Louis $PM_{2.5}$ nonattainment area, in the States of Missouri and Illinois, has attained the 1997 annual $PM_{2.5}$ NAAQS. EPA published its proposed determination for the Saint Louis $PM_{2.5}$ nonattainment area on March 7, 2011 (76 FR 12302). EPA received one set of comments on its proposal from the Interdisciplinary Environmental Clinic, Washington University School of Law on behalf of the American Bottom Conservancy. These comments and EPA's responses are found in Section IV of this notice. As set forth in the proposal, EPA's determination is based upon quality assured, quality controlled, and certified ambient air monitoring data from the 2007–2009 monitoring period and additional quality assured, quality controlled data in AQS for 2010 which show that the Saint Louis area has monitored attainment of the 1997 annual $PM_{2.5}$ NAAQS.

II. What is the background of this action?

The proposed rule (76 FR 12302, March 7, 2011) sets forth the background of this action. The proposed rule describes the pertinent $PM_{2.5}$ NAAQS, the designation of the Saint Louis area as nonattainment for the 1997 annual $PM_{2.5}$ NAAQS, and the effect of determining attainment of this standard on the suspension of attainment-related planning requirements. Details are provided in the notice of proposed rulemaking.

III. What is EPA's analysis of the relevant air quality data?

In its proposal (76 FR 12302, March 7, 2011), EPA evaluated data recorded in the AQS database for the Saint Louis $PM_{2.5}$ nonattainment area from 2007 to 2009. Eight monitoring sites in the nonattainment area presented complete data. The highest design value at these sites was 14.1 $\mu g/m^3$ at monitor 17–119–1007 in Madison County, Illinois. EPA concluded that the Saint Louis area has attained the 1997 annual $PM_{2.5}$ NAAQS based on its evaluation of quality assured and certified data from the area monitoring sites with complete data for the 2007–2009 monitoring period. Supplemental, supporting air quality data were also considered, as discussed in the proposed rule.

The historical certified data recorded at the monitors that were discontinued during the 2007–2009 monitoring period and recent certified data recorded at monitors that started operation during the period provide additional support for EPA's determination that the Saint Louis area has attained the 1997 annual $PM_{2.5}$ NAAQS.

EPA also considered additional monitoring data for 2010 that have been submitted by the states and are in AQS, although not yet certified. The 2010 data indicate that the Saint Louis area continues in attainment for the 2008–2010 monitoring period. EPA believes that these data show that the area continues to meet the 1997 annual $PM_{2.5}$ NAAQS.

IV. What are EPA's responses to public comments?

On March 7, 2011, EPA proposed to determine that the Saint Louis $PM_{2.5}$ nonattainment area has attained the 1997 annual $PM_{2.5}$ NAAQS (76 FR 12302). EPA received one comment letter on the proposed approval, from the Interdisciplinary Environmental Clinic at Washington University Law School, on behalf of the American Bottom Conservancy (ABC). Below we set forth a summary of ABC's comments and EPA's responses.

Comment: The commenter contends that U.S. Steel-Granite City Works (USS–GCW) is a significant source of $PM_{2.5}$ emissions in the Saint Louis area, and that the plant's operations raise environmental justice concerns. The commenter states that a large number of low income and minority residents near USS–GCW are affected by the air quality resulting from the plant's substantial $PM_{2.5}$ emissions.

Response: As stated in our proposal, the 2007–2009 design value for the monitor closest to the USS–GCW plant, monitor 17–119–1007 in Granite City, is 14.1 $\mu g/m^3$, which meets the NAAQS. We further found that 2010 monitoring data indicate that the 2008–2010 design values from monitor 17–119–1007 and also from another Granite City monitor close to the plant, 17–119–0024, that began operating in July 2007, show attainment of the NAAQS. In addition to these monitors in Granite City, air quality is measured at more monitors in Madison County (Alton and Wood River) as well as by monitors in the adjacent Saint Clair County and elsewhere throughout the area. See Section III of the proposed rule for more detail, at 76 FR 12303. These monitors measure $PM_{2.5}$ concentrations in the ambient air—the air people breathe. The annual $PM_{2.5}$ standard was set to protect the public from long-term fine particulate exposure. EPA's obligation, in this rulemaking, is solely to determine whether quality assured monitored data for the most recent three-year period show that the Saint Louis area is meeting the annual $PM_{2.5}$ NAAQS. Monitored attainment of the standard is the only basis of a determination of attainment or nonattainment, and it is the only relevant issue. EPA's role in this rulemaking is limited to making the determination in accordance with the requirements of the CAA and EPA regulations. See 40 CFR 50.13 and 40 CFR 50 Appendix N. Should the plant's operations or any other source of emissions at any time in the future result in monitored nonattainment of the standard, in accordance with the statute and EPA regulations, then EPA will take action, through notice and comment rulemaking, to withdraw this determination. Thus, people who live or work in Granite City or surrounding towns will be protected if the air quality falls back into nonattainment.

EPA reviewed air quality data throughout the Saint Louis area, including environmental justice areas and other areas alike, and EPA is determining that the Saint Louis area is attaining the standard only because we find that all portions of the area are meeting the standard. This means that the health of citizens who live or work in environmental justice communities is protected just as the health of citizens who live or work elsewhere in the area is protected.

Comment: "The highest ambient $PM_{2.5}$ air monitoring values in [the Saint Louis area] consistently have been associated with monitor 17–119–1007 in Madison County, Illinois, just a few blocks from USS–GCW. The facility is a significant source of $PM_{2.5}$ and has been identified [by Illinois] as a contributor to $PM_{2.5}$ nonattainment" at the monitor.

Response: EPA agrees that Madison County, Illinois monitors have generally recorded the highest ambient $PM_{2.5}$ concentrations in the Saint Louis area. In addition to monitor 17–119–1007, area high values have been recorded at monitor 17–119–0024. Both monitors are in Granite City near USS–GCW. Nevertheless, the two most recent three-year periods of data (2007–2009 and 2008–2010) show that all area monitors, including monitors 17–119–0024 and 17–119–1007 in Granite City, are meeting the annual $PM_{2.5}$ standard. For the monitor of greatest concern to the commenter, EPA calculated the 2008–2010 design value as 13.8 $\mu g/m^3$, which is the area's highest design value. This supports EPA's determination that the Saint Louis area continues to meet the annual $PM_{2.5}$ NAAQS.

Comment: The commenter argues that the proposed determination of attainment is based on air quality data that are unrepresentative of air quality during "normal" operation of the USS–GCW facility. The commenter asserts that the period of USS–GCW's shutdown from the end of 2008 through a substantial portion of 2009 is associated with considerably lower than normal ambient $PM_{2.5}$ values, based on data from monitor 17–119–1007. Thus, the commenter claims that the apparent finding of attainment is "illusory" because it is dependent on air data gathered during the plant shutdown that the commenter believes are not indicative of USS–GCW's true impact on the air quality and risks to public health in the community. ABC asks that EPA reconsider its decision to make a determination of attainment for the Saint Louis area for the 1997 annual $PM_{2.5}$ NAAQS based on the unrepresentative period from 2007–2009.

ABC also noted that steel production at USS–GCW remained relatively constant between 2004 and 2008 with annual production of 2,294,000 to 2,545,000 tons. The commenter states that in 2009, steel production dropped sharply to 906,000 tons because the plant was closed for a substantial portion of the year. USS–GCW steel production then increased significantly from 2009 to 2010 with the facility producing 2,539,000 tons of steel in 2010. The commenter asserts that as a result, ambient air quality $PM_{2.5}$ concentrations near the USS–GCW facility increased in 2010 as well.

Response: First, EPA notes that the commenter concedes that air quality data for 2007–2009 for the Saint Louis area meet the 1997 annual $PM_{2.5}$ NAAQS. The commenter argues, however, that these data are not "representative" of air quality in the area. While EPA agrees that the 2009 air quality values monitored in the Saint Louis area generally were lower than the 2007, 2008, and 2010 values recorded at the same monitors, EPA disagrees with the commenter's position that this should prevent EPA from determining that the Saint Louis area is meeting the 1997 annual $PM_{2.5}$ standard. A determination of attainment under 40 CFR 50 Appendix N is based on an analysis of the three most recent years of complete, quality assured monitoring data. These data by definition are representative of air quality during the requisite period. And here, EPA determined that both 2007 to 2009 data and 2008 to 2010 data indicate that the area is attaining the standard.

A determination of attainment centers on the monitored air quality during a specific time period. The underlying causes of the monitored values are not relevant to the determination. Maintenance of the standard in the future is also not relevant to an assessment of current attainment. The ability of an area to maintain attainment of the NAAQS is reserved for consideration as a required element for EPA approval of an area's redesignation request, and is a question that is separate from and independent of a determination of attainment. See CAA section 107(d)(3)(E), listing separately among the requirements for redesignation a determination of attainment and an approved

maintenance plan. Even after EPA finalizes a determination of attainment for the Saint Louis area, the area remains designated nonattainment, and the determination is subject to revision if in the future EPA determines that the air quality in the area once again fails to meet the standard.

We note that the monitored ambient $PM_{2.5}$ levels rose from 2009 to 2010, but they did not reach the levels above the standard that had been recorded a few years earlier. The Granite City monitor 17–119–1007 recorded an 11.3 μg/m³ annual $PM_{2.5}$ average in 2009 and the data in EPA's AQS for 2010 show an annual average of 14.3 μg/m³. This 2010 value is below the standard and less than the annual averages of 15.1 μg/m³ in 2007 and 15.7 μg/m³ in 2008 at monitor 17–119–1007, when the plant was also operating at a level of production that the commenter regards as "normal." For a determination of attainment of the annual $PM_{2.5}$ NAAQS, the design value is calculated using the arithmetic mean of three consecutive annual averages, such as 2007–2009 or 2008–2010. However, for the sole purpose of showing what the air quality might have been without the impact of the plant shutdown, EPA calculated the mean using the annual averages from the three most recent years when USS–GCW had "normal" steel production, i.e., 2007, 2008, and 2010. The mean derived from this calculation, 15.0 μg/m³, meets the level of the 1997 $PM_{2.5}$ annual standard. While this calculated value does not obey the requirement to use consecutive years and thus is not a design value that can be compared to the NAAQS for regulatory purposes, it does provide reassurance that data from recent years during which the plant operated at higher levels of production do not undermine EPA's determination, using the appropriate design value, that the Saint Louis area attains the annual $PM_{2.5}$ NAAQS.

EPA also notes the design values history in the Saint Louis area. The 2008–2010 design values appear likely to be similar to or even a little lower than the 2007–2009 design values. Most significantly, despite any increase in 2010 values from the 2009 values, the air quality meets the 1997 annual $PM_{2.5}$ standard. The historic design values at monitor 17–119–1007, which is closest to USS–GCW, are shown on Table 1. The 2008–2010 design value in Table 1 was calculated using quality assured but not yet certified 2010 data.

TABLE 1—ANNUAL $PM_{2.5}$ DESIGN VALUES AT 17–119–1007

Years	2001–2003	2002–2004	2003–2005	2004–2006	2005–2007	2006–2008	2007–2009	2008–2010
Value	17.5 μg/m³	16.9	17.0	16.6	16.5	15.7	14.1	* 13.8

* Value calculated with quality assured, but uncertified 2010 data.

Table 1 shows the design values have decreased from values above 16 μg/m³ to 15.7 μg/m³ in 2006–2008. That is, these data suggest a downward trend in $PM_{2.5}$ concentrations even in years with similar levels of steel production at USS–GCW, suggesting that air quality has improved as a result of long-term emission reductions from sources throughout the Saint Louis area and elsewhere. See also EPA's response to the comment below. Nevertheless, as we noted before, a determination of attainment is a straightforward assessment of air quality during a particular time period. EPA is not required, when making a determination of attainment, to account for the causes of attainment or to show that attainment is due to permanent and enforceable emissions reductions. That showing, like maintenance, is a specific requirement for redesignation of an area to attainment, and independent of a determination of attainment. EPA will consider this requirement for redesignation at such time as the states submit any requests for redesignation. It is not, however, a relevant requirement in this rulemaking. Compare section 107(d)(3)(E) (i) and (iii).

Comment: ABC commented that, "Not only is USS–GCW a significant source of $PM_{2.5}$ in the [Saint Louis] area, but the facility has a history of air pollution noncompliance. Regardless of EPA's determination of attainment, ABC urges "EPA and IEPA to be vigilant about enforcing CAA violations at USS–GCW to reduce the threats of air pollution to the surrounding community." ABC noted some enforcement actions taken at USS–GCW. ABC concluded by asking EPA "to use all legal authorities to protect the community from excessive $PM_{2.5}$ emissions."

Response: A determination of attainment is simply an evaluation of the ambient air quality data that are compared to the NAAQS. For the Saint Louis area, EPA has determined that the most recent air quality data establish that the area meets the 1997 $PM_{2.5}$ NAAQS. The evaluation is not required to consider the emission limits or compliance history of sources. The determination of attainment does not express or imply any EPA position on the compliance history of USS–GCW. EPA is also working with Illinois and Missouri to seek additional emission reductions to continue to improve the air quality in the Saint Louis area. For example, important steps toward further control of USS–GCW are provided in the Memorandum of Understanding (MOU) that U.S. Steel and Illinois signed on June 30 and July 1, 2010, respectively. This agreement is expected to provide significant reductions of $PM_{2.5}$ emissions from USS–GCW by the start of 2012 and again in spring 2013. Although some MOU conditions to aid compliance are already in place, particulate matter emission limits on several units are effective beginning January 1, 2012, and on additional units starting March 31, 2013.

EPA stated in the proposed rule and has reiterated in this final rule that this determination of attainment is not a redesignation. The Saint Louis area remains designated nonattainment. For the area to be redesignated to attainment, Illinois and Missouri must show that the improvement in air quality is due to permanent and enforceable emissions reductions, and EPA must fully approve a maintenance plan meeting the requirements of section 175A of the CAA. Thus, in any $PM_{2.5}$ redesignation request that Illinois or Missouri submits for this area, the state would be required to demonstrate, among other things, that controls at USS–GCW and other sources in the area and upwind are sufficient to assure that the area will continue to attain the standard for at least 10 years beyond the date of the redesignation.

V. What are the effects of this action?

This determination suspends, under the provisions of the $PM_{2.5}$ Implementation Rule (40 CFR 51.1004(c)), the requirements for the Saint Louis $PM_{2.5}$ nonattainment area and the States of Illinois and Missouri to submit attainment demonstrations, RACM (including RACT), reasonable further progress plans, contingency measures, and other planning SIPs revisions related to attainment of the 1997 annual $PM_{2.5}$ NAAQS provided

that the area continues to attain the 1997 annual $PM_{2.5}$ NAAQS.

As discussed further, final approval of the determination of attainment for the Saint Louis $PM_{2.5}$ nonattainment area: (1) Suspends the obligation for Missouri and Illinois to submit the requirements listed above; (2) continues such suspension until such time, if any, that EPA subsequently determines that any monitor in the area has violated the 1997 annual $PM_{2.5}$ NAAQS; and, (3) is separate from, and will not influence or otherwise affect, any future designation determination or requirements for the Saint Louis $PM_{2.5}$ nonattainment area based on the 2006 24-hour $PM_{2.5}$ NAAQS or future $PM_{2.5}$ NAAQ revision. Final approval also suspends the sanction and Federal Implementation Plan (FIP) timetables for Illinois that were started on November 27, 2009 (EPA found in a November 27, 2009 Final Rule (74 FR 62251), that Illinois failed to submit a plan with the elements listed in the previous paragraph for the Saint Louis $PM_{2.5}$ nonattainment area). If, in the future, EPA determines, after notice-and-comment rulemaking in the **Federal Register**, that the area has violated the 1997 annual $PM_{2.5}$ NAAQS, the basis for the suspension of the specific requirements, set forth above, would no longer exist, and the States of Missouri and Illinois would thereafter have to address the pertinent requirements. The suspension of the sanction and FIP timetables would also end and those timetables would begin again at the point at which they were suspended.

This rulemaking action is limited to a determination that the air quality data show that the Saint Louis $PM_{2.5}$ nonattainment area has monitored attainment of the 1997 annual $PM_{2.5}$ NAAQS, and it is not equivalent to the redesignation of the Saint Louis $PM_{2.5}$ nonattainment area to attainment of the 1997 annual $PM_{2.5}$ NAAQS. It is not a redesignation to attainment under section 107(d)(3) of the CAA because the EPA has not yet approved a maintenance plan for the area as required under CAA section 175A, nor a determination that the Saint Louis $PM_{2.5}$ nonattainment area has met the other requirements for redesignation under the CAA. The designation status of the Missouri and Illinois portions of the Saint Louis $PM_{2.5}$ nonattainment area will remain nonattainment for the 1997 annual $PM_{2.5}$ NAAQS until such time as the EPA takes final rulemaking action to determine that such portions meet the CAA requirements for redesignation to attainment.

VI. When is this rule effective?

EPA finds that there is good cause for this determination of attainment to become effective on the date of publication of this action in the **Federal Register**, because a delayed effective date is unnecessary due to the nature of the action. The expedited effective date for this action is authorized under both 5 U.S.C. 553(d)(1), which provides that rule actions may become effective less than 30 days after publication if the rule "grants or recognizes an exemption or relieves a restriction," and 5 U.S.C. 553(d)(3), which allows an effective date less than 30 days after publication "as otherwise provided by the agency for good cause found and published with the rule." As noted above, this determination of attainment will result in a suspension of the requirements for the Saint Louis area to submit an attainment demonstration, a RFP plan, section 172(c)(9) contingency measures, and any other planning SIPs related to attainment of the 1997 annual $PM_{2.5}$ NAAQS for so long as the area continues to attain the $PM_{2.5}$ NAAQS. The suspension of these requirements is sufficient reason to allow an expedited effective date of this rule under 5 U.S.C. 553(d)(1). This determination of attainment will also suspend the sanction and FIP timetables for Illinois on the effective date of this rule. In addition, the suspension of the obligations of Illinois and Missouri to make submissions for these requirements provides good cause to make this rule effective on the date of publication of this action in the **Federal Register**, pursuant to 5 U.S.C. 553(d)(3). The purpose of the 30-day waiting period prescribed in 5 U.S.C. 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Where, as here, the final rule suspends requirements rather than imposing obligations, affected parties, such as the Saint Louis area, do not need time to adjust and prepare before the rule takes effect.

VII. Statutory and Executive Order Reviews

This action makes a determination of attainment based on air quality, and results in the suspension of certain 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 July 22, 2011. Filing a petition for reconsideration by the Administrator of this Final Rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Dated: May 10, 2011.

Susan Hedman,

Regional Administrator, Region 5.

Dated: May 16, 2011.

Karl Brooks,

Regional Administrator, Region 7.

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 O—Illinois

■ 2. Section 52.725 is amended by adding paragraph (k) to read as follows:

§ 52.725 Control strategy: Particulates.

* * * * *

(k) Determination of Attainment. EPA has determined, as of May 23, 2011, that the Saint Louis, Illinois-Missouri $PM_{2.5}$ nonattainment area has attained the 1997 $PM_{2.5}$ NAAQS. This determination, in accordance with 40 CFR 51.1004(c), suspends the requirements for this area to submit an attainment demonstration, associated reasonably available control measures, reasonable further progress, contingency measures, and other plan elements related to attainment of the standards for as long as the area continues to meet the 1997 $PM_{2.5}$ NAAQS.

Subpart AA—Missouri

■ 3. Subpart AA is amended by adding § 52.1341 to read as follows:

§ 52.1341 Control strategy: Particulate Matter.

Determination of Attainment. EPA has determined, as of May 23, 2011, that the Saint Louis, Illinois-Missouri $PM_{2.5}$ nonattainment area has attained the 1997 $PM_{2.5}$ NAAQS. This determination, in accordance with 40 CFR 51.1004(c), suspends the requirements for this area to submit an attainment demonstration, associated reasonably available control measures, reasonable further progress, contingency measures, and other plan elements related to attainment of the standards for as long as the area continues to meet the 1997 $PM_{2.5}$ NAAQS.

[FR Doc. 2011–12480 Filed 5–20–11; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2011–0002]

Final Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: Base (1% annual-chance) Flood Elevations (BFEs) and modified BFEs are made final for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that each community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: The date of issuance of the Flood Insurance Rate Map (FIRM) showing BFEs and modified BFEs for each community. This date may be obtained by contacting the office where the maps are available for inspection as indicated in the table below.

ADDRESSES: The final BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–4064, or (e-mail) *luis.rodriguez1@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Deputy Federal Insurance and Mitigation Administrator has resolved any appeals resulting from this notification.

This final rule is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and FIRM available at the address cited below for each community.The BFEs and modified BFEs are made final in the communities listed below. Elevations at selected locations in each community are shown.

National Environmental Policy Act. This final rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This final rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This final rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is amended as follows:

PART 67—[AMENDED]

■ 1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.11 [Amended]

■ 2. The tables published under the authority of § 67.11 are amended as follows:

State	City/town/county	Source of flooding	Location	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified
City of St. Louis, Missouri Docket No.: FEMA–B–1062				
Missouri	City of St. Louis	Mississippi River	Approximately 0.5 mile upstream of Poplar Street.	+426
			Approximately 0.6 mile upstream from I–270 at the northern boundary of the City of St. Louis.	+433

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of St. Louis
Maps are available for inspection at the Building Division, 1200 Market Street, Room 400, St. Louis, MO 63103.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Canyon County, Idaho, and Incorporated Areas Docket Nos.: FEMA–B–7776 and FEMA–B–1104			
Boise River	Approximately 2,000 feet upstream of I–84	+2360	City of Caldwell, City of Star, Unincorporated Areas of Canyon County.
	At the Ada County Boundary	+2456	
Indian Creek	Just upstream of Centennial Way	+2356	City of Caldwell, City of Nampa, Unincorporated Areas of Canyon County.
	Just upstream of West Columbian Road	+2555	
Mason Creek	At the confluence with the Boise River	+2370	City of Caldwell, City of Nampa, Unincorporated Areas of Canyon County.
	Just upstream of Lone Tree Lane/Ustick Road	+2450	
Renshaw Canal	Just upstream of Union Pacific Railroad	+2346	City of Greenleaf.
	Just upstream of State Highway 19	+2352	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Caldwell
Maps are available for inspection at 621 Cleveland Boulevard, 2nd Floor, Caldwell, ID 83605.

City of Greenleaf
Maps are available for inspection at 20523 North Whittier Drive, Greenleaf, ID 83626.

City of Nampa
Maps are available for inspection at 411 3rd Street South, Nampa, ID 83651.

City of Star
Maps are available for inspection at 10769 West State Street, Star, ID 83669.

Unincorporated Areas of Canyon County
Maps are available for inspection at 1115 Albany Street, Caldwell, ID 83605.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Douglas County, Illinois, and Incorporated Areas Docket No.: FEMA–B–1093			
Bourbon No. 3	Approximately 0.4 mile downstream of Vine Street	+654	Unincorporated Areas of Douglas County.
	At Vine Street	+658	
Embarras River	Approximately 0.7 mile upstream of U.S. Route 36	+641	Village of Camargo.
	Approximately 0.5 mile upstream of Main Street	+644	
Lake Fork	Approximately 900 feet downstream of U.S. Route 36	+657	Village of Atwood.
	Approximately 100 feet downstream of U.S. Route 36	+657	
West Ditch	Approximately 50 feet downstream of Sycamore Street	+650	City of Villa Grove, Unincorporated Areas of Douglas County.
	Approximately 0.41 mile upstream of Harrison Street	+651	
West Fork Kaskaskia River	At the railroad	+653	Unincorporated Areas of Douglas County.
	Approximately 300 feet upstream of County Road 500 North.	+655	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Villa Grove
Maps are available for inspection at City Hall, 612 East Front Street, Villa Grove, IL 61956.

Unincorporated Areas of Douglas County
Maps are available for inspection at the Douglas County Courthouse, 401 South Center Street, Tuscola, IL 61953.

Village of Atwood
Maps are available for inspection at the Municipal Building, 110 West Central Avenue, Atwood, IL 61913.

Village of Camargo
Maps are available for inspection at the Douglas County Courthouse, 401 South Center Street, Tuscola, IL 61953.

Carlisle County, Kentucky, and Incorporated Areas Docket No.: FEMA–B–1111			
Back Slough (backwater effects from Mississippi River).	From the confluence with Mayfield Creek to approximately 3.2 miles upstream of the confluence with Mayfield Creek.	+328	Unincorporated Areas of Carlisle County.
Gray Creek (backwater effects from Mississippi River).	From the confluence with Mayfield Creek to approximately 1,142 feet upstream of U.S. Route 51.	+329	Unincorporated Areas of Carlisle County.
Gray Creek Tributary 2 (backwater effects from Mississippi River).	From the confluence with Gray Creek to approximately 0.68 mile upstream of the confluence with Gray Creek.	+329	Unincorporated Areas of Carlisle County.
Hurricane Creek (backwater effects from Mississippi River).	From the confluence with Mayfield Creek to approximately 0.91 mile upstream of the confluence with Mayfield Creek.	+329	Unincorporated Areas of Carlisle County.
Mayfield Creek	At the confluence with the Mississippi River	+329	Unincorporated Areas of Carlisle County.
	Approximately 0.62 mile upstream of U.S. Route 62	+352	
Mayfield Creek Tributary 23 (backwater effects from Mayfield Creek).	From the confluence with Mayfield Creek to approximately 0.63 mile upstream of the confluence with Mayfield Creek.	+346	Unincorporated Areas of Carlisle County.
Mayfield Creek Tributary 6 (backwater effects from Mississippi River).	From the confluence with Mayfield Creek to approximately 1.92 miles upstream of the confluence with Mayfield Creek.	+329	Unincorporated Areas of Carlisle County.
Mayfield Creek Tributary 6.3 (backwater effects from Mississippi River).	From the confluence with Mayfield Creek Tributary 6 to approximately 0.8 mile upstream of the confluence with Mayfield Creek Tributary 6.	+329	Unincorporated Areas of Carlisle County.
Mississippi River	Approximately 2,656 feet upstream of the confluence with Sandy Branch in Hickman County (at county boundary).	+325	Unincorporated Areas of Carlisle County.
	Approximately 158 feet upstream of the confluence with Mayfield Creek.	+329	
Sandy Branch (backwater effects from Mississippi River).	From the confluence with Sandy Branch Tributary 2 to approximately 3.2 miles upstream of the confluence with Sandy Branch Tributary 2.	+326	Unincorporated Areas of Carlisle County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Sandy Branch Tributary 2 (backwater effects from Mississippi River).	From the confluence with Sandy Branch to approximately 1 mile upstream of the confluence with Sandy Branch.	+325	Unincorporated Areas of Carlisle County.
Truman Creek (backwater effects from Mississippi River).	From the confluence with Mayfield Creek to approximately 1.9 mile upstream of the confluence with Mayfield Creek.	+329	Unincorporated Areas of Carlisle County.
West Fork Mayfield Creek (backwater effects from Mississippi River).	From the confluence with Mayfield Creek to approximately 1,548 feet upstream of U.S. Route 62.	+329	Unincorporated Areas of Carlisle County.
Wilson Creek (backwater effects from Mayfield Creek).	From the confluence with Mayfield Creek to approximately 1,707 feet upstream of the confluence with Mayfield Creek.	+334	Unincorporated Areas of Carlisle County.

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

Unincorporated Areas of Carlisle County

Maps are available for inspection at 70 West Court Street, Bardwell, KY 42023.

Estill County, Kentucky, and Incorporated Areas
Docket No.: FEMA–B–1111

Big Doe Creek (backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 769 feet downstream of Roberts Road.	+632	Unincorporated Areas of Estill County.
Billey Fork (backwater effects from Kentucky River).	From the confluence with Millers Creek to approximately 1,390 feet upstream of CSX Abandoned Railroad.	+635	Unincorporated Areas of Estill County.
Blue Run (backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 1.1 miles upstream of the confluence with the Kentucky River.	+621	Unincorporated Areas of Estill County.
Buck Creek (backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 0.4 mile downstream of Little Buck Creek Road.	+636	Unincorporated Areas of Estill County.
Buck Creek Tributary 1 (backwater effects from Kentucky River).	From the confluence with Buck Creek to approximately 685 feet upstream of Little Buck Creek Road.	+635	Unincorporated Areas of Estill County.
Calloway Creek (backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 1,708 feet downstream of Dry Branch Road.	+626	Unincorporated Areas of Estill County.
Calloway Creek Tributary 1 (backwater effects from Kentucky River).	From the confluence with Calloway Creek to approximately 0.7 mile upstream of the confluence with Calloway Creek.	+627	Unincorporated Areas of Estill County.
Campbell Creek (backwater effects from Kentucky River).	From the confluence with Cow Creek to approximately 0.7 mile upstream of Sid Griffie Road.	+632	Unincorporated Areas of Estill County.
Caney Branch (backwater effects from Kentucky River).	From the confluence with the Red River to approximately 0.6 mile upstream of the confluence with the Red River.	+605	Unincorporated Areas of Estill County.
Clear Creek (backwater effects from Kentucky River).	From the confluence with Station Camp Creek to approximately 0.4 mile downstream of Clearcreek Road.	+630	Unincorporated Areas of Estill County.
Cow Creek (backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 1,307 feet downstream of Cow Creek Road.	+632	Unincorporated Areas of Estill County.
Crooked Creek (backwater effects from Kentucky River).	From the confluence with Station Camp Creek to approximately 1.3 miles upstream of Crooked Creek Road.	+631	Unincorporated Areas of Estill County.
Drowning Creek (backwater effects from Kentucky River).	From the confluence with the Kentucky River to just downstream of Richmond Road.	+620	Unincorporated Areas of Estill County.
Furnace Fork (backwater effects from Kentucky River).	From the confluence with Millers Creek to approximately 966 feet upstream of Cobhill Road.	+635	Unincorporated Areas of Estill County.
Hinton Branch (backwater effects from Kentucky River).	From the confluence with Crooked Creek to approximately 0.5 mile upstream of Newton Circle.	+631	Unincorporated Areas of Estill County.
Hoys Fork (backwater effects from Kentucky River).	From the confluence with Crooked Creek to approximately 0.6 mile upstream of Dug Hill Road.	+631	Unincorporated Areas of Estill County.
Kentucky River	At the confluence with the Red River	+605	City of Irvine, City of Ravenna, Unincorporated Areas of Estill County.
	Approximately 8.7 miles upstream of the confluence with Buck Creek.	+645	
Kentucky River Tributary 4 (backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 1.0 mile upstream of the confluence with the Kentucky River.	+627	Unincorporated Areas of Estill County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Little Doe Creek (backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 532 feet upstream of Little Doe Creek Road.	+632	Unincorporated Areas of Estill County.
Long Branch II (backwater effects from Kentucky River).	From the confluence with Furnace Fork to approximately 0.4 mile upstream of CSX Abandoned Railroad.	+635	Unincorporated Areas of Estill County.
Millers Creek (backwater effects from Kentucky River).	From the confluence with the Kentucky River to the confluence with Billey Fork.	+635	Unincorporated Areas of Estill County.
Noland Creek (backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 364 feet downstream of Noland Creek Road.	+613	Unincorporated Areas of Estill County.
Polecat Creek (backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 0.6 mile downstream of CSX Railroad.	+624	Unincorporated Areas of Estill County.
Possum Run (backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 0.9 mile downstream of Opossum Run Road.	+621	Unincorporated Areas of Estill County.
Red River (backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 0.4 mile upstream of the confluence with Caney Branch.	+605	Unincorporated Areas of Estill County.
South Fork Noland Creek (backwater effects from Kentucky River).	From the confluence with Noland Creek to approximately 0.8 mile upstream of the confluence with Noland Creek.	+613	Unincorporated Areas of Estill County.
Station Camp Creek (backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 1.6 miles upstream of the confluence with Crooked Creek.	+631	Unincorporated Areas of Estill County.
Sudders Fork (backwater effects from Kentucky River).	From the confluence with Millers Creek to approximately 0.4 mile upstream of CSX Abandoned Railroad.	+635	Unincorporated Areas of Estill County.
Sweet Lick Branch (backwater effects from Kentucky River).	From the confluence with White Oak Creek to approximately 669 feet upstream of Main Street.	+630	Unincorporated Areas of Estill County.
White Oak Creek (backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 795 feet upstream of White Oak Road.	+630	Unincorporated Areas of Estill County.

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Irvine
Maps are available for inspection at 101 Chestnut Street, Irvine, KY 40336.

City of Ravenna
Maps are available for inspection at 620 Main Street, Ravenna, KY 40472.

Unincorporated Areas of Estill County
Maps are available for inspection at 130 Main Street, Irvine, KY 40336.

Fulton County, Kentucky, and Incorporated Areas
Docket No.: FEMA–B–1111

Bayou de Chien (backwater effects from Mississippi River).	From the confluence with the Mississippi River to 0.5 mile upstream of the confluence with Little Bayou de Chien.	+321	Unincorporated Areas of Fulton County.
Harris Fork Creek Tributary 16 (backwater effects from Harris Fork Creek).	At the confluence with Harris Fork Creek	+365	City of Fulton, Unincorporated Areas of Fulton County.
	Approximately 0.4 mile upstream of the confluence with Harris Fork Creek.	+368	
Little Bayou de Chien (backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 2,140 feet downstream of KY–94.	+321	Unincorporated Areas of Fulton County.
Little Bayou de Chien Tributary 29 (backwater effects from Mississippi River).	From the confluence with Little Bayou de Chien to approximately 0.54 mile upstream of the confluence with Little Bayou de Chien.	+321	Unincorporated Areas of Fulton County.
Little Bayou de Chien Tributary 35 (backwater effects from Mississippi River).	From the confluence with Little Bayou de Chien to approximately 655 feet upstream of the confluence with Little Bayou de Chien.	+321	Unincorporated Areas of Fulton County.
Little Bayou de Chien Tributary 9 (backwater effects from Mississippi River).	From the confluence with Little Bayou de Chien to approximately 0.7 mile upstream of the confluence with Little Bayou de Chien.	+321	Unincorporated Areas of Fulton County.
Little Mud Creek (backwater effects from Mississippi River).	From the confluence with Bayou de Chien to approximately 0.5 mile upstream of KY–94.	+320	Unincorporated Areas of Fulton County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Little Mud Creek Tributary 1 (backwater effects from Mississippi River).	From the confluence with Little Mud Creek to approximately 1.2 miles upstream of the confluence with Little Mud Creek.	+320	Unincorporated Areas of Fulton County.
Mississippi River	At the Tennessee State boundary	+299	City of Hickman, Unincorporated Areas of Fulton County.
	Approximately 5.7 miles upstream of the confluence with Bayou de Chien.	+321	
Mud Creek (backwater effects from Mississippi River).	From the confluence with Bayou de Chien to approximately 2,300 feet upstream of the confluence with Mud Creek Tributary 13.	+320	Unincorporated Areas of Fulton County.
Mud Creek Tributary 10 (backwater effects from Mississippi River).	From the confluence with Mud Creek to approximately 0.9 mile upstream of the confluence with Mud Creek.	+320	Unincorporated Areas of Fulton County.
Mud Creek Tributary 12 (backwater effects from Mississippi River).	From the confluence with Mud Creek to approximately 350 feet upstream of KY–1127.	+320	Unincorporated Areas of Fulton County.
Mud Creek Tributary 13 (backwater effects from Mississippi River).	From the confluence with Mud Creek to approximately 1,775 feet upstream of the confluence with Mud Creek.	+320	Unincorporated Areas of Fulton County.
Mud Creek Tributary 3 (backwater effects from Mississippi River).	From the confluence with Mud Creek to approximately 0.83 mile upstream of KY–94.	+320	Unincorporated Areas of Fulton County.
Mud Creek Tributary 4 (backwater effects from Mississippi River).	From the confluence with Mud Creek to approximately 1 mile upstream of KY–2140.	+320	Unincorporated Areas of Fulton County.

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Fulton
Maps are available for inspection at 101 Nelson Tripp Place, Fulton, KY 42041.

City of Hickman
Maps are available for inspection at 1812 South 7th Street, Hickman, KY 42350.

Unincorporated Areas of Fulton County
Maps are available for inspection at 2216 Myron Cory Drive, Hickman, KY 42050.

Nelson County, Kentucky, and Incorporated Areas
Docket No.: FEMA–B–1093

Beech Fork Tributary 27 (backwater effects from Beech Fork).	From the confluence with Beech Fork to just downstream of Martha Layne Collins Bluegrass Parkway.	+480	Unincorporated Areas of Nelson County.
Beech Fork Tributary 29 (backwater effects from Beech Fork).	From the confluence with Beech Fork to approximately 0.8 mile upstream of the confluence with Beech Fork.	+478	Unincorporated Areas of Nelson County.
Buffalo Creek (backwater effects from Beech Fork).	From the confluence with Beech Fork to just downstream of Boston Road.	+482	Unincorporated Areas of Nelson County.
Cedar Creek (backwater effects from Beech Fork).	From the confluence with Beech Fork to approximately 1,710 feet upstream of the confluence with Cedar Creek Tributary 12.	+475	Unincorporated Areas of Nelson County.
David Run (backwater effects from Rolling Fork).	From the confluence with Rolling Fork to approximately 0.7 mile upstream of the confluence with Rolling Fork.	+467	Unincorporated Areas of Nelson County.
Price Creek (backwater effects from Rolling Fork).	From the confluence with Rolling Fork to approximately 0.6 mile upstream of the confluence with Price Creek Tributary 7.	+465	Unincorporated Areas of Nelson County.
Price Creek Tributary 7 (backwater effects from Rolling Fork).	From the confluence with Price Creek to approximately 0.5 mile upstream of the confluence with Price Creek.	+465	Unincorporated Areas of Nelson County.
Rowan Creek (backwater effects from Beech Fork).	From the confluence with Beech Fork to approximately 1,140 feet upstream of the confluence with Town Creek.	+486	City of Bardstown, Unincorporated Areas of Nelson County.
Taylorsville Lake	Entire shoreline	+592	Unincorporated Areas of Nelson County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Timber Creek (backwater effects from Taylorsville Lake).	From the confluence with Taylorsville Lake to approximately 0.7 mile downstream of Highview Church Road.	+592	Unincorporated Areas of Nelson County.
Town Creek (backwater effects from Beech Fork).	From the confluence with Rowan Creek to approximately 585 feet upstream of the confluence with Rowan Creek.	+486	City of Bardstown, Unincorporated Areas of Nelson County.
Vittow Creek (backwater effects from Rolling Fork).	From the confluence with Rolling Fork to approximately 0.6 mile upstream of the confluence with Rolling Fork.	+463	Unincorporated Areas of Nelson County.

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Bardstown

Maps are available for inspection at City Hall, 220 North 5th Street, Morgantown, KY 42261.

Unincorporated Areas of Nelson County

Maps are available for inspection at the Nelson County Courthouse, 113 East Stephen Foster Avenue, Morgantown, KY 42261.

Taylor County, Kentucky, and Incorporated Areas
Docket No.: FEMA–B–1093

Brushy Fork (backwater effects from Green River Lake).	From the confluence with Long Branch to approximately 0.4 mile upstream of the confluence with Long Branch.	+713	Unincorporated Areas of Taylor County.
Green River Lake	Entire shoreline	+713	Unincorporated Areas of Taylor County.
Green River Tributary 24.2 (backwater effects from Green River Lake).	From the confluence with Green River Lake to approximately 1,300 feet upstream of the confluence with Green River Lake.	+713	Unincorporated Areas of Taylor County.
Long Branch (backwater effects from Green River Lake).	From the confluence with Green River Lake to approximately 1,022 feet upstream of the confluence with Brushy Fork.	+713	Unincorporated Areas of Taylor County.
Opossum Branch (backwater effects from Green River Lake).	From the confluence with Robinson Creek to approximately 1,716 feet upstream of the confluence with Robinson Creek.	+713	Unincorporated Areas of Taylor County.
Robinson Creek (backwater effects from Green River Lake).	From the confluence with Green River Lake to approximately 730 feet downstream of the confluence with Duton Creek.	+713	Unincorporated Areas of Taylor County.
Robinson Creek Tributary 1 (backwater effects from Green River Lake).	From the confluence with Green River Lake to approximately 0.6 mile upstream of the confluence with Green River Lake.	+713	Unincorporated Areas of Taylor County.
Robinson Creek Tributary 10 (backwater effects from Robinson Creek).	From the confluence with Robinson Creek to approximately 88 feet upstream of Bradfordsville Road.	+741	Unincorporated Areas of Taylor County.
Robinson Creek Tributary 12 (backwater effects from Robinson Creek).	From the confluence with Robinson Creek to approximately 1,166 feet upstream of the confluence with Robinson Creek.	+732	Unincorporated Areas of Taylor County.
Robinson Creek Tributary 7 (backwater effects from Robinson Creek).	From the confluence with Robinson Creek to approximately 1,855 feet upstream of the confluence with Robinson Creek.	+750	Unincorporated Areas of Taylor County.
Robinson Creek Tributary 8 (backwater effects from Robinson Creek).	From the confluence with Robinson Creek to approximately 1,041 feet upstream of the confluence with Robinson Creek.	+744	Unincorporated Areas of Taylor County.
Robinson Creek Tributary 9 (backwater effects from Robinson Creek).	From the confluence with Robinson Creek to approximately 55 feet upstream of Bradfordsville Road.	+743	Unincorporated Areas of Taylor County.
Sprat Branch (backwater effects from Green River Lake).	From the confluence with Green River Lake to approximately 0.7 mile upstream of Elkhorn Road.	+713	Unincorporated Areas of Taylor County.
Stone Quarry Creek (backwater effects from Green River Lake).	From the confluence with Green River Lake to approximately 1,010 feet upstream of the confluence with Stone Quarry Creek Tributary 5.	+713	Unincorporated Areas of Taylor County.
Stone Quarry Creek Tributary 5 (backwater effects from Green River Lake).	From the confluence with Stone Quarry Creek to approximately 845 feet upstream of the confluence with Stone Quarry Creek.	+713	Unincorporated Areas of Taylor County.
Stoner Creek (backwater effects from Green River Lake).	From the confluence with Robinson Creek to approximately 1.2 miles upstream of the confluence with Robinson Creek.	+713	Unincorporated Areas of Taylor County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Tallow Creek Tributary 4 (backwater effects from Tallow Creek).	From the confluence with Tallow Creek to approximately 920 feet upstream of Bradfordsville Road.	+831	Unincorporated Areas of Taylor County.
Wilson Creek (backwater effects from Green River Lake).	From the confluence with Green River Lake to approximately 1,630 feet upstream of the confluence with Wilson Creek Tributary 14.	+713	Unincorporated Areas of Taylor County.
Wilson Creek Tributary 14 (backwater effects from Green River Lake).	From the confluence with Wilson Creek to approximately 670 feet upstream of the confluence with Wilson Creek.	+713	Unincorporated Areas of Taylor County.

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

Unincorporated Areas of Taylor County

Maps are available for inspection at the Taylor County Judicial Center, 300 East Main Street, Campbellsville, KY 42718.

Dorchester County, Maryland, and Incorporated Areas
Docket No.: FEMA–B–1083

Marshy Hope Creek	At the Caroline County boundary	+11	Unincorporated Areas of Dorchester County.
	Approximately 250 feet downstream of the Town of Federalsburg corporate limits.	+11	
Wright's Branch	At Delaware Avenue	+35	Unincorporated Areas of Dorchester County.
	Approximately 400 feet upstream of Andrews Street	+37	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

Unincorporated Areas of Dorchester County

Maps are available for inspection at the Dorchester County Office Building, 501 Court Lane, Cambridge, MD 21613.

Grenada County, Mississippi, and Incorporated Areas
Docket No.: FEMA–B–1093

Grenada Lake	Entire shoreline within community	+237	City of Grenada, Unincorporated Areas of Grenada County.

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Grenada

Maps are available for inspection at City Hall, 108 South Main Street, Grenada, MS 38901.

Unincorporated Areas of Grenada County

Maps are available for inspection at the Grenada County Courthouse, 59 Green Street, Room 1, Grenada, MS 38901.

Dade County, Missouri, and Incorporated Areas
Docket No.: FEMA–B–1093

Stockton Lake	Entire shoreline	+887	Unincorporated Areas of Dade County.

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected

ADDRESSES

Unincorporated Areas of Dade County

Maps are available for inspection at 300 West Water Street, Greenfield, MO 65661.

Stutsman County, North Dakota, and Incorporated Areas
Docket No.: FEMA–B–1087

Spiritwood Lake	Approximately 124 feet upstream of 4713 Street Southeast.	+1448	City of Spiritwood Lake City, Unincorporated Areas of Stutsman County.

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Spiritwood Lake City

Maps are available for inspection at 603 East Lake County Road, Jamestown, ND 58401.

Unincorporated Areas of Stutsman County

Maps are available for inspection at 511 2nd Avenue Southeast, Jamestown, ND 58401.

Dillon County, South Carolina, and Incorporated Areas
Docket No.: FEMA–B–1122

Bear Swamp Creek	Just upstream of West 5th Avenue	+81	Town of Lake View.
	Approximately 900 feet upstream of Cedar Street	+92	
Little Pee Dee River	Approximately 1,200 feet upstream of the confluence with Maple Swamp.	+85	Unincorporated Areas of Dillon County.
	Approximately 1,600 feet upstream of State Route 9	+87	
Maple Swamp	At the confluence with the Little Pee Dee River	+85	Town of Dillon, Unincorporated Areas of Dillon County.
	Approximately 200 feet upstream of the railroad	+104	
Maple Swamp Tributary 5	At the confluence with Maple Swamp	+106	Town of Dillon, Unincorporated Areas of Dillon County.
	Approximately 1,400 feet upstream of Longstreet Road	+113	
Reedy Creek Tributary 1	Approximately 3,000 feet downstream of Academy Street	+88	Town of Latta, Unincorporated Areas of Dillon County.
	Just upstream of the railroad	+103	
Reedy Creek Tributary 2	Approximately 2,000 feet downstream of West Academy Street.	+93	Town of Latta, Unincorporated Areas of Dillon County.
	Approximately 600 feet upstream of Manning View Road	+102	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

Town of Dillion

Maps are available for inspection at 401 West Main Street, Dillon, SC 29536.

Town of Lake View

Maps are available for inspection at 205 North Main Street, Lake View, SC 29563.

Town of Latta

Maps are available for inspection at 107 Northwest Railroad Avenue, Latta, SC 29565.

Unincorporated Areas of Dillon County

Maps are available for inspection at 109 South 3rd Street, Dillon, SC 29536.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: May 16, 2011.

Edward L. Connor,

Acting Federal Insurance and Mitigation Administrator, Department of Homeland Security, Federal Emergency Management Agency.

FR Doc. 2011–12653 Filed 5–20–11; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 21

[Docket No. FWS–R9–MB–2009–0018; 91200–1231–9BPP]

RIN 1018–AT60

Migratory Bird Permits; Changes in the Regulations Governing Raptor Propagation

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We amend the regulations governing captive propagation of raptors in the United States. We reorganize the current regulations, and add or change some provisions therein. The changes make it easier to understand the requirements for raptor propagation, make it simpler to conduct raptor propagation, and clarify the procedures for obtaining a propagation permit. These regulations continue to prohibit propagation of golden eagles, though we may consider allowing it in the future.

DATES: This rule is effective on June 22, 2011.

FOR FURTHER INFORMATION CONTACT: Dr. George T. Allen, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, 703–358–1825.

SUPPLEMENTARY INFORMATION:

I. Background

The Fish and Wildlife Service is the Federal agency with the primary responsibility for managing migratory birds. Our authority is based on the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703 *et seq.*), which implements conventions with Great Britain (for Canada), Mexico, Japan, and the Soviet Union (Russia). Raptors (birds of prey) are afforded Federal protection by the 1972 amendment to the Convention for the Protection of Migratory Birds and Game Animals, February 7, 1936, United States-Mexico, as amended; the Convention between the United States and Japan for the Protection of Migratory Birds in Danger of Extinction and Their Environment, September 19, 1974; and the Convention Between the United States of America and the Union of Soviet Socialist Republics (Russia) Concerning the Conservation of Migratory Birds and Their Environment, November 26, 1976.

The taking and use of raptors are strictly prohibited except as permitted under regulations implementing the MBTA. Raptors also may be protected by State or tribal regulations. The issuance of permits for migratory birds is authorized by the MBTA and subsequent regulations. They are in title 50, Code of Federal Regulations (CFR), parts 10, 13, 21, and (for eagles) 22. Regulations for issuing permits for propagation of captive raptors are at 50 CFR 21.30.

On October 14, 2005, we published in the **Federal Register** a proposed rule to change the regulations governing captive propagation of raptors in the United States (70 FR 60052). We proposed to reorganize the current regulations and add or change some provisions. Our goal was to make it easier for the public to understand the requirements for raptor propagation and the procedures for obtaining a propagation permit. We opened a public comment period on the proposed rule until January 12, 2006.

On June 21, 2006, we published a notice of availability of a "Draft Environmental Assessment on Take of Raptors From the Wild for Falconry and Raptor Propagation" (71 FR 35599). We solicited comments on the draft environmental assessment until September 19, 2006, and then on that day, we published a notice in the **Federal Register** to extend the comment period until November 21, 2006 (71 FR 54794). After consideration of all the comments received, we published a notice of availability of the "Final Environmental Assessment on Take of Raptors From the Wild for Falconry and Raptor Propagation" and a Finding of No Significant Impact on June 6, 2007 (72 FR 31268).

II. Changes in the Regulations Governing Raptor Propagation

We have rewritten the regulations at 50 CFR 21.30 on the propagation of captive raptors in plain language and have changed or added some provisions. The following are substantive changes to the regulations:

1. The permit period is changed from 3 to 5 years.
2. Until they are 1 year old, captive-bred offspring may be used in actual hunting as a means of training them.
3. We eliminate the requirement for reporting within 5 days on eggs laid by raptors in propagation. An annual report on propagation efforts will be required from permittees.
4. A permittee will not have to submit or have a copy of a FWS Form 3–186A for raptors produced by captive propagation if the raptors are kept in the permittee's possession under his or her propagation permit.

III. Changes From the Proposed Rule

We made many wording and organizational changes from the proposed rule of October 14, 2005 (70 FR 60052). Major changes from the proposed rule are limited.

1. We deleted the provision requiring proof of successful propagation in order to renew a raptor propagation permit.
2. We simplified the facilities requirements now found in paragraph (c).
3. We will allow the use of propagation raptors in education programs per paragraph (n).
4. We will allow hacking of raptors produced by captive propagation per paragraph (q).
5. We will allow ISO-compliant microchips in addition to banding per paragraphs (e)(1)(ii) and (e)(3).

IV. Comments on the Proposed Rule

We received approximately 500 comments from individuals and organizations, including 6 from States, on the proposed rule published on October 14, 2005 (70 FR 60052). We reviewed the comments, and respond here to the most significant issues raised.

Issue. *Requirement for demonstrated propagation success for permit renewal.* A significant proportion of those who commented on this requirement opposed it. Most pointed out that it is very difficult to achieve breeding success with some species, and it may even be difficult with some individual raptors. The change was supported, without explanation, by some States.

Response. We agree that this requirement may set too high a standard. We deleted it from this final rule.

Issue. *Requirement that propagation raptors be housed separately from other raptors.* Most commenters, including some States, opposed this proposal because it would add an "undue financial burden" for construction of facilities to house the birds. Visual barriers would suffice for separating them.

Response. We eliminated this requirement.

Issue. *Hacking of captive-bred raptors should be allowed.* Hacking the birds, particularly in their first year, would

make them more fit for use in falconry and propagation.

Response. We added a provision for hacking.

Issue. *Returning used bands.* The current regulations and the proposed regulations require return of used bands. The bands are destroyed when removed, and returning them adds concerns about disease transmission.

Response. We revised the language to require destruction of the bands at paragraph (e)(2)(iv).

Issue. *Temporary care of nestlings.* It was suggested that we provide a way for "assistants" to the propagator to care for young nestlings, including keeping the nestlings at a location other than the propagator's facilities. This would allow better care of nestlings when, for example, the permittee is at work.

Response. We added provisions for such care to the regulations at paragraph (j).

Issue. *Maintenance of records after expiration of a propagation permit. Many commenters argued that the requirement for keeping records for 5 years after a permit expires is unwarranted.*

After the expiration of the permit, law enforcement is no longer authorized to come onto the former permittee's premises to inspect anything, including the former permittee's paperwork. Law enforcement would have to seek a judicially issued search warrant to come onto the premises to inspect the paperwork of an expired permit. Consequently, the requirement for a permittee to maintain paperwork for an additional 5 years is a burden without any useful benefit.

Response. Maintenance of records for 5 years is required of all permit types issued by the Fish and Wildlife Service (50 CFR 13.46). The burden from keeping these records is minimal. Law Enforcement officers may not inspect a former permittee's premises, but they may request the permittee's records, which the permittee agreed to keep. Each permittee should recognize that he or she may want the records later if he or she wishes to get another migratory bird permit, a Convention on International Trade in Endangered Species of Wild Fauna and Flora permit, or a Wild Bird Conservation Act permit.

Issue. "*The Division believes that a form 3–186A should be completed and submitted for all birds, including those produced in captive propagation, and kept under the propagation permit of the original propagator. Requiring 3–186A for all birds whenever a bird is produced (reaches 2 weeks post-hatch), acquired, transferred, or added to a propagation permit will enable adequate regulatory oversight by documenting each bird's history.*" *(State agency)*

Response. We understand the State's concerns on this point. However, we believe that banding records should be sufficient for law enforcement purposes.

Issue. "*Given the current threats of West Nile Virus, Avian Influenza and environmental pollutants to wild raptor populations, and considering the overwhelming costs of recovering endangered raptor populations, the Service might consider taking steps to encourage raptor propagation in the private sector with more user-friendly oversight.*" *(State agency)*

Response. We have attempted to simplify and clarify these regulations, and we hope that they accomplish what the agency asked.

Issue. *Allowing propagators to train offspring by allowing them to hunt.* Two States opposed the provision that would allow propagators to use captive-bred raptors produced in their facilities in hunting or other training activities until the raptors are 1 year old.

Response. We recognize that this provision would essentially allow a propagator to fly birds in falconry. However, there is value in exposing first-year raptors to training, hunting, or both. A State may wish to further restrict training of raptors in this manner.

Issue. *Many commenters said that we should not require that non-native raptors be banded.*

Response. These regulations cover only species protected under the MBTA. We do not require that species not protected under the MBTA be banded.

Required Determinations

Regulatory Planning and Review (Executive Order 12866)

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

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

(b) Whether the rule will create inconsistencies with other Federal agencies' actions,

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

(d) Whether the rule raises novel legal or policy issues.

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

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, Pub. L. 104–121), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis (RFA) that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no RFA is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide the statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

We have examined this rule's potential effects on small entities as required by the Regulatory Flexibility Act, and have determined that this action will not have a significant economic impact on a substantial number of small entities. This determination is based on the fact that we are not making any changes to the current requirements for raptor propagation facilities (housing). The changes we are making are intended primarily to clarify the requirements for raptor propagation and the procedures for obtaining a raptor propagation permit. In addition, the changes do not affect either the information collected or the fee required to obtain a permit. Consequently, we certify that this rule will not have a significant economic effect on a substantial number of small entities, and a regulatory flexibility analysis is not required. Therefore, this is not a major rule under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2)) because it will not have a significant impact on a substantial number of small entities.

a. This rule does not have an annual effect on the economy of $100 million or more. We foresee no effects on the economy from implementation of this rule.

b. This rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. The practice of raptor propagation does not significantly affect costs or prices in any sector of the economy.

c. This rule will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Raptor propagation is an endeavor of private individuals. Neither regulation nor practice of raptor propagation significantly affects business activities.

Unfunded Mandates Reform Act

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

a. This rule will not "significantly or uniquely" affect small governments, and thus a Small Government Agency Plan is not required. Raptor propagation is an endeavor of private individuals. Neither regulation nor practice of raptor propagation affects small government activities in any significant way.

b. This rule will not produce a Federal mandate of $100 million or greater in any year, i.e., it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. States will not have to alter their raptor propagation regulations to comply with the proposed revisions.

Takings

In accordance with Executive Order 12630, the rule does not have significant takings implications. This rule has no provision for taking of private property. A takings implication assessment is not required.

Federalism

This rule does not have sufficient Federalism effects to warrant preparation of a Federalism assessment under Executive Order 13132. It will not interfere with the States' ability to manage themselves or their funds. No significant economic impacts should result from the changes in the regulation of raptor propagation. However, this rule provides the opportunity for States to cooperate in management of raptor propagation permits and to ease the permitting process for permit applicants.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This proposed rule does not contain new or revised information collection requirements for which OMB approval is required under the Paperwork Reduction Act. Information collection required by this regulation is covered by OMB approval 1018–0022, which expires on November 30, 2010. This regulation does not add to that approved information collection. We may not conduct or sponsor, and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We have analyzed this rule in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C. 432–437f) and Part 516 of the U.S. Department of the Interior Manual (516 DM).). We completed a Final Environmental Assessment (FEA) in June 2007 (U.S.F.W.S. 2007) (72 FR 31268; June 6, 2007) to assess establishment of regulations governing the take of raptors for falconry and raptor propagation. We concluded in a Finding of No Significant Impact that the take of raptors from the wild for these purposes is not a major Federal action significantly affecting the quality of the human environment. You can obtain a copy of the EA by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

Environmental Consequences of the Action

The changes we make are primarily in the combining, reorganizing, and rewriting of the regulations. The environmental impacts of this action are limited.

Socio-economic. We do not expect the action to have discernible socio-economic impacts.

Raptor populations. This rule will not significantly alter the conduct of raptor propagation in the United States. We expect it to have no discernible effect on them.

Endangered and Threatened Species. The regulations have no provisions that affect threatened or endangered species.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and 512 DM 2, we have evaluated potential effects on federally recognized Indian Tribes and have determined that there are no potential effects. This rule will not interfere with the Tribes' ability to manage themselves or their funds, or to regulate raptor propagation on tribal lands.

Energy Supply, Distribution, or Use (Executive Order 13211)

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Because this rule only affects the practice of raptor propagation in the United States, it is not a significant regulatory action under Executive Order 12866, and will not significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and thus no Statement of Energy Effects is required.

Compliance With Endangered Species Act Requirements

Section 7 of the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires that "The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter" (16 U.S.C. 1536(a)(1)). It further states that the Secretary must "insure that any authorized, funded, or completed action" * * * "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat" (16 U.S.C. 1536(a)(2)). The Division of Threatened and Endangered Species concurred with our finding that the revised regulations will not affect listed species.

List of Subjects in 50 CFR Part 21

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

Regulation Promulgation

For the reasons stated in the preamble, we hereby amend subparts A and C of part 21, subchapter B, chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 21—[AMENDED]

■ 1. The authority citation for part 21 continues to read as follows:

Authority: Migratory Bird Treaty Act, 40 Stat. 755 (16 U.S.C. 703); Public Law 95–616, 92 Stat. 3112 (16 U.S.C. 712(2)); Public Law 106–108, 113 Stat. 1491, Note Following 16 U.S.C. 703.

■ 2. Revise § 21.30 to read as set forth below.

§ 21.30 Raptor propagation permits.

(a) *Legal basis for regulating raptor propagation.* (1) Among other actions, the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703 *et seq.*) prohibits any person from capturing from the wild, possessing, purchasing, bartering,

selling, or offering to purchase, barter, or sell raptors (vultures, kites, eagles, hawks, caracaras, falcons, and owls) listed in § 10.13 of this chapter unless the activities are allowed by Federal permit issued pursuant to this part and part 13 of this chapter, or as permitted by regulations in this part.

(i) This section covers all "native" raptors (accipitriformes, falconiformes, and strigiformes listed in § 10.13 of this chapter), and applies to any person who possesses one or more wild-caught, captive-bred, or hybrid raptors protected under the MBTA to use in raptor propagation, except that neither bald eagles *(Haliaeetus leucocephalus)* nor golden eagles *(Aquila chrysaetos)* may be propagated under these regulations or any other permit regulation listed in part 21 of this chapter.

(ii) You must have a Federal raptor propagation permit before you may capture from the wild, possess, transport, import, purchase, barter, or offer to sell, purchase, or barter any raptor, raptor egg, or raptor semen for propagation purposes. Your State may require that you also have a State permit.

(2) Other regulations, such as those for the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Wild Bird Conservation Act, and State regulations, may affect propagation-related activities. In cases in which more than one set of regulations affect raptor propagation, the most restrictive requirements affecting the activity will apply.

(b) *Species available for raptor propagation.* If you have a raptor propagation permit, you may attempt to propagate any species of raptor listed in § 10.13 of this chapter, with the following exceptions:

(1) You may not propagate bald eagles *(Haliaeetus leucocephalus)* or golden eagles (*Aquila chrysaetos*) under a raptor propagation permit or any other permit regulation listed in part 21 of this chapter.

(2) If you are authorized by your Regional Migratory Bird Permit office to do so, you may possess and attempt to propagate threatened or endangered raptor species. See paragraphs (f) and (u) of this section.

(c) *Facilities used for raptor propagation.* In addition to the general conditions found in part 13 of this chapter, raptor propagation permits are subject to the following additional conditions:

(1) You must maintain any tethered raptor you possess under this permit in accordance with the facilities and standards requirements in § 21.29, unless you obtain a written exception to this requirement from your Regional Migratory Bird Permit Office.

(2) For untethered raptors, your breeding facilities must be soundly constructed and entirely enclosed with wood, wire netting, or other suitable material that provides a safe, healthy environment.

(i) Your facilities must minimize the risk of injury by providing protection from predators, pets, and extreme weather conditions.

(ii) Your facilities must minimize the risk of raptor injuries due to collision with interior or perimeter construction materials and equipment, such as support poles, windows, wire netting, perches, or lights.

(iii) Your facilities must have suitable perches and nesting sites, fresh air ventilation, a source of light, a well-drained floor, and ready access for cleaning. Each bird must have access to a pan of clean water unless weather conditions, the perch type used, or some other factor makes access to a water pan unsafe for the raptor.

(iv) You do not need to house your propagation raptors separately from other raptors you hold. However, you must keep raptors that you are not authorized to propagate separated from those you use in propagation.

(d) *Inspection.* In the presence of the permittee, Federal or State officials may inspect propagation raptors, facilities, equipment, and records during business hours on any day of the week.

(e) *Banding of raptors used for propagation.* —(1) *Certain species.* You must band a goshawk *(Accipiter gentilis),* Harris's hawk *(Parabuteo unicinctus),* peregrine falcon *(Falco peregrinus),* or gyrfalcon *(Falco rusticolus)* that you take from the wild to use in captive propagation.

(i) You must use a nonreusable band that we provide.

(ii) You may purchase and implant an ISO (International Organization for Standardization)-compliant 134.2 kHz microchip in the raptor in addition to banding it.

(iii) You must report the information on the raptor (including information identifying the microchip, if you implant one, and where it is located) at *http://permits.fws.gov/186A* or by submitting a paper FWS Form 3–186A form to your State or tribal agency that governs propagation, if applicable, and to us.

(2) *Banding nestlings.* Unless a particular nestling is specifically exempted, you must band every captive-bred raptor within 2 weeks of hatching.

(i) You must use a numbered, seamless band that we will provide.

(ii) You must use a band with an inside diameter that is small enough to prevent loss or removal of the band when the raptor is grown without causing serious injury to the raptor or damaging the band's integrity or one-piece construction.

(iii) You may band a nestling with more than one band of different sizes if you cannot determine the proper size when you band the nestling. You must then remove and destroy all but the correctly sized band before the nestling is 5 weeks old.

(iv) You may submit a letter requesting an exemption from the banding requirement for any nestling or fledgling for which the band causes a problem. If you demonstrate that the band itself or the behavior of the raptor in response to the band poses a hazard to the raptor, we may exempt that raptor from the banding requirement. You must destroy the band after you remove it.

(3) You may purchase and implant an ISO-compliant 134.2 kHz microchip in the raptor in addition to a band. You must report information to identify the microchip and where on the raptor the chip is implanted when you report your acquisition of the raptor.

(4) If a captive-bred raptor is not banded with a seamless band, or if you must remove the seamless band from a captive-bred raptor, you must band the bird with a nonreusable band that we provide.

(f) *Taking and transferring raptors or raptor eggs from the wild to use in propagation.* You may take no more than two raptors or raptor eggs from the wild each year to use in propagation.

(1) The State 'must authorize you to take the raptor(s) or egg(s) from the wild.

(2) You must comply with all State laws in taking raptor(s) or egg(s) from the wild.

(3) You may take a raptor listed in § 17.11(h) of this chapter as "endangered" or "threatened" from the wild only if you have a permit under part 17 of this chapter (See paragraph (u) of this section.).

(4) You may transfer a raptor taken from the wild for propagation to any other person authorized to possess it, except that you must comply with the prohibitions in § 21.29 on a transfer to a falconer.

(g) *Transfer, purchase, sale, or barter of captive-bred raptors, eggs, or semen.*

(1) You may transfer, sell, or barter a lawfully possessed captive-bred raptor to another person authorized to possess captive-bred raptors if the raptor is marked on the metatarsus by a seamless, numbered band that we provide.

(2) You may transfer, sell, or barter a lawfully possessed raptor egg or raptor semen produced by a raptor held under your captive propagation permit (including a raptor taken from the wild) to another raptor propagation permittee.

(3) You may not purchase, sell, or barter any raptor eggs or any raptors taken from the wild in the United States or its territories or possessions, any semen collected from a raptor in the wild in the United States or its territories or possessions, or any raptor hatched from eggs taken from the wild in the United States or its territories or possessions.

(h) *Required paperwork.* You must have a copy of a properly completed FWS Form 3–186A (Migratory Bird Acquisition and Disposition Report) for each raptor you acquire or that is transferred to you.

(1) You do not have to submit or have a copy of an FWS Form 3–186A for raptors you produce by captive propagation if you keep the raptors in your possession under your propagation permit.

(2) If you sell, trade, barter, or transfer a raptor held under your captive propagation permit, even if the transfer is to a falconry permit you hold, you must complete an FWS Form 3–186A and send it to us within 5 calendar days of the transfer.

(i) *Care of a propagation raptor by another person—*

(1) *Care of a propagation raptor by another permittee.* The regulations in this paragraph pertain to care of propagation raptors by persons other than the permittee. Another person who can legally possess raptors may care for a propagation raptor for you for up to 120 calendar days.

(i) The person must have a letter from you authorizing him or her to care for the birds, beginning on the date of your letter.

(ii) The raptor will remain on your raptor propagation permit. If the person who temporarily holds it for you is a falconer or a captive propagator, the raptor will not be counted against his or her possession limit on raptors held for falconry or propagation. However, the other person may not use the raptor in falconry or in propagation.

(iii) If you wish to have someone else care for a propagation raptor for more than 120 days, or if you wish to let another person use the raptor in falconry or captive propagation, you must transfer the raptor to that person and report the transfer by submitting a completed FWS Form 3–186A.

(2) *Care of a propagation raptor by an individual who does not have a propagation or falconry permit.* Another person may care for propagation raptors you possess for up to 120 consecutive calendar days.

(i) The raptor(s) will remain on your propagation permit.

(ii) The raptors must remain in your facilities.

(iii) This care may be extended indefinitely in extenuating circumstances, such as illness, military service, or for a family emergency. The person(s) caring for your raptors may not fly them for any reason.

(j) *Care of nestlings by an individual who does not hold a migratory bird permit.* Another person may temporarily care for and band nestlings you hold from the time they are hatched until they are fully feathered. You may allow the other person to keep the nestlings at another location. You must give the individual a letter authorizing him or her to care for the nestlings, beginning on the date of your letter. The care might be part of each day during the nestling period so that the nestlings can be fed, or it might be a series of full days if transport to and from the breeding facility is not practical or needed.

(k) *Disposition of molted feathers from a live raptor or carcasses of raptors held under your permit.*

(1) You may donate the body or feathers of any species you possess under your propagation permit to any person or institution exempt under § 21.12 or authorized by permit to acquire and possess such parts or feathers.

(2) For any raptor you hold under your propagation permit, if the bird was banded or microchipped prior to its death, you may keep the body to have the feathers available for imping or to have the body mounted by a taxidermist. You may use the mount in propagation activities or in giving conservation education programs. If the bird was banded, you must leave the band on the body. If the bird has an implanted microchip, the microchip must be placed inside the mounted bird.

(3) If you do not wish to donate the bird body or feathers or keep it or them yourself, you must burn, bury, or otherwise destroy it or them within 10 days of the death of the bird or after final examination by a veterinarian to determine cause of death. Carcasses of euthanized raptors could pose a risk of secondary poisoning of eagles and other scavengers. You must take appropriate precautions to avoid such poisonings.

(4) If you do not donate the bird body or feathers or have the body mounted by a taxidermist, you may possess the flight feathers for as long as you have a valid raptor propagation or falconry permit. However, you may not buy, sell, or barter the feathers. You must keep the paperwork documenting your acquisition of the bird.

(l) *Raptor products.* You may possess addled or blown eggs, nests, and feathers from raptors held under permit, and may transfer any of these items to any other person authorized to possess them.

(m) *Release to the wild.* You may release a captive-bred raptor to the wild if it is allowed by the State or territory in which you wish to release the raptor, except that you may not release a hybrid raptor to the wild. You must leave the captive-bred band on any raptor you release to the wild.

(n) *Conservation education programs.* You may use a raptor you possess for raptor propagation in conservation education programs presented in public venues.

(1) You do not need a Federal education permit to conduct conservation education activities using a propagation raptor.

(2) You must use the raptor primarily for propagation.

(3) You may charge a fee for presentation of a conservation education program. The fee may not exceed the amount required to recoup your costs.

(4) In conservation education programs, you must provide information about the biology, ecological roles, and conservation needs of raptors and other migratory birds, although not all of these topics must be addressed in every presentation. You may not give presentations that do not address falconry and conservation education.

(5) You are responsible for all liability associated with conservation education activities you undertake (see § 13.50 of this chapter).

(o) *Permit restrictions.* With limited exceptions, you may use raptors held under your captive propagation permit only for propagation or keep them to transfer or sell. You must transfer a raptor used in captive propagation to a falconry permit before you or another person may use it in falconry. If you transfer a raptor used in captive propagation to another permit, you and the recipient of the raptor (which might be you) must complete an FWS Form 3–186A and report the transfer. You do not need to transfer a bird from your falconry permit (if you hold one) if you use the bird for fewer than 8 months in a year in captive propagation, but you must do so if you permanently transfer the bird for propagation. The bird must then be banded as required in paragraph (e).

(p) *Training propagation raptors.* You may use falconry training or conditioning practices such as, but not

limited to, creance (tethered) flying, lures, balloons, or kites in training or conditioning captive-bred progeny of raptors you hold under your permit.

(1) Until the raptors are 1 year old, you may use captive-bred offspring in actual hunting as a means of training them. To do so, you will not need to transfer them to another permit type. You may not use them in hunting after their first year if they are held under your captive propagation permit.

(2) Any hybrid raptor that you fly free must have at least two attached radio transmitters to help you to locate the bird.

(3) You may not hunt at any time with raptors you use in propagation.

(q) *Hacking of propagation raptors.* "Hacking" (temporary release to the wild) is an approved method to condition raptors. You may hack a raptor that you produce under your propagation permit.

(1) You may need permission from your State or tribal wildlife agency to hack a raptor you possess under your propagation permit. Check with your State or tribal agency that regulates falconry to determine if hacking is allowed.

(2) Any hybrid you hack must have two attached functioning radio transmitters during hacking.

(3) You may not hack a raptor near a nesting area of a federally threatened or endangered bird species or in any other location where the raptor is likely to harm a federally listed threatened or endangered animal species that might be disturbed or taken by your falconry raptor. You should contact your State or territorial wildlife agency before hacking a falconry raptor to ensure that this does not occur. Contact the Fish and Wildlife Service office in your State or territory for information on federally listed species.

(r) *Transfer of propagation raptors and offspring if a permittee dies.* A surviving spouse, executor, administrator, or other legal representative of a deceased raptor propagation permittee may transfer any bird, eggs, or semen held by the deceased permittee to another authorized permittee within 90 days of the death of the falconry permittee. After 90 days, disposition of a bird held under the permit is at our discretion.

(s) *Records of captive propagation efforts.* You must maintain complete and accurate records of all operations, including the following, for at least 5 years after the expiration of your permit. However, you may want to retain your records for a longer time if you want to get another migratory bird permit, a Convention on International Trade in Endangered Species of Wild Fauna and Flora permit, or a Wild Bird Conservation Act permit.

(1) The acquisition of raptors, eggs, or semen you acquired from the wild or that were transferred to you.

(i) What you acquired, and the species, sex, age, and band number of each bird you acquired.

(ii) Whether you acquired the raptor, egg, or semen from the wild or you purchased it or it was transferred to you.

(2) The disposition of raptors, eggs, or semen you sell or transfer to another permittee. The information should include the band number of raptors you sell or transfer.

(t) *Annual report.* You must submit a completed FWS Form 3–202–8 to your Regional Migratory Bird Permit office by January 31 each year for January 1 through December 31 of the preceding year.

(u) *Endangered or threatened species.* If you wish to propagate endangered or threatened species, you must have at least 2 years of experience handling raptors in a propagation program or programs. You may also need an endangered species permit to propagate threatened or endangered raptors. See §§ 17.21 and 17.22 of this chapter for permit requirements to propagate threatened or endangered raptors.

(v) *Applying for a Federal raptor propagation permit.* Using FWS Form 3–200–12, you must submit your application for a raptor propagation permit to the appropriate Regional Director, to the attention of the Migratory Bird Permit Office. You can find addresses for the Regional Directors in 50 CFR 2.2. Your application must contain the general information and the certification required in § 13.12(a) of this chapter, a copy of your State permit authorizing raptor propagation, if your State requires one, and a description (including dimensions), drawings, and photographs of the facilities and equipment you will use.

(w) *Criteria for issuing a permit.* When we receive a completed application, we will decide whether we should issue a permit to you. We will consider the general criteria in part 13 of this chapter and the following factors:

(1) You must be at least 18 years old and have at least 2 full years of experience handling raptors.

(2) You must have a propagation permit or other authorization for raptor propagation from your State or Tribe, if your State or Tribe requires it.

(3) Your raptor propagation facilities must be adequate for the number and species of raptors to be held under your permit.

(x) *Updating a raptor propagation permit after a move.* If you move within your State or get a new mailing address, you must notify us within 30 days (see § 13.23(c) of this chapter). If you move to a new State, within 30 days you must inform both your former and your new (if applicable) Migratory Bird Permit Offices of your address change. If you have new propagation facilities, you must provide information, pictures, and diagrams of them, and they may be inspected in accordance with Federal or State requirements. Thereafter, no mandatory inspections of the facilities will continue.

(y) *Permit expiration.* Your Federal permit may be valid for up to 5 years from when it is issued or renewed. It will expire on the same day as your State permit, unless your State permit is for a period longer than 5 years, or unless we amend, suspend, or revoke it.

Dated: May 12, 2011.

Will Shafroth,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2011–12519 Filed 5–20–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 101029427–0609–02]

RIN 0648–XA403

Fisheries of the Northeastern United States; Summer Flounder Fishery; Quota Transfer

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

ACTION: Temporary rule; quota transfer.

SUMMARY: NMFS announces that the State of North Carolina is transferring a portion of its 2011 commercial summer flounder quota to the Commonwealth of Virginia and the State of New Jersey. Virginia is also transferring a portion of its 2011 commercial summer flounder quota to New Jersey. Vessels from North Carolina were authorized by Virginia to land summer flounder under safe harbor provisions, thereby requiring a quota transfer to account for an increase in Virginia's landings that would have otherwise accrued against the North Carolina quota. Additionally, a vessel experiencing mechanical problems was authorized to land in New Jersey, prompting a quota transfer from North

Carolina and Virginia to account for an increase in landings in New Jersey. By this action, NMFS adjusts the quotas and announces the revised commercial quota for each state involved.

DATES: Effective May 18, 2011, through December 31, 2011.

FOR FURTHER INFORMATION CONTACT: Carly Knoell, Fishery Management Specialist, 978–281–9224.

SUPPLEMENTARY INFORMATION: Regulations governing the summer flounder fishery are found at 50 CFR part 648. The regulations require annual specification of a commercial quota that is apportioned among the coastal states from North Carolina through Maine. The process to set the annual commercial quota and the percent allocated to each state are described in § 648.100.

The final rule implementing Amendment 5 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan, which was published on December 17, 1993 (58 FR 65936), provided a mechanism for summer flounder quota to be transferred from one state to another. Two or more states, under mutual agreement and with the concurrence of the Administrator, Northeast Region, NMFS (Regional Administrator), can transfer or combine summer flounder commercial quota under § 648.100(d). The Regional Administrator is required to consider the criteria set forth in § 648.100(d)(3) in the evaluation of requests for quota transfers or combinations.

North Carolina has agreed to transfer 306,967 lb (139,237 kg) of its 2011 commercial quota to Virginia. This transfer was prompted by 43 summer flounder landings of North Carolina vessels that were granted safe harbor in Virginia due to hazardous shoaling in Oregon Inlet, North Carolina, severe winter storm conditions, and/or mechanical problems between April 4, 2011, and April 15, 2011, totaling 307,557 lb (139,505 kg). The transfer amount also includes a correction to a landing on March 24, 2011, that was included in the quota transfer effective April 21, 2011 (76 FR 23206). The difference is 590 lb (268 kg) less of summer flounder to be transferred; therefore, the total transfer amount is 306,967 lb (139,237 kg).

Additionally, on April 13, 2011, a vessel experienced mechanical problems and was granted safe harbor in New Jersey. This vessel landed 15,490 lb (7,026 kg) of summer flounder; North Carolina has agreed to transfer 5,490 lb (2,490 kg) of summer flounder to New Jersey and Virginia has agreed to transfer 10,000 lb (4,536 kg) of summer flounder to New Jersey. The Regional Administrator has determined that the criteria set forth in § 648.100(d)(3) have been met. The revised summer flounder quotas for calendar year 2011 are: North Carolina, 3,379,144 lb (1,532,754 kg); Virginia, 5,077,934 lb (2,303,312 kg); and New Jersey 2,921,480 lb (1,325,161 kg).

Classification

This action is taken under 50 CFR part 648 and is exempt from review under Executive Order 12866.

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

Dated: May 18, 2011.

Margo Schulze-Haugen,

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

[FR Doc. 2011–12662 Filed 5–18–11; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 101126521–0640–02]

RIN 0648–XA442

Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Pacific Cod in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; reallocation.

SUMMARY: NMFS is reallocating the projected unused amount of Pacific cod from vessels using trawl gear to catcher vessels less than 60 feet (18.3 meters) length overall using hook-and-line or pot gear in the Bering Sea and Aleutian Islands management area. This action is necessary to allow the 2011 total allowable catch of Pacific cod to be harvested.

DATES: Effective May 18, 2011, through 2400 hrs, Alaska local time (A.l.t.), December 31, 2011.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The B season apportionment of the 2011 Pacific cod total allowable catch (TAC) specified for vessels using trawl gear in the Bering Sea and Aleutian Islands management area (BSAI) is 4,949 metric tons (mt) for the period 1200 hrs, A.l.t., April 1, 2011, through 1200 hrs, A.l.t., June 10, 2011, as established by the final 2011 and 2012 harvest specifications for groundfish in the BSAI (76 FR 11139, March 1, 2011).

The Administrator, Alaska Region, NMFS, has determined that trawl catcher vessels will not be able to harvest 1,300 mt of the B season apportionment of the 2011 Pacific cod TAC allocated to those vessels under § 679.20(a)(7)(ii)(A)(*9*). Therefore, in accordance with § 679.20(a)(7)(iii)(A), NMFS apportions 1,300 mt of Pacific cod from the B season trawl catcher vessel apportionment to catcher vessels less than 60 feet length overall (LOA) using hook-and-line or pot gear.

The harvest specifications for Pacific cod included in the final 2011 harvest specifications for groundfish in the BSAI (76 FR 11139, March 1, 2011) are revised as follows: 3,649 mt to the B season apportionment for catcher vessels using trawl gear and 7,505 mt to catcher vessels less than 60 feet LOA using hook-and-line or pot gear.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the reallocation of Pacific cod specified from trawl catcher vessels to catcher vessels less than 60 feet LOA using hook-and-line or pot gear. Since the fishery is currently open, it is important to immediately inform the industry as to the revised allocations. Immediate notification is necessary to allow for the orderly conduct and efficient operation of this fishery, to allow the industry to plan for the fishing season, and to avoid potential disruption to the fishing fleet as well as processors. NMFS was unable to publish a notice providing time for

public comment because the most recent, relevant data only became available as of May 17, 2011.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: May 18, 2011.

Margo Schulze-Haugen,

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

[FR Doc. 2011–12654 Filed 5–19–11; 11:15 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 76, No. 99
Monday, May 23, 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 TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0474; Directorate Identifier 2010–NM–213–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A330–200 and –300 Series Airplanes, and Model A340–200 and –300 Series 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 results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

It was noticed in production that the distance between the wire harnesses 5376VB/2M and 5377VB/1M which are above the left-hand (LH) and right-hand (RH) door 4, and the air conditioning duct could be too small. This could result in collision between the flexible air conditioning hose and wire harnesses.

This condition, if not corrected, could lead to the short circuit of wires dedicated to oxygen, which, in case of emergency, could result in a large number of passenger oxygen masks not being supplied with oxygen, possibly causing personal injuries.

* * * * *

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by July 7, 2011.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Airbus SAS—Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80, e-mail *airworthiness.A330-A340@airbus.com;* Internet *http://www.airbus.com*. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1138; fax (425) 227–1149.

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–2011–0474; Directorate Identifier 2010–NM–213–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2010–0103R1, dated April 28, 2011 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

It was noticed in production that the distance between the wire harnesses 5376VB/2M and 5377VB/1M which are above the left-hand (LH) and right-hand (RH) door 4, and the air conditioning duct could be too small. This could result in collision between the flexible air conditioning hose and wire harnesses.

This condition, if not corrected, could lead to the short circuit of wires dedicated to oxygen, which, in case of emergency, could result in a large number of passenger oxygen masks not being supplied with oxygen, possibly causing personal injuries.

For the reasons described above, this [EASA] AD requires the installation of a protective sleeve and an additional bracket to maintain the appropriate distance between wires.

Revision 1 of this [EASA] AD is issued to revise the applicability section of this AD in order to take into account all configurations of air conditioning duct and the associated solutions embodied in production.

For certain airplanes, required actions include modifying the support assembly of the air outlet. For other airplanes, required actions include exchanging certain attachment screws of the air outlet box assembly on each door. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Airbus has issued Mandatory Service Bulletins A330–92–3077, Revision 01, dated March 29, 2010 (for Model A330–200 and –300 series airplanes); and A340–92–4078, Revision 01, dated April

9, 2010 (for Model A340–200 and –300 series airplanes).

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 41 products of U.S. registry. We also estimate that it would take up to 11 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost up to $503 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be up to $58,958, or up to $1,438 per product.

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); and
3. 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.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

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 AD:

Airbus: Docket No. FAA–2011–0474; Directorate Identifier 2010–NM–213–AD.

Comments Due Date

(a) We must receive comments by July 7, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to the Airbus airplanes identified in paragraphs (c)(1) and (c)(2) of this AD, all manufacturer serial numbers; certificated in any category; except those identified in paragraph (c)(3) of this AD.

(1) Model A330–201, –202, –203, –223, –243, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes.

(2) Model A340–211, –212, –213, –311, –312, and –313 airplanes.

(3) Airplanes on which the following Airbus Modifications are embodied in production: Both Airbus Modifications 57349 and 58924, or Airbus Modification 201642 or 57562.

Subject

(d) Air Transport Association (ATA) of America Code 92.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

It was noticed in production that the distance between the wire harnesses 5376VB/2M and 5377VB/1M which are above the left-hand (LH) and right-hand (RH) door 4, and the air conditioning duct could be too small. This could result in collision between the flexible air conditioning hose and wire harnesses.

This condition, if not corrected, could lead to the short circuit of wires dedicated to oxygen, which, in case of emergency, could result in a large number of passenger oxygen masks not being supplied with oxygen, possibly causing personal injuries.

* * * * *

Compliance

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

Actions

(g) Within 24 months after the effective date of this AD: Modify the wire harness 5376VB/2M and 5377VB/1M attachments above the LH and RH door 4, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330–92–3077, Revision 01, dated March 29, 2010; or Airbus Mandatory Service Bulletin A340–92–4078, Revision 01, dated April 9, 2010; as applicable.

(h) For airplanes that have been modified before the effective date of this AD in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330–92–3077 or A340–92–4078, both dated June 17, 2008: Within 24 months after the effective date of this AD, perform the additional work identified in Airbus Mandatory Service Bulletin A330–92–3077, Revision 01, dated March 29, 2010, or A340–92–4078, Revision 01, dated April 9, 2010, as applicable (including modifying the support

assembly of the air outlet, or exchanging certain attachment screws of the air outlet box assembly on each door, as applicable), in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330–92–3077, Revision 01, dated March 29, 2010, or Airbus Mandatory Service Bulletin A340–92–4078, Revision 01, dated April 9, 2010, as applicable.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(i) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, 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 International Branch, send it to ATTN: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1138; fax (425) 227–1149. Information may be e-mailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* 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. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

Related Information

(j) Refer to MCAI European Aviation Safety Agency Airworthiness Directive 2010–0103R1, dated April 28, 2011; Airbus Mandatory Service Bulletin A330–92–3077, Revision 01, dated March 29, 2010; and Airbus Mandatory Service Bulletin A340–92–4078, Revision 01, dated April 9, 2010; for related information.

Issued in Renton, Washington, on May 13, 2011.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–12507 Filed 5–20–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF JUSTICE

28 CFR Part 50

[Docket No. OAG 142; AG Order No. 3279–2011]

RIN 1105–AB38

Assumption of Concurrent Federal Criminal Jurisdiction in Certain Areas of Indian Country

AGENCY: Office of the Attorney General, Department of Justice.

ACTION: Proposed rule.

SUMMARY: This rule proposes to establish the procedures for an Indian tribe whose Indian country is subject to State criminal jurisdiction under Public Law 280 (18 U.S.C. 1162(a)) to request that the United States accept concurrent criminal jurisdiction within the tribe's Indian country, and for the Attorney General to decide whether to consent to such a request.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before July 7, 2011. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after Midnight Eastern Time on the last day of the comment period.

ADDRESSES: Comments may be mailed to Mr. Tracy Toulou, Director, Office of Tribal Justice, Department of Justice, 950 Pennsylvania Avenue, NW., Room 2310, Washington, DC 20530. To ensure proper handling, please reference OAG Docket No. 142 on your correspondence. You may submit comments electronically or view an electronic version of this proposed rule at *http://www.regulations.gov.*

FOR FURTHER INFORMATION, CONTACT: Mr. Tracy Toulou, Director, Office of Tribal Justice, Department of Justice, at (202) 514–8812 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Posting of Public Comments. Please note that all comments received are considered part of the public record and made available for public inspection online at *http://www.regulations.gov.* Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

You are not required to submit personal identifying information in order to comment on this rule. If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You also must locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You also must prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on *http://www.regulations.gov.*

Personal identifying information and confidential business information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph.

The reason the Department is requesting electronic comments before Midnight Eastern Time on the day the comment period closes is that the inter-agency Regulations.gov/Federal Docket Management System (FDMS), which receives electronic comments, terminates the public's ability to submit comments at Midnight on the day the comment period closes. Commenters in time zones other than Eastern may want to take this fact into account so that their electronic comments can be received. The constraints imposed by the Regulations.gov/FDMS system do not apply to U.S. postal comments, which will be considered as timely filed if they are postmarked before Midnight on the day the comment period closes.

Discussion

For more than two centuries, the Federal Government has recognized Indian tribes as domestic sovereigns that have unique government-to-government relationships with the United States. Congress has broad authority to legislate with respect to Indian tribes, however, and has exercised this authority to establish a complex jurisdictional scheme for crimes committed in Indian country. (The term "Indian country" is defined in 18 U.S.C. 1151.) Criminal jurisdiction in Indian country typically depends on several factors, including the nature of the crime; whether the alleged offender, the victim, or both are Indian; and whether a treaty, Federal statute, executive order, or judicial

decision has conferred jurisdiction on a particular government.

Here, three Federal statutes are particularly relevant: the General Crimes Act (also known as the Indian Country Crimes Act), 18 U.S.C. 1152; the Major Crimes Act (also known as the Indian Major Crimes Act), 18 U.S.C. 1153; and Public Law 280, Act of Aug. 15, 1953, Public Law 83–280, 67 Stat. 588, *codified in part as amended* at 18 U.S.C. 1162. Under the General Crimes and Major Crimes Acts, which apply to most of Indian country, jurisdiction to prosecute most crimes in Indian country rests with the Federal Government, the tribal government, or both concurrently. State criminal jurisdiction in Indian country is generally limited to crimes committed by non-Indians against non-Indian victims, as well as victimless crimes committed by non-Indians.

But there is an important exception to this general rule: In certain areas of Indian country, Public Law 280 renders the General Crimes and Major Crimes Acts inapplicable and instead gives the States jurisdiction over crimes committed by or against Indians. Specifically, the Public Law 280 criminal-jurisdiction provision codified at 18 U.S.C. 1162 applies in parts of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. (Section 1162(a) expressly exempts some areas of Indian country in these States, such as the Red Lake Reservation in Minnesota and the Warm Springs Reservation in Oregon; and some of these States have formally "retroceded" jurisdiction over other reservations.) In the areas of Indian country covered by section 1162, which are known as "mandatory" Public Law 280 jurisdictions, the Federal Government can prosecute violations of general Federal criminal statutes that apply nationwide, such as Federal narcotics laws, but typically cannot prosecute violent crimes such as murder, assault with a dangerous weapon, or felony child abuse.

In contrast, the Public Law 280 provision that is codified at 25 U.S.C. 1321 provides a basis for other States to elect to assume criminal jurisdiction in Indian country on an optional basis, subject to the consent of the affected tribe. In the Indian country of these tribes, known as "optional" Public Law 280 jurisdictions, the Department understands the applicable statutes to provide that the Federal Government retains concurrent jurisdiction under the General Crimes and Major Crimes Acts. *See* U.S. Department of Justice, United States Attorneys' Manual, tit. 9, Criminal Resource Manual § 688 (Federal Government may exercise concurrent criminal jurisdiction in "the so-called 'option states' * * * which assumed jurisdiction pursuant to Public Law 280 after its enactment"); *United States* v. *High Elk,* 902 F.2d 660, 661 (8th Cir. 1990) (per curiam) (holding that Federal courts retain Major Crimes Act jurisdiction in those States that voluntarily assumed jurisdiction under Pub. L. 280); *cf. Negonsott* v. *Samuels,* 507 U.S. 99, 105–06 (1993) (holding that a different Federal statute conferred criminal jurisdiction on a State without divesting the United States of concurrent criminal jurisdiction). *But cf. United States* v. *Burch,* 169 F.3d 666, 669–71 (10th Cir. 1999) (holding that a 1984 "direct congressional grant of jurisdiction over [crimes committed in one town in] Indian country" vested Colorado with exclusive jurisdiction akin to mandatory jurisdiction under Public Law 280).

The Tribal Law and Order Act of 2010

The Tribal Law and Order Act of 2010 (TLOA) was enacted on July 29, 2010, as Title II of Public Law 111–211. The purpose of the TLOA is to help the Federal Government and tribal governments better address the unique public-safety challenges that confront tribal communities.

Section 221 of the new law permits an Indian tribe with Indian country subject to State criminal jurisdiction under Public Law 280 to request that the United States accept concurrent jurisdiction to prosecute violations of the General Crimes Act and the Major Crimes Act within that tribe's Indian country. This jurisdiction will be concurrent among the Federal Government, the State government, and (where applicable) the tribal government. Section 221 provides for the United States to assume concurrent criminal jurisdiction at the tribe's request, and after consultation between the tribe and the Attorney General and consent to Federal jurisdiction by the Attorney General. The State need not consent. Once the United States has accepted concurrent criminal jurisdiction, Federal authorities can investigate and prosecute offenses that Public Law 280 currently bars them from prosecuting.

Section 221 does not expressly require Indian tribes to request that the United States accept concurrent jurisdiction to prosecute "all" violations of the General Crimes and Major Crimes Acts within the tribe's Indian country. To the contrary, the statute provides that those two Acts "shall apply in the areas of the Indian country of the Indian tribe" only "at the request of" the tribe and "after consultation with and consent by the Attorney General." 18 U.S.C. 1162(d). Therefore, the Department understands section 221 to permit the tribe to request and the Attorney General, after consultation with the tribe, to consent to assumption of concurrent Federal jurisdiction over a limited set of crimes or over crimes in a limited geographic portion of the tribe's Indian country.

Assumption of Concurrent Federal Criminal Jurisdiction

This rule establishes the framework and procedures for a mandatory Public Law 280 tribe to request the assumption of concurrent Federal criminal jurisdiction within the Indian country of the tribe. It also describes the process to be used by the Attorney General in deciding whether to consent to such a request.

The TLOA provides that the Attorney General is the deciding official for requests submitted by Indian tribes under section 221. Given the potentially high volume of requests, the large number of Department of Justice components and non-Department partners that should be conferred with, and the detailed tribe-by-tribe analyses that will be needed, the Attorney General is delegating decisional authority under section 221 to the Deputy Attorney General. The Office of the Deputy Attorney General (ODAG) will receive recommendations from the Office of Tribal Justice (OTJ), the Executive Office for United States Attorneys (EOUSA), and the Federal Bureau of Investigation (FBI), after discussions with other Department components (including the Bureau of Prisons (BOP) and the Office of Community Oriented Policing Services (COPS)) and other Federal, tribal, State, and local entities. OTJ will handle the staffing and tracking of assumption requests.

Pursuant to Executive Order 13175 of November 6, 2000, the Department has held tribal consultations regarding these proposed assumption procedures.

Retrocession of State Criminal Jurisdiction

The process described in this rule is separate and distinct from Public Law 280's "retrocession" process for transferring criminal jurisdiction from the State government to the Federal Government. *See* 25 U.S.C. 1323(a). The retrocession process is initiated by the State, not the tribe. By contrast, the process for a tribe to seek assumption of concurrent Federal criminal jurisdiction under section 221 does not require the State's approval. And unlike retrocession, a section 221 assumption gives the United States concurrent

criminal jurisdiction without eliminating the State's criminal jurisdiction.

After a tribe has submitted a request under section 221, the Department will publish a notice in the **Federal Register** inviting input from affected State and local law enforcement authorities. But ultimately, it is the tribe's request and the Attorney General's consent that will determine whether the United States accepts concurrent criminal jurisdiction.

Where Section 221 Does Not Apply

The process described in this rule applies only to Indian country that is subject to "mandatory" Public Law 280 State criminal jurisdiction under 18 U.S.C. 1162. As indicated above, the Department understands that the United States already has concurrent jurisdiction over General Crimes Act and Major Crimes Act violations in areas where States have assumed criminal jurisdiction under "optional" Public Law 280. Accordingly, although the TLOA requires the United States to assume concurrent criminal jurisdiction "[a]t the request of an Indian tribe, and after consultation with and consent by the Attorney General," 25 U.S.C. 1321(a)(2), the Department does not believe requests by tribes are necessary to establish concurrent Federal jurisdiction in such areas.

Regulatory Certifications

Executive Order 12866—Regulatory Planning and Review

This regulation has been drafted and reviewed in accordance with Executive Order 12866 of September 30, 1993, as amended, Regulatory Planning and Review, section 1(b), Principles of Regulation. The Department of Justice has determined that this rule is a "significant regulatory action" under Executive Order 12866, section 3(f), and, accordingly, this rule has been reviewed by the Office of Management and Budget.

Executive Order 13132—Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The process provided under section 221 allows the United States to assume concurrent criminal jurisdiction over offenses in a particular area of Indian country, without eliminating or affecting the State's existing criminal jurisdiction, and accordingly it imposes no new burdens on the State. This regulation sets forth the procedural mechanism for the Department to consider, in consultation with other Federal, tribal, State, and local authorities, whether or not to consent to a request from an individual tribe for the Federal Government to assume concurrent criminal jurisdiction within that tribe's Indian country. Therefore, in accordance with Executive Order 13132 of August 4, 1999, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

Executive Order 12988—Civil Justice Reform

This regulation meets the applicable standards set forth in section 3(a) and (b)(2) of Executive Order 12988 of February 5, 1996.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

This rule comports with Executive Order 13175 of November 6, 2000. The rule has significant tribal implications, as it will have substantial direct effects on one or more Indian tribes and on the relationship between the Federal Government and Indian tribes. The Department therefore has engaged in meaningful consultation and collaboration with tribal officials in developing this rule. More specifically, the Department of Justice participated in six consultations with tribal officials on the Tribal Law and Order Act of 2010. The dates and locations of those tribal consultations were as follows:

- October 14, 2010, in Billings, Montana
- October 20, 2010, in Albuquerque, New Mexico
- October 28, 2010, in Miami, Florida
- November 16, 2010, in Albuquerque, New Mexico
- December 8, 2010, in Palm Springs, California
- March 23, 2011, in Hayward, Wisconsin

The last two consultation sessions focused on section 221 of Public Law 111–211, with the March 23, 2011 consultation expressly addressing a draft version of this proposed rule.

During these consultations, some tribal officials expressed a desire to see the Attorney General consent to each and every tribal request for concurrent Federal criminal jurisdiction. Other tribal officials raised more specific concerns. In direct response to the latter, the Department of Justice significantly rewrote portions of the draft proposed rule. Eight changes are particularly noteworthy.

First, rather than giving priority only to those tribal requests received by August 31 of any calendar year, the proposed rule now gives priority to requests received by August 31 or by February 28. This change effectively doubles the number of annual cycles in which the Department will consider tribal requests on a prioritized basis.

Second, the proposed rule now allows tribes to ask the United States to assume concurrent criminal jurisdiction either over all violations of the General Crimes and Major Crimes Acts within the tribe's Indian country or over a subset of those violations that is clearly defined in the tribal request. Thus, requests can now focus on a limited set of crimes or on crimes in a limited geographic portion of the tribe's Indian country.

Third, the proposed rule now clarifies why it is unnecessary, under the Department's understanding of the applicable statutes, for a tribe in an "optional" Public Law 280 jurisdiction to request an assumption of concurrent Federal criminal jurisdiction.

Fourth, the proposed rule now clarifies that Federal agencies are to supply comments and information relevant to each tribal request, rather than merely announcing their overall support or opposition for each request.

Fifth, the proposed rule reiterates that the assumption of concurrent Federal criminal jurisdiction under section 221 does not require the agreement, consent, or concurrence of any State or local government.

Sixth, the proposed rule now expressly provides that the Department's Office of Tribal Justice may give appropriate technical assistance to any tribe that wishes to prepare and submit a renewed request, following the denial of an earlier request.

Seventh, the proposed rule now states that the assumption of concurrent Federal criminal jurisdiction will commence within six months of the decision to assume jurisdiction, if feasible, rather than merely mandating action within twelve months.

Eighth and finally, the proposed rule now requires that notice of a decision consenting to the request for assumption of concurrent Federal criminal jurisdiction will be published in the **Federal Register**.

The Department of Justice thus believes that many of the concerns that tribal officials expressed about section 221 and the draft proposed regulation at the tribal consultations in 2010 and 2011 have now been met.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities. This rule provides only a framework for processing requests by Indian tribes for the assumption of concurrent Federal criminal jurisdiction over certain Indian country crimes, as provided for by section 221.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104–4.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act

Section 221 of Public Law 111–211 permits certain Indian tribes to request that the United States accept concurrent jurisdiction to prosecute violations of the General Crimes Act, 18 U.S.C. 1152, and the Major Crimes Act, 18 U.S.C. 1153, within that tribe's Indian country. This jurisdiction will be concurrent among the Federal Government, the State government, and (where applicable) the tribal government. Section 221 provides for the United States to assume concurrent criminal jurisdiction at the tribe's request, and after consultation between the tribe and the Attorney General and consent to Federal jurisdiction by the Attorney General. The Department of Justice will be submitting the information collection request set forth below to the Office of Management and Budget for review and clearance in accordance with the review procedures of the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies.

All comments, suggestions, and questions should be directed to Mr. Tracy Toulou, Director, Office of Tribal Justice, Department of Justice, 950 Pennsylvania Avenue, NW., Room 2310, Washington, DC 20530.

Written comments and suggestions from the public and affected agencies concerning the collection of information are encouraged. Comments on the information collection-related aspects of this rule should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* Request to the Attorney General for Assumption of Concurrent Federal Criminal Jurisdiction.

(3*) Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* No form. Component: Office of Tribal Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Tribal governments.

Other: None.

Abstract: The Department of Justice is publishing a proposed rule to establish the procedures for an Indian tribe whose Indian country is subject to State criminal jurisdiction under Public Law 280 (18 U.S.C. 1162(a)) to request that the United States accept concurrent criminal jurisdiction within the tribe's Indian country, and for the Attorney General to decide whether to consent to such a request. The purpose of the collection is to provide information from the requesting tribe sufficient for the Attorney General to make a decision whether to consent to the request.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to collect the required information is: Fewer than 350 respondents; 80 hours.

(6) An estimate of the total public burden (in hours) associated with the collection: 28,000 hours.

Fewer than 350 Indian tribes are eligible for the assumption of concurrent criminal jurisdiction by the United States. The Department of Justice does not know how many eligible tribes will, in fact, make such a request. Since the enactment of the Tribal Law and Order Act on July 29, 2010, the Department of Justice has received three such requests as of April 1, 2011.

The information collection requirements contemplated by this proposed rule are new requirements that will require a new OMB Control Number. The Department is seeking comment on these new requirements as part of this proposed rule. These new requirements will require Indian tribes seeking assumption of concurrent criminal jurisdiction by the United States to provide certain information relating to public safety within the Indian country of the tribe.

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–502, Washington, DC 20530.

List of Subjects in 28 CFR Part 50

Administrative practice and procedure, Crime, Indians.

Accordingly, for the reasons set forth in the preamble, part 50 of chapter I of title 28 of the Code of Federal Regulations is proposed to be amended as follows:

PART 50—STATEMENTS OF POLICY

1. The authority citation for part 50 is revised to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 1162; 28 U.S.C. 509, 510; 42 U.S.C. 1921 et seq., 1973c; and Public Law 107–273, 116 Stat. 1758, 1824.

2. Section 50.25 is added to read as follows:

§ 50.25 Assumption of concurrent Federal criminal jurisdiction in certain areas of Indian country.

(a) *Assumption of concurrent Federal criminal jurisdiction.* (1) Section 221 of Public Law 111–211 permits the United States to accept concurrent Federal criminal jurisdiction to prosecute

violations of 18 U.S.C. 1152 (the General Crimes, or Indian Country Crimes, Act) and 18 U.S.C. 1153 (the Major Crimes, or Indian Major Crimes, Act) within areas of Indian country in the States of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin that are subject to State criminal jurisdiction under Public Law 280, 18 U.S.C. 1162(a), if the tribe requests such an assumption of jurisdiction and the Attorney General consents to that request. Once the Attorney General has consented to an Indian tribe's request for concurrent Federal criminal jurisdiction, the General Crimes and Major Crimes Acts shall apply in the Indian country of the requesting tribe, and criminal jurisdiction over those areas shall be concurrent among the Federal Government, the State government, and (where applicable) the tribal government. Assumption of concurrent Federal criminal jurisdiction under section 221 does not require the agreement, consent, or concurrence of any State or local government.

(2) Section 221 also permits the United States to accept such concurrent Federal criminal jurisdiction in other areas of Indian country as to which States have assumed optional Public Law 280 criminal jurisdiction under 25 U.S.C. 1321(a), if a tribe so requests and after consultation with and consent by the Attorney General. The Department does not believe, however, that such requests are necessary, because the Department understands the applicable statutes to establish such concurrent Federal criminal jurisdiction without the need for a request by a tribe or acceptance by the United States.

(b) *Request requirements.* (1) A tribal request for assumption of concurrent Federal criminal jurisdiction under section 221 shall be made by the chief executive official of a federally recognized Indian tribe that occupies Indian country listed in 18 U.S.C. 1162(a). For purposes of this section, a chief executive official shall include a tribal chairperson, president, governor, principal chief, or other equivalent position.

(2) The tribal request shall be submitted in writing to the Director of the Office of Tribal Justice at the Department of Justice. The tribal request shall explain why the assumption of concurrent Federal criminal jurisdiction will improve public safety and criminal law enforcement and reduce crime in the Indian country of the requesting tribe. The tribe may ask the United States to assume concurrent criminal jurisdiction either over all violations of the General Crimes and Major Crimes Acts within the tribe's Indian country or over a subset of those violations that is clearly defined in the tribal request.

(c) *Process for handling tribal requests.* (1) Upon receipt of a tribal request, the Office of Tribal Justice shall:

(i) Acknowledge receipt;

(ii) Open a file;

(iii) Promptly publish a notice in the **Federal Register**, seeking comments from the general public;

(iv) Promptly seek comments from the relevant United States Attorney's Offices, the Federal Bureau of Investigation, and other Department of Justice components that would be affected by consenting to the request;

(v) Promptly seek comments from the Department of the Interior (including the Bureau of Indian Affairs), the Department of Homeland Security, other affected Federal departments and agencies, and Federal courts;

(vi) Promptly consult with the requesting tribe, consistent with applicable Executive Orders and Presidential Memoranda on tribal consultation; and

(vii) Promptly seek comments from other affected agencies, including State and local law enforcement agencies.

(2) An Indian tribe may submit a request at any time. However, requests received by February 28 of each calendar year will be prioritized for decision by July 31 of the same calendar year, if feasible; and requests received by August 31 of each calendar year will be prioritized for decision by January 31 of the following calendar year, if feasible.

(d) *Factors.* Factors that may be considered in determining whether or not to consent to a tribe's request for assumption of concurrent Federal criminal jurisdiction include the following:

(1) Whether consenting to the request will increase the availability of law enforcement resources for the requesting tribe, its members, and other residents of the tribe's Indian country.

(2) Whether consenting to the request will improve access to judicial resources for the requesting tribe, its members, and other residents of the tribe's Indian country.

(3) Whether consenting to the request will improve access to detention and correctional resources for the requesting tribe, its members, and other residents of the tribe's Indian country.

(4) Other information received from the relevant United States Attorney's Offices, the Federal Bureau of Investigation, and other Department of Justice components that would be affected by consenting to the request.

(5) Other information received from the Department of the Interior (including the Bureau of Indian Affairs), the Department of Homeland Security, other affected Federal departments and agencies, and Federal courts.

(6) Other information received from tribal consultation.

(7) Other information received from other sources, including State and local law enforcement agencies.

(e) *Federal comments.* (1) The deciding official shall consider any comments from the relevant United States Attorney's Offices, the Federal Bureau of Investigation, and other Department of Justice components.

(2) The deciding official shall consider any comments from the Department of the Interior (including the Bureau of Indian Affairs), the Department of Homeland Security, other Federal departments and agencies, and Federal courts.

(f) *Tribal comments.* The deciding official shall consider any comments from tribes and other tribal sources.

(g) *Other comments.* The deciding official shall consider any comments from State, local, and other sources, although assumption of concurrent Federal criminal jurisdiction under section 221 does not require the agreement, consent, or concurrence of any State or local government.

(h) *Decision.* (1) The decision whether to consent to a tribal request for assumption of concurrent Federal criminal jurisdiction shall be made by the Deputy Attorney General after receiving written recommendations from the Office of Tribal Justice (OTJ), the Executive Office for United States Attorneys (EOUSA), and the Federal Bureau of Investigation (FBI).

(2) The deciding official will:

(i) Consent to the request for assumption of concurrent Federal criminal jurisdiction, as of some future date certain within the next twelve months (and, if feasible, within the next six months), with or without conditions, and publish a notice of the consent in the Federal Register;

(ii) Deny the request for assumption of concurrent Federal criminal jurisdiction; or

(iii) Request further information or comment before making a final decision.

(3) The deciding official shall explain the basis for the decision in writing.

(4) A denial of a request for assumption of concurrent Federal criminal jurisdiction is not appealable. However, at any time after such a denial, a tribe may submit a renewed request for assumption of concurrent Federal criminal jurisdiction. A renewed request shall address the basis

for the prior denial. The Office of Tribal Justice may provide appropriate technical assistance to any tribe that wishes to prepare and submit a renewed request.

(i) *Retrocession of State criminal jurisdiction.* Retrocession of State criminal jurisdiction under Public Law 280 is governed by 25 U.S.C. 1323(a) and Executive Order 11435 of November 21, 1968. The procedures for retrocession do not govern a request for assumption of concurrent Federal criminal jurisdiction under section 221.

Dated: May 16, 2011.

Eric H. Holder, Jr.,

Attorney General.

[FR Doc. 2011–12541 Filed 5–20–11; 8:45 am]

BILLING CODE 4410–07–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2010–0303; FRL–9310–1]

Approval and Disapproval and Promulgation of State Implementation Plan Revisions; Infrastructure Requirements for the 1997 8-Hour Ozone National Ambient Air Quality Standards; Wyoming

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to partially approve and partially disapprove the State Implementation Plan (SIP) submission from the State of Wyoming to demonstrate that the SIP meets the requirements of Sections 110(a)(1) and (2) of the Clean Air Act (CAA) for the National Ambient Air Quality Standards (NAAQS) promulgated for ozone on July 18, 1997. Section 110(a)(1) of the CAA requires that each state, after a new or revised NAAQS is promulgated, review their SIPs to ensure that they meet the requirements of the "infrastructure elements" of section 110(a)(2). The State of Wyoming submitted two certifications of their infrastructure SIP for the 1997 ozone NAAQS, date December 7, 2007 and December 10, 2009. EPA does not propose to act on the State's May 25, 2007 submission to meet the requirements of section 110(a)(2)(D)(i) of the CAA, relating to interstate transport of air pollution, for the 1997 ozone NAAQS. EPA approved the State's interstate transport SIP submission on May 8, 2008 (73 FR 26019). EPA is also proposing to approve a Wyoming submittal, dated May 10, 2011, revising the State's Prevention of Significant Deterioration (PSD) program.

DATES: Written comments must be received on or before June 22, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2010–0303, by one of the following methods:

- *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *E-mail: dolan.kathy@epa.gov.*
- *Fax:* (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).
- *Mail:* Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mail Code 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129.
- *Hand Delivery:* Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mail Code 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129.

Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R08–OAR–2010–0303. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA, without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* For additional instructions on submitting comments, go to section I, General Information, of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Kathy Dolan, Air Program, U.S. Environmental Protection Agency (EPA), Region 8, Mail Code 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129. 303–312–6142, *dolan.kathy@epa.gov.*

SUPPLEMENTARY INFORMATION:

Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The initials *SIP* mean or refer to State Implementation Plan.

Table of Contents

I. General Information
II. Background
III. What infrastructure elements are required under sections 110(a)(1) and (2)?
IV. How did the State of Wyoming address the infrastructure elements of section 110(a)(2)?
V. What action is EPA taking?
VI. Statutory and Executive Order Reviews

I. General Information

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

1. *Submitting Confidential Business Information (CBI).* Do not submit CBI to EPA through *http://www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register, date, and page number);

Follow directions and organize your comments;

Explain why you agree or disagree;

Suggest alternatives and substitute language for your requested changes;

Describe any assumptions and provide any technical information and/or data that you used;

If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced;

Provide specific examples to illustrate your concerns, and suggest alternatives;

Explain your views as clearly as possible, avoiding the use of profanity or personal threats; and,

Make sure to submit your comments by the comment period deadline identified.

II. Background

On July 18, 1997, EPA promulgated new NAAQS for ozone based on 8-hour average concentrations. The 8-hour averaging period replaced the previous 1-hour averaging period, and the level of the NAAQS was changed from 0.12 parts per million (ppm) to 0.08 ppm (62 FR 38856). By statute, SIPs meeting the requirements of sections 110(a)(1) and (2) are to be submitted by states within three years after promulgation of a new or revised standard. Section 110(a)(2) provides basic requirements for SIPs, including emissions inventories, monitoring, and modeling, to assure attainment and maintenance of the standards. These requirements are set out in several "infrastructure elements," listed in section 110(a)(2).

Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, and the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affects the content of the submission. The contents of such SIP submissions may also vary depending upon what provisions the state's existing SIP already contains. In the case of the 1997 ozone NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous NAAQS. In a guidance issued on October 2, 2007, EPA noted that, to the extent an existing SIP already meets the section 110(a)(2) requirements, states need only to certify that fact via a letter to EPA.[1]

On March 27, 2008, EPA published a final rule entitled, "Completeness Findings for Section 110(a) State Implementation Plans for the 8-hour Ozone NAAQS" (73 FR 16205). In the rule, EPA made a finding for each State that it had submitted or had failed to submit a complete SIP that provided the basic program elements of section 110(a)(2) necessary to implement the 1997 8-hour ozone NAAQS. In particular, EPA found that Wyoming had submitted a complete SIP to meet these requirements.

III. What infrastructure elements are required under sections 110(a)(1) and (2)?

Section 110(a)(1) provides the procedural and timing requirements for SIP submissions after a new or revised NAAQS is promulgated. Section 110(a)(2) lists specific elements the SIP must contain or satisfy. These infrastructure elements include requirements, such as modeling, monitoring, and emissions inventories that are designed to assure attainment and maintenance of the NAAQS. The elements that are the subject of this action are listed below.

- 110(a)(2)(A): Emission limits and other control measures.
- 110(a)(2)(B): Ambient air quality monitoring/data system.
- 110(a)(2)(C): Program for enforcement of control measures.
- 110(a)(2)(D)(ii): Interstate and international pollution.
- 110(a)(2)(E): Adequate resources and authority.
- 110(a)(2)(F): Stationary source monitoring and reporting.
- 110(a)(2)(G): Emergency powers.
- 110(a)(2)(H): Future SIP revisions.
- 110(a)(2)(J): Consultation with government officials; public notification; and prevention of significant deterioration (PSD) and visibility protection.
- 110(a)(2)(K): Air quality modeling/data.
- 110(a)(2)(L): Permitting fees.
- 110(a)(2)(M): Consultation/participation by affected local entities.

A detailed discussion of each of these elements is contained in the next section.

Two elements identified in section 110(a)(2) are not governed by the three-year submission deadline of section 110(a)(1) and are therefore not addressed in this action. These elements relate to part D of Title I of the CAA, and submissions to satisfy them are not due within three years after promulgation of a new or revised NAAQS, but rather are due at the same time nonattainment area plan requirements are due under section 172. The two elements are: (i) section 110(a)(2)(C) to the extent it refers to permit programs (known as "nonattainment new source review (NSR)") required under part D, and (ii) section 110(a)(2)(I), pertaining to the nonattainment planning requirements of part D. As a result, this action does not address infrastructure elements related to the nonattainment NSR portion of section 110(a)(2)(C) or related to 110(a)(2)(I).

This action also does not address the "interstate transport" requirements of element 110(a)(2)(D)(i). In a separate action, EPA approved the State's submission to meet the requirements of 110(a)(2)(D)(i) for the 1997 ozone NAAQS (73 FR 26019).

IV. How did the State of Wyoming address the infrastructure elements of section 110(a)(2)?

1. *Emission limits and other control measures:* Section 110(a)(2)(A) requires SIPs to include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this Act.

[1] Memorandum from William T. Harnett, Director, Air Quality Policy Division, "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 1997 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards" (Oct. 2, 2007).

a. *Wyoming's response to this requirement:* Wyoming cited the following SIP provisions: *Non-regulatory documents:* Control Strategy Document, Source Surveillance Document and Compliance Schedule Document approved by EPA May 31, 1972 (37 FR 10842). *Regulatory Documents:* Wyoming Air Quality Standards and Regulations (WAQSR), Section 2, *Definitions;* Section 18, *Diluting and concealing emissions;* Section 19, *Abnormal conditions and equipment malfunction;* Section 14, *Control of particulate emissions;* and, Section 10, *Nitrogen oxides,* approved by EPA May 31, 1972 (37 FR 10842). WAQSR, Section 4, *Sulfur oxides,* approved by EPA June 10, 1975 (40 FR 24726). WAQSR, Section 12, *Carbon monoxide* and Section 9, *Hydrocarbons,* approved by EPA on May 31, 1972 (37 FR 10842). WAQSR, Section 4, *Sulfur oxides,* approved by EPA June 10, 1975 (40 FR 24726). WAQSR, Section 5, *Sulfuric acid mist,* approved by EPA May 31, 1972 (37 FR 10842). WAQSR, Section 25, *Sweetwater County non-attainment area particulate matter regulations,* approved by EPA July 2, 1979 (44 FR 38473). WAQSR, Section 13, *Open burning restrictions,* Section 15, *Wood waste burners,* Section 17, *Motor vehicle pollution,* approved by EPA May 31, 1972 (37 FR 10842). Chapter 1, Section 3, *Definitions;* Section 4, *Diluting and concealing emissions;* Section 5, *Abnormal conditions and equipment malfunction;* Chapter 3, Section 2, *Emission standards for particulate matter;* Section 3, *Emission standards for nitrogen oxides;* Section 4, *Emission standard for sulfur oxides;* Section 5, *Emission standards for carbon monoxide;* Section 6, *Emission standards for volatile organic compounds;* Chapter 4, Section 2, *Existing sulfuric acid production units;* Section 3, *Existing nitric acid manufacturing plans;* Chapter 8, Section 2, *Sweetwater County particular matter regulations,* Section 3, *Conformity of general federal actions to state implementation plans;* Chapter 10, Section 2, *Open burning restrictions;* Section 3, *Wood waste burners;* Chapter 13, Section 2, *Motor vehicle pollution control,* approved by EPA July 28, 2004 (69 FR 44965).

b. *EPA analysis:* Wyoming's SIP meets the requirements of CAA section 110(a)(2)(A) for the 1997 ozone NAAQS, subject to the following clarifications. First, Wyoming has no areas designated as nonattainment for the 1997 ozone NAAQS and, therefore, is not required to establish enforceable emission limitations or other emission reduction measures to attain the 1997 ozone NAAQS. The SIP provisions cited by Wyoming include emissions limitations for ozone precursors: Nitrogen oxides (WAQSR Chapter 3, section 3), and volatile organic compounds (WAQSR Chapter 3, section 6). These emissions limitations meet the requirements of 110(a)(2)(A) for the 1997 ozone NAAQS.

Second, in this action, EPA is not proposing to approve or disapprove any existing state rules with regard to director's discretion or variance provisions. A number of states have such provisions which are contrary to the CAA and existing EPA guidance (52 FR 45109, Nov. 24, 1987), and the Agency plans to take action in the future to address such state regulations. In the meantime, EPA encourages any state having a director's discretion or variance provision which is contrary to the CAA and EPA guidance to take steps to correct the deficiency as soon as possible.

Finally, in this action, EPA is also not proposing to approve or disapprove any existing state provisions with regard to excess emissions during startup, shutdown, or malfunction (SSM) of operations at a facility. A number of states have SSM provisions which are contrary to the CAA and existing EPA guidance [2] and the Agency plans to address such state regulations in the future. In the meantime, EPA encourages any state having a deficient SSM provision to take steps to correct it as soon as possible.

2. *Ambient air quality monitoring/data system:* Section 110(a)(2)(B) requires SIPs to provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality, and (ii) upon request, make such data available to the Administrator.

a. *Wyoming's response to this requirement:* Wyoming cited the following SIP provisions: *Non-regulatory documents: Air Quality Surveillance Document,* approved by EPA May 31, 1972 (37 FR 10842); *Air Quality Surveillance Network Document,* approved by EPA February 9, 1982 (47 FR 5892); *Implementation Plan for Lead,* approved by EPA October 11, 1984 (49 FR 39843). *Regulatory documents:* WAQSR, Section 3, *Particulates;* Section 10, *Nitrogen Oxides;* Section 4, *Sulfur oxides;* Section 12, *Carbon monoxide;* Section 8, *Photochemical oxidants;* Section 6, *Sulfation;* and, Section 27, *Ambient air quality standard for lead,* approved by EPA October 11, 1984 (49 FR 39843). Chapter 2, Section 2, *Ambient standards for particular matter;* Section 3, *Ambient standards for nitrogen oxides;* Section 4, *Ambient standards for sulfur oxides,* Section 5, *Ambient standards for carbon monoxide;* Section 6, *Ambient standards for ozone;* Section 8, *Ambient standards for suspended sulfates;* and, Section 10, *Ambient standards for lead,* approved by EPA July 28, 2004 (69 FR 44965).

b. *EPA analysis:* Wyoming's air monitoring programs and data systems meet the requirements of CAA section 110(a)(2)(B) for the 1997 ozone NAAQS. The Wyoming Ambient Air Monitoring Annual Network Plan, 2009, was approved by EPA Region 8 on December 3, 2009.

3. *Program for enforcement of control measures:* Section 110(a)(2)(C) requires SIPs to include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that NAAQS are achieved, including a permit program as required in parts C and D.

a. *Wyoming's response to this requirement:* Wyoming cited the following SIP provisions: *Non-regulatory documents: Legal authority document; Source Surveillance document; Review of New Sources and Modifications Document,* approved by EPA May 31, 1972 (37 FR 10842). *Regulatory documents:* 1974 WAQSR, Section 21, *Permit requirements for construction, modification and operation,* approved by EPA June 10, 1975 (40 FR 24726); 1979 WAQSR, Section 24, *Prevention of significant deterioration,* approved by EPA July 2, 1979 (44 FR 38473). Chapter 6, Section 2, *Permit requirements for construction, modification, and operation* and Section 4, *Prevention of significant deterioration,* approved by EPA July 28, 2004 (69 FR 44965).

b. *EPA analysis:* As explained above, in this action EPA is not evaluating nonattainment related provisions, such as the nonattainment NSR program required by part D of the Act. In addition, Wyoming has no nonattainment areas for the 1997 ozone NAAQS and is therefore not required at this point to have a corresponding nonattainment NSR program. EPA is evaluating the State's prevention of

[2] Steven Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation, Memorandum to EPA Air Division Directors, "State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown." (Sept. 20, 1999).

significant deterioration (PSD) program as required by part C of the Act, and the State's minor NSR program as required by 110(a)(2)(C).

GHG Regulation

Wyoming's PSD program was most recently approved by EPA on July 16, 2008. As described in our notice of approval (73 FR 40750), Wyoming's PSD program at that date met the general requirements of CAA section 110(a)(2)(C). However, on June 3, 2010, EPA promulgated the "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule" ("Tailoring Rule") (75 FR 31514), setting out requirements for application of PSD to emissions sources of greenhouse gases (GHG). On December 13, 2010, EPA issued a finding of substantial inadequacy and SIP call for seven states, including Wyoming, on the basis that the states' SIP-approved PSD programs did not apply PSD to GHG-emitting sources as required under the Tailoring Rule (75 FR 77698). Next, on December 29, 2010, EPA issued a finding that the seven states had failed to submit revisions to their SIPs as necessary to correct this inadequacy (75 FR 81874). Finally, on December 30, 2010, EPA established a federal implementation plan (FIP) in the seven states to ensure that PSD permits for sources emitting GHGs could be issued in accordance with the Tailoring Rule (75 FR 82246). As the Wyoming PSD program is currently subject to a finding of substantial inadequacy and SIP call, and Wyoming has not taken steps to remedy the inadequacy, EPA proposes in this action to disapprove the Wyoming infrastructure SIP for each infrastructure element that requires the SIP to contain a PSD program that meets the requirements of part C of title I of the Act. These elements are 110(a)(2)(C) and (J).

Ozone Precursors

In addition, in order for the State's SIP-approved PSD program to satisfy the requirements of section 110(a)(2)(C) for the 1997 ozone NAAQS, the program must properly regulate ozone precursors. On November 29, 2005, EPA promulgated the phase 2 implementation rule for the 1997 ozone NAAQS (Phase 2 Rule), which includes requirements for PSD programs to treat nitrogen oxides (NOx) as a precursor for ozone (72 FR 71612). Wyoming has adopted revisions to its PSD program to meet the requirements of the Phase 2 rule, and submitted these revisions to EPA on May 10, 2011. EPA proposes in this action to concurrently approve the PSD program updates in Wyoming's May 11, 2011 submittal, including approval of the revisions which meet the requirements of the Phase 2 Rule. In particular, the revisions in Chapter 6, section 4(a) to the definitions of "major modification," "major stationary source," "regulated NSR pollutant," and "significant" meet the requirements of 40 CFR 51.166(b)(2)(ii), (b)(1)(ii), (b)(49)(i)(a), and (b)(23)(i), respectively, as amended by the Phase 2 Rule (see 70 FR at 71699–700). In addition, the revision to section 4(b)(i)(E)(vi)(1)(e) meets the requirements of the footnote to 40 CFR 51.166(i)(5)(i)(e). Contingent on final approval of these revisions, Wyoming's SIP meets the requirement of infrastructure element 110(a)(2)(C) to include a PSD program that properly regulates ozone precursors. This approval does not negate the disapproval (discussed in the previous paragraph) based on the finding of substantial inadequacy and SIP call.

EPA also proposes approval of the portions of Wyoming's May 11, 2011 submission which update the State's PSD program to comply with the NSR implementation rule for $PM_{2.5}$ (73 FR 28321, May 16, 2008), and the inserted definition of "replacement unit," which reflects the language of 40 CFR 51.166 (b)(32)(i) through (iv). In particular, the revisions in Chapter 6, section 4(a) to the definitions of "regulated NSR pollutant" and "significant" meet the requirements of 40 CFR 51.166 (b)(49)(i)(b), (c), (d), and (b)(49)(vi); and (b)(23)(i), respectively, as amended by the $PM_{2.5}$ NSR implementation rule (see 73 FR at 28348). In addition, the revisions to section 4(b)(i)(E)(vi)(2) and (3) meet the requirements of 40 CFR 51.166(i)(5)(ii) and (iii), respectively.

Minor NSR

Finally, with regards to minor NSR, in this action EPA is proposing to approve Wyoming's infrastructure SIP for the 1997 ozone NAAQS with respect to the general requirement in section 110(a)(2)(C) to include a program in the SIP that regulates the modification and construction of any stationary source as necessary to assure that the NAAQS are achieved. Wyoming's approved minor NSR program is found in Chapter 6, section 2 of the WAQSR. EPA previously approved Wyoming's minor NSR program into the SIP (at that time as Chapter 1, section 21), and has subsequently approved revisions to the program, and at those times there were no objections to the provisions of this program. (See, for example, 47 FR 5892, Feb. 9, 1982.) Since then, the State and EPA have relied on the State's existing minor NSR program to assure that new and modified sources not captured by the major NSR permitting programs do not interfere with attainment and maintenance of the NAAQS. EPA is not proposing to approve or disapprove the State's existing minor NSR program itself to the extent that it is inconsistent with EPA's regulations governing this program. A number of states may have minor NSR provisions that are contrary to the existing EPA regulations for this program. EPA intends to work with states to reconcile state minor NSR programs with EPA's regulatory provisions for the program. The statutory requirements of section 110(a)(2)(C) provide for considerable flexibility in designing minor NSR programs, and it may be time to revisit the regulatory requirements for this program to give the states an appropriate level of flexibility to design a program that meets their particular air quality concerns, while assuring reasonable consistency across the country in protecting the NAAQS with respect to new and modified minor sources.

4. *Interstate transport:* Section 110(a)(2)(D)(i) requires SIPs to contain adequate provisions prohibiting, consistent with the provisions of this title, any source or other type of emissions activity within the state from emitting any air pollutant in amounts which will (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other state, with respect to any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other state under part C to prevent significant deterioration of air quality or to protect visibility.

a. *Wyoming's response to this requirement:* Wyoming submitted its Interstate Transport SIP to EPA on May 25, 2007.

b. *EPA Analysis:* EPA approved the State's Interstate Transport provisions for the 1997 ozone NAAQS on May 8, 2008 (73 FR 26019). EPA is taking no action relevant to section 110(a)(2)(D)(i) in this proposal.

5. *Interstate and International transport provisions:* Section 110(a)(2)(D)(ii) requires that each SIP shall contain adequate provisions insuring compliance with applicable requirements of sections 126 and 115 (relating to interstate and international pollution abatement).

a. *Wyoming's response to this requirement:* Wyoming did not cite any specific provisions relevant to this requirement.

b. *EPA Analysis:* Section 126(a) requires notification to affected, nearby

states of major proposed new (or modified) sources. Sections 126(b) and (c) pertain to petitions by affected States to the Administrator regarding sources violating the "interstate transport" provisions of section 110(a)(2)(D)(i). Section 115 similarly pertains to international transport of air pollution.

WAQSR Chapter 6, Section 2, specifically paragraph (m) meets the requirements of CAA section 126(a) for the 1997 ozone NAAQS. Final approval of this language became effective January 30, 1995 (59 FR 60902, Nov. 29, 1994). Final approval of the renumbering of this language became effective August 27, 2004 (See 69 FR 44965, July 28, 2004).

Wyoming has no pending obligations under sections 126(c) or 115(b); therefore, its SIP currently meets the requirements of those sections. The SIP therefore meets the requirements of 110(a)(2)(D)(ii) for the 1997 ozone NAAQS.

6. *Adequate resources:* Section 110(a)(2)(E) requires states to provide (i) necessary assurances that the state will have adequate personnel, funding, and authority under state law to carry out the SIP (and is not prohibited by any provision of federal or state law from carrying out the SIP or portion thereof), (ii) requires that the state comply with the requirements respecting state boards under section 128, and (iii) necessary assurances that, where the state has relied on a local or regional government, agency, or instrumentality for the implementation of any SIP provision, the state has responsibility for ensuring adequate implementation of such SIP provision.

a. *Wyoming's response to this requirement:* Wyoming cited the following SIP provisions: *Non-regulatory documents:* Resources and legal authority document submitted to EPA on January 28, 1972 and approved by EPA on May 31, 1972 (37 FR 10842). *Regulatory document:* Chapter 1, Section 2, *Authority,* approved by EPA on July 28, 2004 (69 FR 44965).

b. *EPA Analysis:* The provisions in Articles 1 and 2 of the Wyoming Environmental Quality Act (Chapter 11, Title 35 of the Wyoming Statutes) give the State adequate authority to carry out the SIP. The composition of the Wyoming Council of Environmental Quality is governed by section 35–11–111(a) of the Wyoming Statutes. Finally, the State receives sections 103 and 105 grant funds through its Performance Partnership Grant along with required state matching funds to provide funding necessary to carry out Wyoming's SIP requirements. The requirements of section 110(a)(2)(E) for the 1997 ozone NAAQS are therefore met.

7. *Stationary source monitoring system:* Section 110(a)(2)(F) requires (i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources, (ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and (iii) correlation of such reports by the state agency with any emission limitations or standards established pursuant to the Act, which reports shall be available at reasonable times for public inspection.

a. *Wyoming's response to this requirement:* Wyoming cited the following SIP provisions: *Regulatory documents:* 1979 WAQSR, Section 23, *Continuous monitoring requirements for existing sources,* approved by EPA on July 2, 1979 (44 FR 38473) and Chapter 7, Section 2, *Continuous monitoring requirements for existing sources,* approved by EPA on July 28, 2004 (69 FR 44965).

b. *EPA Analysis:* In addition to the specific monitoring provisions cited by Wyoming, the SIP provides for monitoring, recordkeeping, and reporting requirements for sources subject to minor and major source permitting. (See WAQSR Chapter 6, section 2.) Wyoming's SIP therefore meets the requirements of section 110(a)(2)(F) for the 1997 ozone NAAQS.

8. *Emergency power:* Section 110(a)(2)(G) requires states to provide for authority to address activities causing imminent and substantial endangerment to public health, including contingency plans to implement the emergency episode provisions in their SIPs.

a. *Wyoming's response to this requirement:* Wyoming cited the following SIP provisions: *Non-regulatory documents: Emergency Episode Plan Document,* approved by EPA May 31, 1972 (37 FR 10842); *Emergency Episode Contingency Plan Document,* approved by EPA February 9, 1982 (47 FR 5892). *Regulatory documents:* 1971 WAQSR, Section 20, *Air Pollution emergency episodes,* approved by EPA May 31, 1972 (37 FR 10842) and Chapter 12, Section 2, *Air pollution emergency episodes,* approved by EPA July 28, 2004 (69 FR 44965).

b. *EPA analysis:* Section 35–11–115 of the Wyoming Statutes gives the Director of the Wyoming Department of Environmental Quality (DEQ) comparable emergency powers to those in section 303 of the Act. Furthermore, Wyoming has not monitored any values above the priority cut point for ozone (see 40 CFR 51.150(b)(5)), and is not required at this point to have a contingency plan for ozone that meets the requirements of 40 CFR part 51, subpart H. The SIP therefore meets the requirements of 110(a)(2)(G) for the 1997 ozone NAAQS.

9. *Future SIP revisions:* Section 110(a)(2)(H) requires that SIPs provide for revision of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and (ii), except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the SIP is substantially inadequate to attain the NAAQS which it implements or to otherwise comply with any additional requirements under this Act.

a. *Wyoming's response to this requirement:* Wyoming cited the following SIP provisions: *Non-regulatory document:* Implementation Plan Review Document, approved by EPA April 19, 1983 (48 FR 16682).

b. *EPA analysis:* The general provisions in Article 1 of the Wyoming Environmental Quality Act (Article 1, Chapter 11, Title 35 of the Wyoming Statutes) and the particular provision in Article 2 at section 35–11–202 of the Wyoming Statutes give the State sufficient authority to revise the SIP as required by section 110(a)(2)(H).

10. *Nonattainment Area Plan or Plan Revision under Part D:* Section 110(a)(2)(I) requires that a SIP or SIP revision for an area designated as a nonattainment area must meet the applicable requirements of part D of this subchapter (relating to nonattainment areas).

a. *EPA analysis for Section 110(a)(2)(I):* As noted above, the specific nonattainment area plan requirements of Section 110(a)(2)(I) are subject to the timing requirement of Section 172, not the timing requirement of Section 110(a)(1). This element is therefore not applicable to this action. EPA will take action on part D attainment plans through a separate process.

11. *Consultation with government officials, public notification, PSD and visibility protection:* Section 110(a)(2)(J) requires that each SIP meet the applicable requirements of section 121 of this title (relating to consultation), section 127 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection).

a. *Wyoming's response to this requirement:* Wyoming cited the following SIP provisions: *Non-regulatory document:* Consultation document, approved by EPA July 2, 1979 (44 FR 38473). *Regulatory-document:* 1979 WAQSR, Section 24, *Prevention of significant deterioration,* approved by EPA on July 2, 1979 (44 FR 38473); Chapter 7, Section 4, *Prevention of significant deterioration,* approved by EPA 7/28/04 (69 FR 44965)

b. *EPA Analysis:*

The State has demonstrated that it has the authority and rules in place to provide a process of consultation with general purpose local governments, designated organizations of elected officials of local governments and any Federal Land Manager having authority over federal land to which the SIP applies, consistent with the requirements of CAA section 121. Furthermore, EPA previously approved portions of the Wyoming SIP meeting the requirements of CAA section 127. (44 FR 38473, July 2, 1979.)

As noted above, the State has a SIP-approved PSD program. EPA has further evaluated Wyoming's SIP-approved PSD program in this proposed action under IV.3, element 110(a)(2)(C). For the same reasons as discussed in subsection IV.3, EPA proposes to disapprove the Wyoming infrastructure SIP for the 1997 ozone NAAQS specifically for the requirement in section 110(a)(2)(J) that the SIP meet the applicable requirements of part C of title I of the Act, in particular with regards to the requirement that the PSD program apply to GHG sources in accordance with the Tailoring Rule.

Finally, with regard to the applicable requirements for visibility protection, EPA recognizes that states are subject to visibility and regional haze program requirements under part C of the act. In the event of the establishment of a new NAAQS, however, the visibility and regional haze program requirements under part C do not change. Thus we find that there is no new visibility obligation "triggered" under section 110(a)(2)(J) when a new NAAQS becomes effective.

12. *Air quality and modeling/data:* Section 110(a)(2)(K) requires that each SIP provide for (i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a NAAQS, and (ii) the submission, upon request, of data related to such air quality modeling to the Administrator.

a. *Wyoming's response to this requirement:* Wyoming cited the following SIP provisions: *Regulatory Documents:* 1974 WAQSR, Section 21, *Permit requirements for construction, modification and operation,* approved by EPA on June 10, 1975 (40 FR 24726); 1979 WAQSR, Section 24, *Prevention of significant deterioration,* approved by EPA on July 2, 1979 (44 FR 38473); Chapter 6, Section 2, *Permit requirements for construction, modification, and operation,* approved by EPA on July 28, 2004 (69 FR 44965); Chapter 6, Section 4, *Prevention of significant deterioration,* approved by EPA on July 28, 2004 (69 FR 44965).

b. *EPA Analysis:* Wyoming's SIP meets the requirements of CAA section 110(a)(2)(K) for the 1997 ozone NAAQS. In particular, Wyoming's PSD program requires that estimates of ambient air concentrations be based on applicable air quality models specified in Appendix W of 40 CFR part 51, and that modification or substitution of a model specified in Appendix W must be approved by the Administrator. (See WAQSR Chapter 6, section 4(b)(iv).) As a result, the SIP provides for such air quality modeling as the Administrator has prescribed.

13. *Permitting fees:* Section 110(a)(2)(L) requires SIPs to require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this act, a fee sufficient to cover (i) the reasonable costs of reviewing and acting upon any application for such a permit, and (ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action), until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under title V.

a. *Wyoming's response to this requirement:* Wyoming cited the following SIP provisions: *Regulatory Documents:* 1993 WAQSR, Section 21, *Permit requirements for construction, modification, and operation,* approved by EPA on 11/29/94 (59 FR 60905); Chapter 6, Section 2, *Permit requirements for construction, modification and operation,* approved by EPA on July 28, 2004 (69 FR 44965).

b. *EPA Analysis:* Wyoming's approved title V operating permit program meets the requirements of CAA section 111(a)(2)(L) for the 1997 ozone NAAQS. Final approval of the title V operating permit program became effective April 23, 1999 (64 FR 8523, Feb. 22, 1990). Interim approval of Wyoming's title V operating permit program became effective February 21, 1995 (60 FR 4563, Jan. 19, 1995). As discussed in a previous direct final rule (which received comments) for interim approval of the title V program (59 FR 48802, Sept. 23, 1994), the State demonstrated that the fees collected were sufficient to administer the program.

14. *Consultation/participation by affected local entities:* Section 110(a)(2)(M) requires states to provide for consultation and participation in SIP development by local political subdivisions affected by the SIP.

a. *Wyoming's response to this requirement:* Wyoming cited the following SIP provisions: *Non-regulatory document:* Intergovernmental Cooperation Document, approved by EPA on May 31, 1972 (37 FR 10842).

b. *EPA Analysis:* Wyoming's submittal meets the requirements of CAA Section 110(a)(2)(M) for the 1997 ozone NAAQS.

V. What action is EPA taking?

In this action, EPA is proposing to approve the following infrastructure elements for the 1997 ozone NAAQS: (A), (B), (C) with regards to the requirement to have a minor NSR program, (D)(ii), (E), (F), (G), (H), (J) with regards to the requirements related to sections 121 and 127 of the Act, (K), (L), and (M).

In this action, EPA also proposes approval of the State's May 11, 2011 submission, updating the Wyoming PSD program to, among other things, regulate NO_X as a precursor to ozone. Contingent on final approval of these updates, EPA is proposing to approve portions of infrastructure elements (C) and (J) for the 1997 ozone NAAQS with regards to the requirement that the State's SIP-approved PSD program properly regulate ozone precursors.

In this action, EPA is proposing to disapprove the following infrastructure elements for the 1997 ozone NAAQS:

(C) and (J) with regards to the requirement that the State's PSD program regulate GHG-emitting sources in accordance with the Tailoring Rule.

In this action, EPA is taking no action on infrastructure elements (D)(i), (I), and (J) specifically in regard to visibility, for the 1997 ozone NAAQS.

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations (42 U.S.C. 7410(k), 40 CFR 52.02(a)).

Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves some state law as meeting Federal requirements and disapproves other state law because it does not meet Federal requirements; this proposed action does not impose additional requirements beyond those imposed by state law. For that reason, this proposed 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.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: May 16, 2011.

James B. Martin,

Regional Administrator, Region 8.

[FR Doc. 2011–12600 Filed 5–20–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2010–0856; FRL–9308–2]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Permits for Major Stationary Sources and Major Modifications Locating in Prevention of Significant Deterioration (PSD) Areas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the Virginia Department of Environmental Quality (VADEQ). This revision pertains to EPA's proposal to approve the addition of nitrogen oxides (NO_X) as a precursor to ozone in the Virginia SIP that governs permits for constructing or significantly modifying facilities located in areas attaining the national ambient air quality standards (NAAQS). This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before June 22, 2011.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2010–0856 by one of the following methods:

A. *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *E-mail: cox.kathleen@epa.gov.*

C. *Mail:* EPA–R03–OAR–2010–0856, Kathleen Cox, Associate Director, Office of Permits and Air Toxics, Mailcode 3AP10, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. 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–R03–OAR–2010–0856. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the Virginia submittal are available at the VADEQ Office, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Sharon McCauley, (215) 814–3376, or by e-mail at *mccauley.sharon@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, whenever "we," "us," or "our" is used, we mean EPA. On June 7, 2010, the VADEQ submitted a revision to the Virginia SIP for including NO_X as a precursor to ozone for permits of major stationary

sources or major modifications locating in areas in Virginia that are attaining the NAAQS, also known as Prevention of Significant Deterioration (PSD) areas.

I. Background

We are proposing approval of Virginia's SIP submission dated June 7, 2010 which addresses regulatory changes needed to be equivalent to the CAA's part C PSD permit program. This SIP submission also corrects deficiencies identified by EPA in the March 27, 2008 **Federal Register** action entitled, "Completeness Findings for Section 110(a) State implementation Plans for the 8-hour ozone National Ambient Air Quality Standards (1997 Ozone NAAQS)" (73 FR 16205). EPA's proposed approval of this SIP submission addresses Virginia's compliance with the portion of CAA Section 110(a)(2)(C) & (J) relating to the CAA's part C PSD permit program for the 1997 Ozone NAAQS, because this proposed approval would approve regulating NO_X as a precursor to ozone in Virginia's SIP in accordance with the **Federal Register** action dated November 29, 2005 (70 FR 71612) that finalized NO_X as a precursor for ozone regulations set forth at 40 CFR 51.166 and in 40 CFR 52.21.

II. Summary of SIP Revision

VADEQ's regulations adding NO_X as a precursor to ozone establish a construction permit program consistent with the Federal CAA's Title I program and implementing regulations at 40 CFR 51.166, "Prevention of Significant Deterioration of Air Quality." VADEQ's regulation 9VAC5 Chapter 80, Article 8 is part of the SIP and sets forth the criteria and procedures for major stationary sources to obtain a permit to construct, operate and/or modify a major stationary source.

We are proposing to fully approve the regulatory citation changes which became effective in Virginia on December 31, 2008, as referenced here in this document and in the Virginia Code of Regulations 9VAC5 Chapter 80, Article 8, sections 5–80–1615 and 5–80–1695 which establish NO_X as a precursor to ozone, into the Virginia SIP. These proposed changes will add NO_X as a precursor to ozone, in addition to volatile organic compounds (VOC), in the definitions of "major modification", "major stationary source", "regulated New Source Review (NSR) pollutant" and "significant" and to the list of exempted facilities.

Previously, EPA had issued an "limited approval" of Virginia's PSD regulations (9VAC5 Chapter 80, Article 8) for reasons that will not deny this action as being fully approved. The "limited approval" issues can be found in the Technical Support Document contained in this Docket or in the **Federal Register** action dated October 22, 2008 (73 FR 62897).

III. General Information Pertaining to SIP Submittals From the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) "privilege" for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information (1) That are generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) that are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1–1198, precludes granting a privilege to documents and information "required by law," including documents and information required by Federal law to maintain program delegation, authorization or approval, "since Virginia must enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts * * *." The opinion concludes that "regarding 10.1–1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval."

Virginia's Immunity law, Va. Code Sec. 10.1–1199, provides that to the extent consistent with requirements imposed by Federal law, any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its PSD program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

IV. Proposed Action

Our review of Virginia's SIP revision request indicates that our proposed approval of this SIP revision is warranted. As previously noted, these changes to the Virginia program are found in the Virginia Code at 9VAC5 Chapter 80, Article 8, Permits for Major Stationary Sources and Major Modifications Locating in Prevention of Significant Deterioration Areas.

This proposed SIP approval for sections 5–80–1615 and 5–80–1695 which addresses regulatory changes needed to be equivalent to the CAA's part C PSD permit program. It will also correct deficiencies identified by EPA in the March 27, 2008 **Federal Register** action entitled, "Completeness Findings for Section 110(a) State implementation Plans for the 8-hour Ozone National Ambient Air Quality Standards (1997 Ozone NAAQS)" (73 FR 16205). EPA's proposed approval of this SIP

submission addresses Virginia's compliance with the portion of CAA Section 110(a)(2)(C) & (J) relating to the CAA's part C PSD permit program for the 1997 Ozone NAAQS, because this proposed approval would approve regulating NO_X as a precursor to ozone in Virginia's SIP in accordance with the **Federal Register** action dated November 29, 2005 (70 FR 71612) that finalized NO_X as a precursor for ozone regulations set forth at 40 CFR 51.166 and in 40 CFR 52.21.

We are proposing to fully approve the Virginia SIP revision request for these changes only. Prior "limited approval" of certain aspects of Virginia's PSD program elements remain valid. A description of these items for "limited approval" can be found in the Technical Support Document contained in this Docket or in the **Federal Register** action dated October 22, 2008 (73 FR 62897). EPA is soliciting public comments on the issues discussed for this proposed approval document only. These comments will be considered before taking final action.

V. 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 proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed 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 proposed rule to include NO_X as a precursor to ozone in Virginia 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.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

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

Dated: April 25, 2011.

James W. Newson,

Acting Regional Administrator, Region III.

[FR Doc. 2011–12515 Filed 5–20–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–0210–0302; FRL–9309–9]

Approval and Promulgation of State Implementation Plan Revisions; Infrastructure Requirements for the 1997 8-Hour Ozone National Ambient Air Quality Standards; Utah

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed Rule.

SUMMARY: EPA is proposing to approve and conditionally approve the State Implementation Plan (SIP) submissions from the State of Utah which demonstrate that the State meets the requirements of section 110(a)(1) and (2) of the Clean Air Act (CAA) for the National Ambient Air Quality Standard (NAAQS) promulgated for ozone on July 18, 1997. Section 110(a) of the CAA requires that each state adopt and submit an "infrastructure SIP" for the implementation, maintenance and enforcement of each NAAQS promulgated by the EPA. The State of Utah submitted two certifications of their Infrastructure SIP for the 1997 ozone NAAQS, one dated December 3, 2007, which was determined to be complete on March 27, 2008 (73 FR 16205), and one dated December 21, 2009. EPA does not propose to act on the State's March 22, 2007 submission to meet the requirements of section 110(a)(2)(D)(i) of the CAA, relating to interstate transport of air pollution, for the 1997 ozone NAAQS. EPA approved the State's interstate transport SIP submission on May 28, 2008 (73 FR 16543).

DATES: Written comments must be received on or before June 22, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2010–0302, by one of the following methods:

- *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *E-mail: dolan.kathy@epa.gov*
- *Fax:* (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).
- *Mail:* Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mail Code 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129.
- *Hand Delivery:* Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mail Code 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:30 p.m., excluding federal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R08–OAR–2010–0302. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The

http://www.regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA, without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* For additional instructions on submitting comments, go to section I, General Information, of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Kathy Dolan, Air Program, U.S. Environmental Protection Agency (EPA), Region 8, Mail Code 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129. 303–312–6142, *dolan.kathy@epa.gov.*

SUPPLEMENTARY INFORMATION:

Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The initials *SIP* mean or refer to State Implementation Plan.

Table of Contents

I. General Information
II. Background
III. What infrastructure elements are required under sections 110(a)(1) and (2)?
IV. How did the State of Utah address the infrastructure elements of sections 110(a)(1) and (2)?
V. What action is EPA taking?
VI. Statutory and Executive Order Reviews

I. General Information

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

1. *Submitting Confidential Business Information (CBI).* Do not submit CBI to EPA through *http://www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register**, date, and page number);

Follow directions and organize your comments;

Explain why you agree or disagree;

Suggest alternatives and substitute language for your requested changes;

Describe any assumptions and provide any technical information and/or data that you used;

If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced;

Provide specific examples to illustrate your concerns, and suggest alternatives;

Explain your views as clearly as possible, avoiding the use of profanity or personal threats; and,

Make sure to submit your comments by the comment period deadline identified.

II. Background

On July 18, 1997, EPA promulgated new NAAQS for ozone based on 8-hour average concentrations. The 8-hour averaging period replaced the previous 1-hour averaging period, and the level of the NAAQS was changed from 0.12 parts per million (ppm) to 0.08 ppm (62 FR 38856). By statute, SIPs meeting the requirements of sections 110(a)(1) and (2) are to be submitted by states within three years after promulgation of a new or revised standard. Section 110(a)(2) provides basic requirements for SIPs, including emissions inventories, monitoring, and modeling, to assure attainment and maintenance of the standards. These requirements are set out in several "infrastructure elements," listed in section 110(a)(2).

Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, and the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affects the content of the submission. The contents of such SIP submissions may also vary depending upon what provisions the state's existing SIP already contains. In the case of the 1997 ozone NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous NAAQS. In a guidance issued on October 2, 2007, EPA noted that, to the extent an existing SIP already meets the section 110(a)(2) requirements, states need only to certify that fact via a letter to EPA.[1]

On March 27, 2008, EPA published a final rule entitled, "Completeness Findings for Section 110(a) State Implementation Plans for the 8-hour Ozone NAAQS" (73 FR 16205). In the rule, EPA made a finding for each State that it had submitted or had failed to submit a complete SIP that provided the basic program elements of section 110(a)(2) necessary to implement the 1997 8-hour ozone NAAQS. In particular, EPA found that Utah had

[1] Memorandum from William T. Harnett, Director, Air Quality Policy Division, "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 1997 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards" (Oct. 2, 2007).

submitted a complete SIP to meet these requirements.

III. What infrastructure elements are required under sections 110(a)(1) and (2)?

Section 110(a)(1) provides the procedural and timing requirements for SIP submissions after a new or revised NAAQS is promulgated. Section 110(a)(2) lists specific elements the SIP must contain or satisfy. These infrastructure elements include requirements, such as modeling, monitoring, and emissions inventories, which are designed to assure attainment and maintenance of the NAAQS. The elements that are the subject of this action are listed below.

- 110(a)(2)(A): Emission limits and other control measures.
- 110(a)(2)(B): Ambient air quality monitoring/data system.
- 110(a)(2)(C): Program for enforcement of control measures.
- 110(a)(2)(D)(ii): Interstate and international pollution.
- 110(a)(2)(E): Adequate resources and authority.
- 110(a)(2)(F): Stationary source monitoring and reporting.
- 110(a)(2)(G): Emergency powers.
- 110(a)(2)(H): Future SIP revisions.
- 110(a)(2)(J): Consultation with government officials; public notification; and prevention of significant deterioration (PSD) and visibility protection.
- 110(a)(2)(K): Air quality modeling/data.
- 110(a)(2)(L): Permitting fees.
- 110(a)(2)(M): Consultation/participation by affected local entities.

A detailed discussion of each of these elements is contained in the next section.

Two elements identified in section 110(a)(2) are not governed by the three year submission deadline of section 110(a)(1) and are therefore not addressed in this action. These elements relate to part D of Title I of the CAA, and submissions to satisfy them are not due within three years after promulgation of a new or revised NAAQS, but rather are due at the same time nonattainment area plan requirements are due under section 172. The two elements are: (i) Section 110(a)(2)(C) to the extent it refers to permit programs (known as "nonattainment new source review (NSR)") required under part D, and (ii) section 110(a)(2)(I), pertaining to the nonattainment planning requirements of part D. As a result, this action does not address infrastructure elements related to the nonattainment NSR portion of section 110(a)(2)(C) or related to 110(a)(2)(I).

This action also does not address the "interstate transport" requirements of element 110(a)(2)(D)(i). In a separate action, EPA approved the State's submission to meet the requirements of 110(a)(2)(D)(i) for the 1997 ozone NAAQS. (73 FR 16543).

IV. How did the State of Utah address the infrastructure elements of sections 110(a)(1) and (2)?

1. *Emission limits and other control measures:* Section 110(a)(2)(A) requires SIPs to include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this Act.

a. *Utah's response to this requirement:* SIP Section I (*Legal Authority*) A.1.a, codified at R307–110–2, identifies the statutory provisions that allow adoption of standards and limitations for attainment and maintenance of national standards. (19–2–104 and 109, Utah Code Annotated 1953 (UCA)). EPA approved this SIP originally in the early 1980's and most recently on June 25, 2003 (68 FR 37744).

b. *EPA analysis:* Utah's SIP meets the requirements of CAA section 110(a)(2)(A) for the 1997 ozone NAAQS, subject to the following clarifications. First, although Utah's certification cited its legal authority to adopt emissions limitations for maintenance of the NAAQS, the certification did not identify emissions limitations specific to the 1997 8-hour ozone NAAQS that the State has adopted and that have been approved into the SIP. EPA notes that, among other emissions limitations, the Utah SIP contains emissions limitations originally developed to attain the previous 1-hour ozone standard. For the purposes of this action, EPA is reviewing any rules originally submitted in response to part D solely for the purposes of determining whether they support a finding that the State has met the basic infrastructure requirements under section 110(a)(2).

In this action, EPA is not proposing to approve or disapprove any existing state rules with regard to director's discretion or variance provisions. A number of states have such provisions which are contrary to the CAA and existing EPA guidance (52 FR 45109, Nov. 24, 1987), and the Agency plans to take action in the future to address such state regulations. In the meantime, EPA encourages any state having a director's discretion or variance provision which is contrary to the CAA and EPA guidance to take steps to correct the deficiency as soon as possible.

Finally, in this action, EPA is also not proposing to approve or disapprove any existing state provisions with regard to excess emissions during startup, shutdown, or malfunction (SSM) of operations at a facility. A number of states have SSM provisions which are contrary to the CAA and existing EPA guidance [2] and the Agency plans to address such state regulations in the future. In the specific case of SSM provisions in the Utah SIP, EPA has issued a finding of substantial inadequacy and call for a SIP revision for Utah's "unavoidable breakdown" rule (76 FR 21639, Apr. 18, 2011). As stated above, though, EPA is not proposing to address SSM provisions in the context of this action and therefore proposes to approve the Utah certification for infrastructure element 110(a)(2)(A) for the 1997 ozone NAAQS.

2. *Ambient air quality monitoring/data system:* Section 110(a)(2)(B) requires SIPs to provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality, and (ii) upon request, make such data available to the Administrator.

a. *Utah's response to this requirement:* SIP Section IV (*Ambient Air Monitoring Program*), codified at R307–110–5, provides a brief description of the purposes of the air monitoring program. EPA approved this SIP originally in the early 1980's and most recently on June 25, 2003 (68 FR 37744).

b. *EPA analysis:* Utah's air monitoring programs and data systems do not meet the requirements of CAA section 110(a)(2)(B) for the 1997 ozone NAAQS. In particular, deficiencies in Utah's monitoring network plan are detailed in a memorandum in the docket for this action. Utah has formally committed to submitting an adequate annual monitoring plan not later than one year after the date of final action on Utah's infrastructure SIP for the 1997 ozone NAAQS. The specific measures Utah will take are detailed in the commitment letter, which may be found in the docket for this action. EPA has reviewed these measures and agrees that they will rectify the deficiencies in Utah's ambient air monitoring network.

[2] Steven Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation, Memorandum to EPA Air Division Directors, "State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown." (Sept. 20, 1999).

As a result of Utah's formal commitment, EPA proposes to conditionally approve the Utah infrastructure SIP for section 110(a)(2)(B) for the 1997 ozone NAAQS. If, however, Utah does not implement the measures specified in its commitment within one year after the date of final action on Utah's infrastructure SIP for the 1997 ozone NAAQS, EPA's conditional approval will automatically revert to disapproval of the infrastructure SIP for section 110(a)(2)(B) for the 1997 ozone NAAQS.

3. *Program for enforcement of control measures:* Section 110(a)(2)(C) requires SIPs to include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that NAAQS are achieved, including a permit program as required in parts C and D.

a. *Utah's response to this requirement:* SIP Section I (*Legal Authority*) A.1.b, identifies the statutory provisions that allow the Division of Air Quality (DAQ) to enforce applicable laws, regulations and standards and seek injunctive relief. (Sections 19–2–104 and 19–2–115, UCA.)

SIP Section I (*Legal Authority*) A.1.d, codified at R307–110–2, identifies the statutory provisions that allow the DAQ to prevent construction, modification or operation of any stationary source at any location where emissions from such source will prevent the attainment or maintenance of a national standard or interfere with PSD requirements. (Authority Utah Code Section 19–2–108) EPA approved this SIP originally in the early 1980's and most recently on June 25, 2003 (68 FR 37744).

SIP Section VIII (*PSD*), codified at R307–110–9 and R307–405, describes the program to prevent significant deterioration of areas of the State where the air is clean. EPA approved the PSD SIP originally in the early 1980's and most recently on June 25, 2003 (68 FR 37744). EPA most recently approved R307–405 on August 19, 2004 (69 FR 51368). Utah submitted revisions to the PSD SIP and R307–405 on September 15, 2006. Updates to the incorporation by reference (IBR) date of 40 CFR 52.21 were submitted on October 1, 2007 and March 3, 2008. The October 1, 2007 update incorporated provisions in the Code of Federal Regulations (CFR) that added NO_X as a precursor for ozone. The most recent update of the IBR date was adopted on February 5, 2009 and will be submitted to EPA in the near future when the final administrative paperwork is available. EPA has not yet acted on these submittals.

SIP Section XVII (*Visibility protection*), codified at R307–10–25, describes the program to protect visibility, especially within the boundaries of the five national parks located in Utah. (Sections 19–2–101 and 104, UCA) EPA approved this SIP in April 1997 and most recently on June 25, 2003 (68 FR 37744).

b. *EPA analysis:* To generally meet the requirements of section 110(a)(2)(C), the State is required to have SIP-approved PSD, nonattainment New Source Review (NSR), and minor NSR permitting programs adequate to implement the 1997 8-hour ozone NAAQS. As explained above, in this action EPA is not evaluating nonattainment related provisions, such as the nonattainment NSR program required by part D of the Act. EPA is evaluating the State's PSD program as required by part C of the Act, and the State's minor NSR program as required by 110(a)(2)(C).

Utah has a SIP-approved PSD program that meets the general requirements of part C of the Act (51 FR 31125). Below, EPA considers requirements for the PSD program specific to the 1997 ozone NAAQS, but first considers the effects of recent rules regulating greenhouse gases on Utah's PSD program.

Greenhouse Gas Regulation

EPA notes a potential inconsistency between Utah's December 3, 2007 and December 21, 2009 infrastructure SIP certifications and EPA's recently promulgated rule, "Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans" ("PSD SIP Narrowing Rule"), 75 FR 82536 (Dec. 30, 2010). In the PSD SIP Narrowing Rule, EPA withdrew its previous approval of Utah's PSD program to the extent that it applied PSD permitting to greenhouse gas (GHG) emissions increases from GHG-emitting sources below thresholds set in EPA's June 3, 2010 "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule" ("Tailoring Rule"), 75 FR 31514. EPA withdrew its approval on the basis that the State lacked sufficient resources to issue PSD permits to such sources at the statutory thresholds in effect in the previously-approved PSD program. After the PSD SIP Narrowing Rule, the portion of Utah's PSD SIP from which EPA withdrew its approval had the status of having been submitted to EPA but not yet acted upon. In its December 3, 2007 and December 21, 2009 certifications, Utah relied on its PSD program as approved at that date—which was before December 30, 2010, the effective date of the PSD SIP Narrowing Rule—to satisfy the requirements of infrastructure element 110(a)(2)(C). Given EPA's basis for the PSD SIP Narrowing Rule, EPA proposes approval of the Utah infrastructure SIP for infrastructure element (C) if either the State clarifies (or modifies) its certification to make clear that the State relies only on the portion of the PSD program that remains approved after the PSD SIP Narrowing Rule issued on December 30, 2010, and for which the State has sufficient resources to implement, or the State acts to withdraw from EPA consideration the remaining portion of its PSD program submission that would have applied PSD permitting to GHG sources below the Tailoring Rule thresholds. In the alternative, if Utah does not take either action, EPA proposes to disapprove the infrastructure SIP to the extent it incorporates that portion of the previously-approved PSD program from which EPA withdrew its approval in the PSD SIP Narrowing Rule, which is the portion which would have applied PSD permitting requirements to GHG emissions increases from GHG-emitting sources below the Tailoring Rule thresholds. Such disapproval, if finalized, would not result in a need for Utah to resubmit a SIP revision, sanctions, or a federal implementation plan (FIP).

Regulation of Ozone Precursors

In order for the State's SIP-approved PSD program to satisfy the requirements of section 110(a)(2)(C) for the 1997 ozone NAAQS, the program must properly regulate ozone precursors. On November 29, 2005, EPA promulgated the phase 2 implementation rule for the 1997 ozone NAAQS (Phase 2 Rule), which includes requirements for PSD programs to treat nitrogen oxides (NO_X) as a precursor for ozone (72 FR 71612). The Phase 2 Rule accordingly updated the federal program at 40 CFR 52.21 to meet these requirements, effective January 30, 2006. On August 7, 2008, Utah submitted to EPA revisions to the State's PSD program. The State's PSD program, as submitted, for the most part incorporates by reference the federal program at 40 CFR 52.21. The August 7, 2008 submittal updates the date of incorporation by reference to July 1, 2007, after the effective date of the Phase 2 Rule, and thereby implementing the requirements of the rule. On January 7, 2009, EPA proposed approval of the August 7, 2008 submittal (74 FR 667). We anticipate finalizing that approval in conjunction with finalizing approval of

Utah's infrastructure SIP. Contingent on that approval, Utah's PSD program meets the requirements of section 110(a)(2)(C) for the 1997 ozone NAAQS.

Minor NSR

The State has a SIP-approved minor NSR program, adopted under section 110(a)(2)(C) of the Act that regulates emissions of ozone and its precursors. The minor NSR program is found in section II of the Utah SIP, and was originally approved by EPA as section 2 of the SIP (See 68 FR 37744, June 25, 2003). Since approval of the minor NSR program, the State and EPA have relied on the program to assure that new and modified sources not captured by the major NSR permitting programs do not interfere with attainment and maintenance of the NAAQS.

In this action, EPA is proposing to approve Utah's infrastructure SIP for the 1997 ozone NAAQS with respect to the general requirement in section 110(a)(2)(C) to include a program in the SIP that regulates the modification and construction of any stationary source as necessary to assure that the NAAQS are achieved. EPA is not proposing to approve or disapprove the State's existing minor NSR program itself to the extent that it is inconsistent with EPA's regulations governing this program. A number of states may have minor NSR provisions that are contrary to the existing EPA regulations for this program. EPA intends to work with states to reconcile state minor NSR programs with EPA's regulatory provisions for the program. The statutory requirements of section 110(a)(2)(C) provide for considerable flexibility in designing minor NSR programs, and it may be time to revisit the regulatory requirements for this program to give the states an appropriate level of flexibility to design a program that meets their particular air quality concerns, while assuring reasonable consistency across the country in protecting the NAAQS with respect to new and modified minor sources.

Visibility Protection

Finally, Utah cited SIP provisions relating to visibility protection. With regards to part C of title I of the Act, section 110(a)(2)(C) of the Act (unlike section 110(a)(2)(J)) refers only to the required PSD permit program, and not to visibility protection. Moreover, as explained below under infrastructure element (J), EPA finds that no new visibility obligation is "triggered" under section 110(a)(2)(J) when a new NAAQS becomes effective. EPA is therefore not assessing in this action the visibility protection provisions cited by Utah.

4. *Interstate transport:* Section 110(a)(2)(D)(i) requires SIPs to contain adequate provisions prohibiting, consistent with the provisions of this title, any source or other type of emissions activity within the state from emitting any air pollutant in amounts which will (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other state, with respect to any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other state under part C to prevent significant deterioration of air quality or to protect visibility.

a. *Utah's response to this requirement:* SIP Section XXIII (*Interstate Transport*), codified at R307–110–36, was written to satisfy the requirements of section 110(a)(2)(D)(i) of the CAA for the 1997 NAAQS for 8-hour ozone. This SIP was approved by EPA on March 28, 2008 at 73 FR 16543.

b. *EPA Analysis:* EPA approved the State's Interstate Transport provisions for the 1997 ozone NAAQS on March 28, 2008 (73 FR 16543). EPA is taking no action relevant to section 110(a)(2)(D)(i) in this proposal.

5. *Interstate and International transport provisions:* Section 110(a)(2)(D)(ii) requires that each SIP shall contain adequate provisions insuring compliance with applicable requirements of sections 126 and 115 (relating to interstate and international pollution abatement).

a. *Utah's response to this requirement:* Utah did not cite any specific provisions for this requirement.

b. *EPA Analysis:* Section 126(a) requires notification to affected, nearby states of major proposed new (or modified) sources. Sections 126(b) and (c) pertain to petitions by affected states to the Administrator regarding sources violating the "interstate transport" provisions of section 110(a)(2)(D)(i). Section 115 similarly pertains to international transport of air pollution.

Utah's rules for PSD permits IBR the public participation requirements at 40 CFR 51.166(q)(2). (See UAC R307–405–18). In particular, the rule incorporates 40 CFR 51.166(q)(2)(iii), which requires notice to states whose lands may be affected by the emissions of sources subject to PSD. This rule was submitted to EPA and proposed for approval in the action discussed in section IV.3 above (74 FR 667, Jan. 7, 2009). Contingent on approval of this rule, the Utah SIP satisfies the requirements of section 126(a).

Utah has no pending obligations under sections 126(c) or 115(b), therefore, Utah's SIP currently meets the requirements of those sections. The SIP therefore meets the requirements of 110(a)(2)(D)(ii) for the 1997 ozone NAAQS.

6. *Adequate resources:* Section 110(a)(2)(E) requires states to provide (i) Necessary assurances that the state will have adequate personnel, funding, and authority under state law to carry out the SIP (and is not prohibited by any provision of federal or state law from carrying out the SIP or portion thereof), (ii) requires that the state comply with the requirements respecting state boards under section 128, and (iii) necessary assurances that, where the state has relied on a local or regional government, agency, or instrumentality for the implementation of any SIP provision, the state has responsibility for ensuring adequate implementation of such SIP provision.

a. *Utah's response to this requirement:* SIP Section V (*Resources*), codified at R307–110–6, commits to implement program activities in relation to resources provided by the annual State/EPA Agreement and 105 grant applications. EPA approved this SIP originally in the early 1980's and most recently on June 25, 2003 (68 FR 37744).

SIP Section I (*Legal Authority*) A.1.g, codified at R307–110–2, identifies the statutory provisions that implement the provisions of the CAA (Section 128) respecting State Boards (Section 9–2–104 UCA.) EPA approved this SIP originally in the early 1980's and most recently on June 25, 2003 (68 FR 37744).

Section 41–6a–1642 UCA provides the counties the authority to run their own emissions inspection and maintenance program, and Subsection 41–6a–1642 (2)(b)(i) UCA requires that the counties' emissions inspection and maintenance program "shall be made to attain or maintain ambient air quality standards in the county, consistent with the SIP and federal requirements." Section X of the SIP, codified at sections R307–110–31 to –35, outlines the specific requirements of the automotive inspection and maintenance program. EPA approved this SIP section in action on July 17, 1997 (62 FR 38213), August 1, 2005 (70 FR 44055), September 14, 2005 (70 FR 54267), and November 2, 2005 (70 FR 66264).

b. *EPA Analysis:* Chapter 2 of Title 19 of the Utah Code gives the DAQ and Air Quality Board (AQB) adequate authority to carry out the SIP. UCA 19–2–103 requires the AQB be composed and act in accordance with section 128 of the CAA. The State receives sections 103 and 105 grant funds through its

Performance Partnership Grant along with required State matching funds to provide funding necessary to carry out Utah's SIP requirements. Utah's SIP meets the requirements of CAA section 110(a)(2)(E) for the 1997 ozone NAAQS.

7. *Stationary source monitoring system:* Section 110(a)(2)(F) requires (i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources, (ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and (iii) correlation of such reports by the state agency with any emission limitations or standards established pursuant to the Act, which reports shall be available at reasonable times for public inspection.

a. *Utah's response to this requirement:* SIP Section I (*Legal Authority*) A.1.f, codified at R307–110–2, identifies the statutory provisions that require owners or operators of stationary sources to install, maintain, and use emission monitoring devices and to make periodic reports to the State Department of Environmental Quality (DEQ) on the nature and amounts of emissions from such sources. The State DEQ will make such data available to the public as reported and as correlated with any applicable emission standards or limitations (Section 19–2–104, UCA). EPA approved this SIP originally in the early 1980's and most recently on June 25, 2003 (68 FR 37744).

SIP Section III (*Source Surveillance*), codified at R307–110–4, includes inventory requirements, stack testing, and plant inspections (Sections 19–2–107 and 19–2–108, UCA, allow inspection of air pollution sources). EPA approved this SIP section originally in the early 1980's and most recently on June 25, 2003 (68 FR 37744).

b. *EPA Analysis:* Utah's SIP meets the requirements of section 110(a)(2)(F) for the 1997 ozone NAAQS.

8. *Emergency powers:* Section 110(a)(2)(G) requires states to provide for authority to address activities causing imminent and substantial endangerment to public health, including contingency plans to implement the emergency episode provisions in their SIPs.

a. *Utah's response to this requirement:* SIP Section 1 (*Legal Authority*) A.1.c, codified at R307–110–2, identifies the statutory provisions to abate pollutant emissions on an emergency basis to prevent substantial endangerment to the health of persons (Section 19–2–112, UCA). EPA approved this SIP originally in the early 1980's and most recently on June 25, 2003 (68 FR 37744).

More details can be found in SIP Section VII (*Prevention of Air Pollution Emergency Episodes*), codified at R307–110–8 (Section 19–2–112, UCA). EPA approved this SIP originally in the early 1980's and most recently on June 25, 2003 (68 FR 37744).

b. *EPA analysis:* Section 19–2–112 of the UCA provides DEQ with general emergency authority comparable to that in section 303 of the Act. The SIP also requires DEQ to follow criteria in 40 CFR 51.151 in proclaiming an emergency episode and to develop a contingency plan. The SIP meets the requirements of 110(a)(2)(G) for the 1997 ozone NAAQS.

9. *Future SIP revisions:* Section 110(a)(2)(H) requires that SIPs provide for revision of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and (ii), except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the SIP is substantially inadequate to attain the NAAQS which it implements or to otherwise comply with any additional requirements under this Act.

a. *Utah's response to this requirement:* SIP Section I (*Legal Authority*) A.1.a, codified at R307–110–2, identifies the statutory provisions that allow the DAQ to revise its plans to take account of revisions of a NAAQS and to adopt expeditious methods of attaining and maintaining such standard. EPA approved this SIP originally in the early 1980's and most recently on June 25, 2003 (68 FR 37744).

b. *EPA analysis:* Section 19–2–104 of the UCA gives the AQB sufficient authority to meet the requirements of 110(a)(2)(H).

10. *Nonattainment Area Plan or Plan Revision under Part D:* Section 110(a)(2)(I) requires that a SIP or SIP revision for an area designated as a nonattainment area must meet the applicable requirements of part D of this subchapter (relating to nonattainment areas).

a. *EPA analysis for section 110(a)(2)(I):* As noted above, the specific nonattainment area plan requirements of section 110(a)(2)(I) are subject to the timing requirement of section 172, not the timing requirement of section 110(a)(1). This element is therefore not applicable to this action. EPA will take action on part D attainment plans through a separate process.

11. *Consultation with government officials, public notification, PSD and visibility protection:* Section 110(a)(2)(J) requires that each SIP meet the applicable requirements of section 121 of this title (relating to consultation), section 127 of this title (relating to public notification), and part C of this subchapter (relating to PSD of air quality and visibility protection).

a. *Utah's response to this requirement:* SIP Section I (*Legal Authority*) A.2, codified at R307–110–2, adopts requirements for transportation consultation (Section 174, Clean Air Act). EPA approved this SIP originally in the early 1980's and most recently on June 25, 2003 (68 FR 37744).

SIP Section I (*Legal Authority*) A.1.d, codified at R307–110–2, identifies the statutory authority to prevent construction, modification or operation of any stationary source at any location where emissions from such source will prevent the attainment or maintenance of a national standard or interfere with PSD requirements. (UCA Section 19–2–108) EPA approved this SIP originally in the early 1980's and most recently on June 25, 2003 (68 FR 37744).

SIP Section VI (*Intergovernmental Cooperation*), provides a brief listing of federal, state, and local agencies involved in protecting air quality in Utah. Codified at R307–110–7/EPA approved this SIP originally in the early 1980's and most recently on June 25, 2003 at 68 FR 37744.

SIP Section XII (*Transportation Conformity Consultation*), codified at R307–110–20, establishes the consultation procedures on transportation conformity issues when preparing State plans. EPA approved SIP Section XII, Transportation Conformity Consultation, on September 2, 2008 (73 FR 51222).

SIP Section VIII (*PSD*), codified at R307–110–9 and R307–405, describes the program to prevent significant deterioration of areas of the State where the air is clean. EPA approved the PSD SIP originally in the early 1980's and most recently on June 25, 2003 (68 FR 37744). EPA most recently approved R307–405 on August 18, 2004 (69 FR 51368). Utah submitted revisions to the PSD SIP and R307–405 on September 15, 2006. Updates to the IBR date of 40 CFR 52.21 were submitted on October 1, 2007 and March 3, 2008. The October 1, 2007 update incorporates provisions in the CFR that added NO_X as a precursor for ozone. The most recent update of the IBR date was adopted on February 5, 2009 and will be submitted to EPA in the near future when the final administrative paperwork is available.

EPA has not yet acted on these submittals.

SIP Section XVI (*Public Notification*), codified at R307–110–24, includes provisions to notify the public when NAAQS have been exceeded as per section 127 of the CAA. EPA approved this SIP originally in the early 1980's and most recently on June 25, 2003 (68 FR 37744).

SIP Section XVII (*Visibility Protection*), codified at R307–110–25, describes the program to protect visibility, especially within the boundaries of the five national parks located in Utah. (Sections 19–2–101 and 104, UCA) EPA approved this SIP in April 1997 and most recently on June 25, 2003 (68 FR 37744).

SIP Section XX (*Regional Haze*), codified at R307–110–28, addresses the requirements in part C of the CAA relating to regional haze. The SIP was based on the recommendations of the Grand Canyon Visibility Transport Commission established by section 169B(f) of the CAA. (Sections 19–2–104, UCA). The Regional Haze SIP was submitted to EPA on December 12, 2003. Revisions to the Regional Haze SIP were submitted on August 8, 2004; May 8, 2006; and September 9, 2008. EPA has not yet acted on these submittals.

b. *EPA Analysis:* The State has demonstrated that it has the authority and rules in place to provide a process of consultation with general purpose local governments, designated organizations of elected officials of local governments and any Federal Land Manager having authority over federal land to which the SIP applies, consistent with the requirements of CAA section 121. Furthermore, SIP section XVI, cited by Utah, satisfies the requirements of section 127 of the Act.

The State has a SIP-approved PSD program that incorporates by reference the federal program at 40 CFR 52.21. The federal program (and therefore Utah's SIP-approved PSD program) automatically implements new PSD requirements triggered by the effective date of any new NAAQS. EPA has further evaluated Utah's SIP-approved PSD program in this proposed action under IV.3 of section 110(a)(2)(C).

Finally, with regard to the applicable requirements for visibility protection, EPA recognizes that states are subject to visibility and regional haze program requirements under part C of the act. In the event of the establishment of a new NAAQS, however, the visibility and regional haze program requirements under part C do not change. Thus we find that there is no new visibility obligation "triggered" under section 110(a)(2)(J) when a new NAAQS becomes effective. In conclusion, the Utah SIP meets the requirements of section 110(a)(2)(J) for the 1997 ozone NAAQS.

12. *Air quality and modeling/data:* Section 110(a)(2)(K) requires that each SIP provide for (i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a NAAQS, and (ii) the submission, upon request, of data related to such air quality modeling to the Administrator.

a. *Utah's response to this requirement:* SIP Section II (*Review of New and Modified Air Pollution Sources),* codified at R307–110–3, provides that new or modified sources of air pollution must submit plans to the DAQ and receive an Approval Order before operating. (Section 19–2–104, UCA) EPA approved this SIP originally in the early 1980's and most recently on June 25, 2003 (68 FR 37744).

b. *EPA Analysis:* Utah's SIP meets the requirements of CAA section 110(a)(2)(K) for the 1997 ozone NAAQS. In particular, Utah's PSD program incorporates by reference the federal program at 40 CFR 52.21, including the provision at 52.21(l)(1) requiring that estimates of ambient air concentrations be based on applicable air quality models specified in Appendix W of 40 CFR part 51, and the provision at 52.21(l)(2) requiring that modification or substitution of a model specified in Appendix W must be approved by the Administrator. As a result, the SIP provides for such air quality modeling as the Administrator has prescribed.

13. *Permitting fees:* Section 110(a)(2)(L) requires SIPs to require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this act, a fee sufficient to cover (i) the reasonable costs of reviewing and acting upon any application for such a permit, and (ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action), until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under title V.

a. *Utah's response to this requirement:* SIP Section I (*Legal Authority*) A.1.h, codified at R307–110–2, identifies the statutory authority to charge a fee to major sources to cover permit and enforcement expenses. EPA approved this SIP originally in the early 1980s and most recently on June 25, 2003 (68 FR 37744).

b. *EPA Analysis:* Utah's approved title V operating permit program meets the requirements of CAA section 110(a)(2)(L) for the 1997 ozone NAAQS. Final approval of the title V operating permit program was approved on June 8, 1995 (60 FR 30192). As discussed in the notice proposing approval of the title V program (60 FR 15105, Mar. 22, 1995), the State demonstrated that the fees collected were sufficient to administer the program.

14. *Consultation/participation by affected local entities:* Section 110(a)(2)(M) requires states to provide for consultation and participation in SIP development by local political subdivisions affected by the SIP.

a. *Utah's response to this requirement:* SIP Section VI (*Intergovernmental Cooperation*), codified at R307–110–7, lists federal, state, and local agencies involved in protecting air quality in Utah. EPA approved this SIP originally in the early 1980's and most recently on June 25, 2003 (68 FR 37744).

SIP Section XII (*Transportation Conformity Consultation*), codified at R307–110–20, establishes the consultation procedures on transportation conformity issues when preparing state plans. EPA approved SIP Section XII, *Transportation Conformity Consultation,* on September 2 2008 (73 FR 51222).

b. *EPA Analysis:* Utah's submittal meets the requirements of CAA section 110(a)(2)(M) for the 1997 ozone NAAQS.

V. What action is EPA taking?

In this action, EPA is proposing to approve the following infrastructure elements for the 1997 ozone NAAQS: (A), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M). EPA proposes to approve the section 110(a)(2)(C) infrastructure element in full for the 1997 ozone NAAQS in the event that Utah takes one of the actions described in the discussion of that element; in the alternative, EPA proposes to disapprove the section 110(a)(2)(C) element to the extent described and to otherwise approve this element. EPA proposes to conditionally approve the section 110(a)(2)(B) infrastructure element for the 1997 ozone NAAQS based on the formal commitment by Utah described in the discussion of that element. Finally, in this action, EPA is taking no action on infrastructure elements (D)(i) and (I) for the 1997 ozone NAAQS.

VI. Statutory and Executive Order Reviews

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: May 16, 2011.

James B. Martin,

Regional Administrator, Region 8.

[FR Doc. 2011–12606 Filed 5–20–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R05–OAR–2008–0396; FRL–9307–1]

Approval, and Promulgation of Air Quality Implementation Plans; Indiana; Redesignation of the Evansville Area to Attainment of the Fine Particulate Matter Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: On April 3, 2008, the Indiana Department of Environmental Management (IDEM) submitted a request for EPA to approve the redesignation of the Evansville, Indiana nonattainment area to attainment of the 1997 annual fine particulate matter ($PM_{2.5}$) standard. The air quality improvement in this area and maintenance of the standard in this area is attributable in substantial part to power plant emission reductions in the Eastern United States prompted by the Clean Air Interstate Rule (CAIR). The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has remanded CAIR, but EPA has proposed a replacement rule known as the Transport Rule. The Evansville area has attained the standard with only a fraction of the reductions that the proposed Transport Rule proposed to require. Therefore, EPA is proposing to approve the redesignation request for the Evansville area, along with related SIP revisions, if and when EPA takes final action to promulgate the Transport Rule, provided that the final Transport Rule requires emission reductions that are at least substantially equivalent to those of the proposed Transport Rule for purposes of maintaining the standard in the Evansville area.

DATES: Comments must be received on or before June 22, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2008–0396, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: mooney.john@epa.gov.*
3. *Fax:* (312) 692–2551.
4. *Mail:* John M. Mooney, Chief, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand Delivery:* John M. Mooney, Chief, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m. excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2008–0396. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to Section I of

the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *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 John Summerhays, Environmental Scientist, at (312) 886–6067 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: John Summerhays, Environmental Scientist, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6067, *summerhays.john@epa.gov.*

SUPPLEMENTARY INFORMATION: This supplementary information section is arranged as follows:

I. What should I consider as I prepare my comments for EPA?
II. What actions is EPA proposing to take?
III. What is the background for this action?
IV. What are the criteria for redesignation to attainment?
V. What is EPA's analysis of the State's request?
1. Attainment
2. Fully Approved SIP Meeting All Pertinent Requirements
a. General Requirements
b. Section 110(a) Requirements
c. Emission Inventories
d. Other Nonattainment Area Requirements
3. Permanent and Enforceable Emission Reductions
4. Maintenance Plan
5. Motor Vehicle Emission Budgets
6. Summary of Proposed Actions
VI. What are the effects of EPA's proposed actions?
VII. Statutory and Executive Order Reviews

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

When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date, and page number).

2. Follow directions—The EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

4. Describe any assumptions and provide any technical information and/or data that you used.

5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

6. Provide specific examples to illustrate your concerns, and suggest alternatives.

7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

8. Make sure to submit your comments by the comment period deadline identified.

II. What actions is EPA proposing to take?

On November 27, 2009, at 74 FR 62243, EPA made a final determination that the Evansville area has attained the 1997 annual $PM_{2.5}$ national ambient air quality standards (NAAQS). EPA here is proposing to determine that the area continues to attain that standard. EPA is also proposing to take several additional actions related to Indiana's request to redesignate the area to attainment for the 1997 annual $PM_{2.5}$ NAAQS.

First, EPA is proposing to approve Indiana's 1997 annual $PM_{2.5}$ maintenance plan for the Evansville area as a revision to the Indiana SIP, subject to the proviso that EPA promulgates a final Transport Rule requiring power plant emission reductions substantially equivalent for purposes of maintaining the $PM_{2.5}$ standard in Evansville to those proposed in EPA's Transport Rule proposal. Since maintenance of the standard in Evansville is based in large part on maintaining substantial control of power plant emissions, promulgation of such a Transport Rule is necessary to help make recent reductions in power plant emissions (or equivalent reductions at other power plants) permanent and enforceable.

Second, EPA is proposing to approve the 2005 emission inventory in Indiana's maintenance plan as satisfying the requirement of section 172(c)(3) for a comprehensive emission inventory.

Third, EPA is proposing to find that, subject to final approval of the emissions inventory and the proviso set forth above with respect to EPA's proposed Transport Rule, Indiana meets the requirements for redesignation of the Evansville area to attainment of the 1997 $PM_{2.5}$ NAAQS under section 107(d)(3)(E) of the Clean Air Act. Because CAIR was remanded, the reductions associated with that rule cannot be considered permanent and enforceable. For this reason, the submissions from Indiana do not currently demonstrate satisfaction of the requirement of section 107(d)(3)(E)(iii), that the area's air quality improvement be due to permanent and enforceable measures. However, EPA proposes that this requirement will be met if and when EPA finalizes a Transport Rule which, for purposes of this action, is substantially equivalent to the Transport Rule that EPA proposed on August 2, 2010. Therefore, subject to this proviso, EPA is proposing to approve the request from the State of Indiana to change the designation of the Evansville area, consisting of Dubois, Vanderburgh, and Warrick Counties along with Montgomery Township in Gibson County, Ohio Township in Spencer County, and Washington Township in Pike County, from nonattainment to attainment of the 1997 $PM_{2.5}$ NAAQS.

Finally, EPA is proposing to approve the 2015 and 2022 motor vehicle emission budgets (MVEBs) for the Evansville area into the Indiana SIP. EPA proposes to take final action on this and the other proposed actions delineated in this section if and when EPA takes final action promulgating a Transport Rule substantially equivalent for purposes of air quality in the Evansville area to the Transport Rule proposed on August 2, 2010.

III. What is the background for these actions?

The first air quality standards for $PM_{2.5}$ were promulgated on July 18, 1997, at 62 FR 38652. EPA promulgated an annual standard at a level of 15 micrograms per cubic meter ($\mu g/m^3$), based on a three-year average of annual mean $PM_{2.5}$ concentrations. In the same rulemaking, EPA promulgated a 24-hour standard of 65 $\mu g/m^3$, based on a three-year average of the 98th percentile of 24-hour concentrations. On October 17, 2006, at 71 FR 61144, EPA retained the annual average standard at 15 $\mu g/m^3$ but revised the 24-hour standard to 35 $\mu g/m^3$, based again on the three-year average of the 98th percentile of 24-hour concentrations.

On January 5, 2005, at 70 FR 944, as supplemented on April 14, 2005, at 70 FR 19844, EPA designated the Evansville area as nonattainment for the 1997 $PM_{2.5}$ air quality standards. In that action, EPA defined the Evansville nonattainment area to include the entirety of Dubois, Vanderburgh, and Warrick Counties and portions of three other counties, specifically including

Montgomery Township in Gibson County, Ohio Township in Spencer County, and Washington Township in Pike County. On November 13, 2009, at 74 FR 58688, EPA promulgated designations for the 24-hour standard set in 2006, designating the Evansville area as attaining this standard. In that action, EPA also clarified the designations for the NAAQS promulgated in 1997, stating that the Evansville area remained designated nonattainment for the 1997 annual $PM_{2.5}$ standard, but was designated attainment for the 1997 24-hour standard. Thus today's action does not address attainment of either the 1997 or the 2006 24-hour standards.

In response to legal challenges of the annual standard promulgated in 2006, the D.C. Circuit remanded this standard to EPA for further consideration. See *American Farm Bureau Federation and National Pork Producers Council, et al.* v. *EPA,* 559 F.3d 512 (D.C. Cir. 2009). However, given that the 1997 and 2006 annual standards are essentially identical, attainment of the 1997 annual standard would also indicate attainment of the remanded 2006 annual standard. Since the Evansville area is designated nonattainment only for the annual standard promulgated in 1997, today's action addresses redesignation to attainment only for this standard.

Indiana has provided multiple submittals in support of its request for redesignation of the Evansville area. On April 3, 2008, Indiana submitted its original request that EPA redesignate the Evansville area to attainment of the 1997 annual $PM_{2.5}$ standard. This request was based on 2004 to 2006 monitoring data indicating that no monitor violated the annual standard. A public hearing was held on March 27, 2008, and the comment period closed on March 31, 2008. Indiana completed the redesignation request by submitting documentation of the public hearing conducted by the State for the $PM_{2.5}$ redesignation request and additional regional air quality analysis on October 20, 2008. On March 6, 2009, Indiana provided updated monitoring data for the 2006 to 2008 period. On April 7, 2009, Indiana submitted supplemental information on regional emissions. On December 7, 2009, Indiana submitted modeling intended to show that the Evansville area would attain and maintain the standard even in the absence of the emission reductions prompted by CAIR. On January 28, 2011, Indiana submitted updated emissions data (including updated MVEBs) to show that maintenance extended further into the future, to 2022. On April 8, 2011, Indiana resubmitted the information submitted on January 28, 2011, in conjunction with evidence that the State provided a public comment period and held a public hearing on the information and received no public comments.

Fine particle pollution can be emitted directly or formed secondarily through chemical reactions in the atmosphere. Sulfates are a type of secondary particle formed from sulfur dioxide (SO_2) emissions from power plants and industrial facilities. Nitrates, another common type of secondary particle, are formed from emissions of nitrogen oxides (NO_X) from power plants, automobiles, and other combustion sources.

Given the significance of sulfates and nitrates in the Evansville area, the area's air quality is strongly affected by regulations of SO_2 and NO_X emissions from power plants. EPA proposed CAIR on January 30, 2004, at 69 FR 4566, promulgated CAIR on May 12, 2005, at 70 FR 25162, and promulgated associated federal implementation plans (FIPs) on April 28, 2006, at 71 FR 25328, in order to reduce SO_2 and NO_X emissions and improve air quality in many areas across the eastern part of the United States. However, on July 11, 2008, the D.C. Circuit Court of Appeals issued a decision to vacate and remand both CAIR and the associated CAIR FIPs in their entirety (*North Carolina* v. *EPA,* 531 F.3d 836 (D.C. Cir. 2008)). EPA petitioned for rehearing, and the court issued an order remanding CAIR and the CAIR FIPs to EPA without vacatur (*North Carolina* v. *EPA,* 550 F.3d 1176 (D.C. Cir. 2008)). The Court, thereby, left CAIR in place in order to "temporarily preserve the environmental values covered by CAIR" until EPA replaces it with a rule consistent with the court's opinion. *Id.* at 1178. The court directed EPA to "remedy CAIR's flaws" consistent with its July 11, 2008, opinion, but declined to impose a schedule on EPA for completing that action. *Id.* As a result of these court rulings, the power plant emission reductions that have resulted from the development, promulgation, and implementation of CAIR, and the associated air quality improvement that has occurred in the Evansville area and elsewhere, cannot be considered permanent.

On August 2, 2010, EPA published its proposal of the Transport Rule to address interstate transport of emissions with respect to the 1997 ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS, to replace CAIR. (*See* 75 FR 45210.) This rule, as proposed, would require substantial reductions of SO_2 and NO_X emissions from electric generating units (EGUs) across most of the Eastern United States. In particular, it would require reductions of these emissions to levels well below the levels that led to attainment in the Evansville area. The proposed Transport Rule proposed to establish permanent and enforceable limits on EGU emissions across most of the Eastern United States. Since the Transport Rule as proposed would require EGU emissions to be well below the levels that have led to attainment in the Evansville area. If EPA finalizes a Transport Rule that similarly requires EGU emissions to be below the levels that led to attainment in the Evansville area, that rule would provide support for a determination that the air quality improvement may be considered permanent and enforceable.

IV. What are the criteria for redesignation to attainment?

The Clean Air Act sets forth the requirements for redesignating a nonattainment area to attainment. Specifically, section 107(d)(3)(E) of the Clean Air Act allows for redesignation provided that: (1) The Administrator determines that the area has attained the applicable NAAQS based on current air quality data; (2) the Administrator has fully approved an applicable state implementation plan for the area under section 110(k) of the Clean Air Act; (3) the Administrator determines that the improvement in air quality is due to permanent and enforceable emission reductions resulting from implementation of the applicable SIP, Federal air pollution control regulations, and other permanent and enforceable emission reductions; (4) the Administrator has fully approved a maintenance plan for the area meeting the requirements of section 175A of the Clean Air Act; and (5) the state containing the area has met all requirements applicable to the area for purposes of redesignation under section 110 and part D of the Clean Air Act.

V. What is EPA's analysis of the State's request?

EPA is proposing to approve the redesignation of the Evansville area to attainment of the 1997 annual $PM_{2.5}$ NAAQS and is proposing to approve the maintenance plan for the area and other related SIP revisions, subject to the provisos discussed in this notice. The bases for these proposed actions follow.

1. Attainment

As noted above, in a final rulemaking dated November 27, 2009, at 74 FR 62243, EPA determined that the Evansville area is attaining the 1997 annual $PM_{2.5}$ NAAQS. Further

discussion of pertinent air quality issues underlying this determination was provided in the notice of proposed rulemaking, published on September 24, 2009, at 74 FR 49690. This determination was based primarily on air quality data from 2006 to 2008.

EPA has reviewed more recent data, including certified, quality-assured data for 2009 and data for all of 2010. These data show that the Evansville area continues to attain the 1997 annual $PM_{2.5}$ NAAQS. Table 1 provides an historical summary of air quality data for the area. This summary is based on quality assured data that have been entered into the EPA Air Quality System, though the data for 2010 have not yet been certified.

TABLE 1—$PM_{2.5}$ DESIGN VALUES FOR EVANSVILLE AREA SITES

County	Site name	Site No.	2004–2006	2006–2008	2007–2009	2008–2010
Dubois (ended 2008)	Jasper Sport	180370004	*13.6	*13.4	*13.4	.....
Dubois (ended 2008)	Jasper Golf	180370005	*13.7	13.7	*13.7	.....
Dubois	6th Street	180372001	15.0	13.6	*13.3	12.1
Gibson (began 2009)	Oakland City	180510012	.....	.....	.....	12.2
Spencer	Dale	181470009	13.9	13.0	12.6	13.0
Vanderburgh (ended 2009)	Civic Center	181630006	14.5	13.4	*12.8	.....
Vanderburgh	West Mill Road	181630012	14.6	13.7	*13.0	.....
Vanderburgh	U. of Evansville	181630016	14.8	13.6	13.1	12.8
Vanderburgh	Post Office	181630020	.....	.....	.....	*12.9
Vanderburgh	Buena Vista	181630021	.....	.....	.....	*13.0

*Less than 75 percent complete data in at least one quarter.

Several of these sites had less than 75 percent complete data for one or more of the applicable recent quarters. From 2008 to 2009, four monitoring sites ended operation, and three new sites began operating. In its prior determination of attainment, EPA determined that prior to ending operation, these monitoring sites recorded data indicating attainment of the annual $PM_{2.5}$ standard.

From 2008 to 2009, three additional sites began operating: Site 18–051–0012 in Gibson County starting in 2008, and sites 18–163–0020 and 18–163–0021 in Vanderburgh County starting in 2009. As a result of their short operating history, these monitors have incomplete data for purposes of comparison to the NAAQS, but the data that are available, summarized in Table 1 above, indicate concentrations well below the NAAQS, consistent with other data showing continued attainment in the area.

Although the monitoring network was in flux during this latter period, the area has been and continues to be monitored at numerous locations addressing the range of locations in the area with potential to violate the standard. EPA has approved these various revisions to Indiana's monitoring network, including approval most recently on October 29, 2010, reflecting its belief that the revised network remains adequate to assess air quality in the Evansville area.

For this and related reasons, EPA proposes to approve the use of these incomplete data, pursuant to Subpart 4.1(c) of 40 CFR part 50, Appendix N, as supplemental evidence for evaluating whether the Evansville area is attaining the standard.

Indiana's request to redesignate the Evansville area was predicated on monitoring data from 2004 to 2006 showing that the area meets the 1997 $PM_{2.5}$ NAAQS. Subsequently, EPA determined that the area is meeting the 1997 $PM_{2.5}$ NAAQS, based primarily on 2006 to 2008 data. According to more recent data, average concentrations for all sites, including these sites with incomplete data as well as the sites with complete data, remain well below the $PM_{2.5}$ NAAQS. Indeed, EPA believes that the Evansville area has been attaining the $PM_{2.5}$ NAAQS for five consecutive three-year periods. Therefore, EPA proposes to determine that the Evansville area continues to meet the 1997 annual $PM_{2.5}$ NAAQS.

2. Fully Approved SIP Meeting All Pertinent Requirements

a. General Requirements

Sections 107(d)(3)(E)(ii) and 107(d)(3)(E)(v) set forth related requirements for the State to have a fully approved SIP meeting all pertinent requirements, and the following discussion addresses Indiana's satisfaction of both of these portions of section 107(d)(3)(E). Since the passage of the Clean Air Act in 1970, Indiana has adopted and submitted, and EPA has fully approved, provisions addressing the various required SIP elements addressing particulate matter in the Evansville area and elsewhere in Indiana. Indiana submitted the "State of Indiana Air Pollution Control Implementation Plan," its SIP, on January 31, 1972. EPA approved Indiana's SIP on May 31, 1972, at 37 FR 10863. These rules addressed total suspended particulate (TSP), reflecting the particulate size range regulated under the 1971 standards. EPA designated Evansville as nonattainment for TSP on March 3, 1978, at 43 FR 8962. Indiana submitted general TSP Reasonably Available Control Technology emission limits and regulations for process sources on October 6, 1980. On January 29, 1981, Indiana submitted its source specific limits for Vanderburgh County with amendments on October 28, 1981. These elements were approved into the Indiana SIP on July 16, 1982. On July 1, 1987, EPA replaced the TSP standard with a standard for finer-sized particulate matter, specifically for particles up to a nominal aerodynamic diameter of ten micrometers, a set of particles known as PM_{10}. EPA promulgated designations under the PM_{10} NAAQS on March 15, 1991, at 56 FR 11101. The Evansville area was designated as attaining the PM_{10} standards. Consequently, Indiana had no obligation to submit PM_{10} attainment plans for the Evansville area.

b. Section 110(a) Requirements

EPA believes that the section 110 elements not connected with nonattainment plan submissions and not linked to the area's nonattainment status are not applicable requirements for purposes of review of the State's redesignation request.

On December 7, 2007, September 19, 2008, and October 20, 2009, Indiana made submittals addressing "infrastructure SIP" elements required under Clean Air Act section 110(a)(2). EPA has published proposed rulemaking on these submittals

(published on April 28, 2011, at 76 FR 23757), but has not completed final rulemaking on these submittals. However, the requirements of section 110(a)(2) are statewide requirements that are not linked to the $PM_{2.5}$ nonattainment status of or requirements for the Evansville area. EPA believes that section 110 elements not linked to an area's nonattainment status are not applicable for purposes of redesignation. *See* the Reading, Pennsylvania proposed and final rulemakings (October 10, 1996, at 61 FR 53174–53176, and May 7, 1997, at 62 FR 24826), the Cleveland-Akron-Loraine, Ohio final rulemaking (May 7, 1996, at 61 FR 20458), and the Tampa, Florida final rulemaking (December 7, 1995, at 60 FR 62748). Therefore, notwithstanding the fact that EPA has not yet completed rulemaking on Indiana's submittals for the "infrastructure SIP" elements of section 110(a)(2), EPA believes that these elements are not applicable requirements for purposes of review of the State's redesignation request.

c. Emission Inventories

Under section 172(c)(3), Indiana is required to submit a comprehensive, accurate and current inventory of actual emissions. As part of Indiana's redesignation request for the Evansville area, the State submitted a maintenance plan that included emissions inventories for the area for SO_2 and NO_X (which are precursors for secondarily formed $PM_{2.5}$) and for directly emitted $PM_{2.5}$ for 2005, 2015, 2020, and 2022. The inventories for 2005 address the requirement under section 172(c)(3) for a base year emission inventory, and the other inventories help address the requirement for a demonstration that the area can expect to maintain the standard for at least 10 years after approval of a redesignation.

For each of the applicable pollutants and years, Indiana prepared emission estimates by county and by five source types, namely onroad mobile sources, nonroad mobile sources, area sources, EGUs, and other point sources. Onroad and nonroad mobile source emissions were estimated by the Evansville Metropolitan Planning Organization and by the Indiana Department of Transportation. The onroad emission estimates were derived using EPA's MOBILE6.2 emission model. When Indiana submitted updated emissions data on April 8, 2011, which showed that the area continued to maintain the annual $PM_{2.5}$ standard to 2022, it continued to use MOBILE6.2 rather than MOVES2010a to estimate the onroad emissions.[1] EPA is proposing to approve Indiana's continued use of MOBILE6.2 in this maintenance plan. Air quality data indicates that the area has attained the annual PM2.5 standard and large emissions reductions are expected in the coming years, which will allow the area to continue to meet the annual PM2.5 standard. If MOVES2010a had been used to estimate onroad emissions for the new last year of this maintenance plan, it would not change this conclusion. In addition, the recent submittal only extended the maintenance period by two years and it was not necessary for the submittal to revisit earlier years of the maintenance period. This extension was necessary because EPA could not act on the submittal at an earlier date due to issues related to the remand of the CAIR rule and the Clean Air Act's requirement that maintenance plans address a period that covers 10 years after EPA approves the submitted maintenance plan. Also, consistent with Question 5 in EPA's "Policy Guidance on the Use of MOVES 2010 for State Implementation Plan Development, Transportation Conformity, and Other Purposes" *(http://www.epa.gov/otaq/models/moves/420b09046.pdf)* we believe that since the bulk of the work on the maintenance plan was performed in 2008, which well before MOVES2010 was released, the continued use of MOBILE6.2 in this maintenance plan is warranted. Even the supplemental work performed by Indiana to support the April 2011 revision was done relatively soon after MOVES was officially released for use in SIPs on March 2, 2010, at 75 FR 9411. It is also worth noting that the area has been attaining the standard for several years, and future anticipated emissions reductions will ensure that the area will continue to maintain the standard through the maintenance period. Based on all of these factors we believe that Indiana's continued use of MOBILE6.2 is justified because it avoids an adverse impact on state resources as is also described in Question 5 of the MOVES SIP and Conformity guidance document.

Most of the nonroad emission estimates were derived using EPA's NONROAD model. Nonroad activity levels reflect information compiled by the Lake Michigan Air Directors Consortium (LADCO), described at *http://www.ladco.org/reports/technical_support_document/references/round_5_emissions_summary-february_2008.pdf.* In addition, the inventory includes emission estimates for marine and railroad sources under contract to LADCO. Area source emissions were developed using local activity level estimates and EPA emission factors as reflected in the 2005 National Emissions Inventory.

Base year emissions for EGUs for SO_2 and NO_X were obtained from continuously monitored emission data that the facilities reported to EPA's Clean Air Markets Division. Projections of these emissions were based on simulations using the Integrated Planning Model (IPM) premised on implementation of CAIR and the associated allowance allocations and trading programs. Indiana's April 2011 submittal states that these emission projections rely on an expectation that the Transport Rule that EPA proposed on August 2, 2010, will require EGUs to achieve a similar set of reductions as has been required by CAIR. EGU emissions of $PM_{2.5}$ were estimated using the same information on activity levels (i.e., baseline heat inputs reported to EPA and projected heat inputs forecast by IPM) in conjunction with EPA emission factors and current emission control levels. For other point sources, baseline emissions were obtained from routine source reports to the State, and projections were based on growth factors developed by LADCO based on appropriate economic indicators.

Table 2 summarizes the 2005 base year emissions estimates, subdivided by source type, that Indiana provided in its maintenance plan as submitted on January 28, 2011. The area has a modest number of people—the 2009 population estimate for the Evansville Metropolitan Statistical Area according to the U.S. Census Bureau is 351,911. The $PM_{2.5}$ nonattainment area includes several large power plants that serve a broad area within the industrial Midwest and beyond. Therefore, point sources (in particular power plants) emit a very high fraction of the area's emissions. Indeed, point sources are estimated to emit over 99 percent of the area's SO_2 emissions, about 86 percent of the area's NO_X emissions, and about 71 percent of the area's $PM_{2.5}$ emissions, and most of the point source emissions are from power plants. EPA proposes to find that

[1] MOVES2010a is EPA's most recent model for estimating on-road mobile source emissions. It was officially released for use in SIPs and regional transportation conformity determinations on March 2, 2010, at 75 FR 9411.

the inventory satisfies the requirements of section 172(c)(3).

TABLE 2—SUMMARY OF 2005 EMISSIONS ESTIMATES FOR THE EVANSVILLE AREA BY SOURCE TYPE

[Tons per year]

	SO_2	NO_X	$PM_{2.5}$
EGUs	360,822	85,320	8,240
Point	3,685	774	1,427
On-road	237	6,528	118
Non-road	537	5,676	337
Area	674	1,624	37
Total	365,954	99,922	10,160

Table 3 shows the 2005 base year emission estimates and the 2015 and 2022 emission projections for the Evansville area that Indiana provided in its April 8, 2011, submission.

TABLE 3—EVANSVILLE AREA EMISSION PROJECTIONS

[Ions per year]

	SO_2	NO_X	$PM_{2.5}$
2005	365,954	99,922	10,160.
2015	117,830	59,897	13,892.
2022	94,627	51,885	12,604.
Change 2005–2022	−271,327	−48,037	+2,444.
	74% decrease	48% decrease	24% increase.

c. Other Nonattainment Area Requirements

EPA is proposing to determine that, if EPA issues final approval of the emission inventories discussed above, the Indiana SIP will meet the SIP requirements for the Evansville area applicable for purposes of redesignation under Part D of the Clean Air Act. Subpart 1 of Part D, sections 172 to 176 of the Clean Air Act, set forth the basic nonattainment plan requirements applicable to $PM_{2.5}$ nonattainment areas.

Under section 172, states with nonattainment areas must submit plans providing for timely attainment and meeting a variety of other requirements. However, pursuant to 40 CFR 51.1004(c), EPA's November 27, 2009, determination that the Evansville area is attaining the $PM_{2.5}$ standard suspended Indiana's obligation to submit most of the attainment planning requirements that would otherwise apply. Specifically, the determination of attainment suspended Indiana's obligation to submit an attainment demonstration, and requirements to provide for reasonable further progress, reasonable available control measures, and contingency measures under section 172(c)(9).

The General Preamble for Implementation of Title I (57 FR 13498, April 16, 1992) also discusses the evaluation of these requirements in the context of EPA's consideration of a redesignation request. The General Preamble sets forth EPA's view of applicable requirements for purposes of evaluating redesignation requests when an area is attaining the standard. General Preamble for Implementation of Title I (57 FR 13498, April 16, 1992).

Because attainment has been reached, no additional measures are needed to provide for attainment, and section 172(c)(1) requirements for an attainment demonstration and RACM are no longer considered to be applicable for purposes of redesignation as long as the area continues to attain the standard until redesignation. *See* also 40 CFR 51.1004(c). The RFP requirement under section 172(c)(2) and contingency measures requirement under section 172(c)(9) are similarly not relevant for purposes of redesignation.

Section 172(c)(3) requires submission and approval of a comprehensive, accurate and current inventory of actual emissions. As part of Indiana's redesignation request for the Evansville area, the State submitted a 2005 emissions inventory. As discussed above, EPA is proposing to approve this inventory as meeting the section 172(c)(3) emissions inventory requirement.

Section 172(c)(4) requires the identification and quantification of allowable emissions for major new and modified stationary sources in an area, and section 172(c)(5) requires source permits for the construction and operation of new and modified major stationary sources anywhere in the nonattainment area. EPA has determined that, since prevention of significant deterioration (PSD) requirements will apply after redesignation, areas being redesignated need not comply with the requirement that a nonattainment new source review (NSR) program be approved prior to redesignation, provided that the area demonstrates maintenance of the NAAQS without part D NSR. A more detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled, "Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment." Indiana has demonstrated that emissions will remain sufficiently low even without part D NSR in effect for the Evansville area to be able to maintain the standard; therefore, the State need not have a fully approved part D NSR program prior to approval of the redesignation request. The State's PSD program will become effective in the Evansville area upon redesignation to attainment. *See* rulemakings for Detroit, Michigan (March 7, 1995, at 60 FR 12467–12468); Cleveland-Akron-Lorain, Ohio (May 7,

1996, at 61 FR 20458, 20469–20470); Louisville, Kentucky (October 23, 2001, at 66 FR 53665); and Grand Rapids, Michigan (June 21, 1996, at 61 FR 31834–31837).

Section 172(c)(6) requires the SIP to contain control measures necessary to provide for attainment of the standard. Because attainment has been reached, no additional measures are needed to provide for attainment.

Section 172(c)(7) requires the SIP to meet the applicable provisions of section 110(a)(2). As noted above, we believe the Indiana SIP meets the requirements of section 110(a)(2) applicable for purposes of redesignation.

Section 176(c) of the CAA requires states to establish criteria and procedures to ensure that Federally-supported or funded activities, including highway projects, conform to the air quality planning goals in the applicable SIPs.

EPA believes that it is reasonable to interpret the conformity SIP requirements as not applying for purposes of evaluating the redesignation request under section 107(d) for two reasons. First, the requirement to submit SIP revisions to comply with the conformity provisions of the CLEAN AIR ACT continues to apply to areas after redesignation to attainment, since such areas would be subject to a section 175A maintenance plan. Second, EPA's Federal conformity rules require the performance of conformity analyses in the absence of Federally-approved state rules. Therefore, because areas are subject to the conformity requirements regardless of whether they are redesignated to attainment and, because they must implement conformity under Federal rules if state rules are not yet approved, EPA believes it is reasonable to view these requirements as not applying for purposes of evaluating a redesignation request. *See Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001), upholding this interpretation. *See also* 60 FR 62748, 62749–62750 (Dec. 7, 1995) (Tampa, Florida).

EPA approved Indiana's general and transportation conformity SIPs on January 14, 1998, at 63 FR 2146, and August 17, 2010, at 75 FR 50730, respectively. Indiana has submitted onroad motor vehicle budgets for the Evansville area for 2015 and 2022. The area must use the MVEBs from the maintenance plan in any conformity determination that is effective on or after the effective date of the maintenance plan approval.

No SIP provisions relevant to the Evansville area are currently disapproved, conditionally approved, or partially approved. If EPA approves the Evansville area emission inventory as proposed, EPA believes that Indiana will have a fully approved SIP for all requirements applicable for purposes of redesignation.

3. Permanent and Enforceable Emission Reductions

Indiana's original redesignation submission cited a number of regulatory programs that it believed resulted in the air quality improvement in the Evansville area between the period that was the basis of the area's 1997 $PM_{2.5}$ nonattainment designation (2002 to 2004), and the period that the Evansville area began attaining the 1997 annual $PM_{2.5}$ standard (2004 to 2006). These programs included the EPA NO_X Budget Trading Program, the acid rain program, mobile source rules such as Heavy-duty Highway Vehicle standards and Non-road Diesel Engine standards, and CAIR.

Indiana subsequently supplemented its request with submittals intended to demonstrate that the Evansville area could be expected to continue to attain the standard even if the emission reductions associated with the promulgation of CAIR did not continue. In particular, on December 7, 2009, Indiana submitted the results of modeling purporting to show $PM_{2.5}$ concentrations that Indiana estimated would occur in the Evansville area in the absence of CAIR. For most power plants, this modeling was based on projections derived from actual emission rates for 2007. For the power plants within the Evansville nonattainment area, this modeling used the highest emission rates from 2000 to 2007. Indiana's modeling showed that these emission rates yielded Evansville area concentrations below the $PM_{2.5}$ NAAQS.

EPA has reviewed Indiana's submission and believes that Indiana's modeling does not properly reflect power plant emissions that would occur in the absence of CAIR. Although the compliance deadlines in CAIR were 2009 for the first phase of NO_X reductions and 2010 for the first phase of SO_2 reductions, CAIR provided significant incentives for earlier emission reductions. Indeed, especially for SO_2, a comparison of 2007 emissions for states in the CAIR region against 2003 emissions shows a significant decline in emissions. For example, according to continuous emission monitoring data submitted by EGUs to EPA's Clean Air Markets Division, EGU emissions of SO_2 in Indiana declined from 804,800 tons per year in 2003 to 714,500 tons per year in 2007, a decline of 93,000 tons per year. Similarly, according to the same set of data, EGU emissions of NO_X in Indiana declined from 261,000 tons per year to 196,600 tons per year, a decline of 64,400 tons per year. Similar declines occur in other states influencing Evansville area air quality. These declines can reasonably be attributed to the incentives of CAIR, such that even the 2004 to 2006 air quality data underlying Indiana's request would reflect benefits from EPA's development, proposal, and promulgation of CAIR.

Given that the DC Circuit has now remanded CAIR to EPA, it will not remain in force indefinitely. As a consequence, the emission reductions associated with CAIR cannot be considered to be permanent.

EPA's proposed Transport Rule would, in a manner consistent with the D.C. Circuit opinion on CAIR, among other things identify emission reductions in the Eastern United States necessary to address significant interference with attainment and maintenance pursuant to section 110(a)(2)(d)(i)(I) of the Clean Air Act with respect to the 1997 ozone and 1997 and 2006 $PM_{2.5}$ NAAQS. The comment period on this proposed rule closed on October 1, 2010. EPA is reviewing all comments received. EPA may not prejudge the requirements of the final Transport Rule, and so cannot complete final rulemaking on Indiana's redesignation request in a manner that relies on Transport Rule requirements unless and until EPA has promulgated a final Transport Rule.

In the proposed Transport Rule, EPA proposed to quantify the reductions needed in specific states to address each covered state's significant contribution to nonattainment and interference with maintenance of specific NAAQS. In that action, EPA also proposed to establish FIPs to ensure that the significant contribution to nonattainment and interference with maintenance identified by EPA is prohibited.

The Evansville area is notable for having several sizable electric generating facilities, and most of these facilities are operating with new or upgraded SO_2 and NO_X controls for their coal-fired units. Vectron's A.B. Brown facility operates a dual alkali system for SO_2 control and select catalytic reduction (SCR) of NO_X. Alcoa's Warrick Power Plant uses wet lime scrubbing to control SO_2 emissions and combustion controls, and uses SCR for one unit and low NO_X burners (LNB) and over-fire air (OFA) for all units to limit its NO_X emissions. Vectron's F.B. Culley generating station uses wet limestone scrubbing for SO_2 control and SCR with LNB for NO_X control at its two

units. Hoosier Energy uses LNB to reduce NO_X emissions from both Frank E. Ratts Generating Station units. Duke Energy's Gibson plant uses wet limestone scrubbing with SCR, LNB, and OFA on all five units. Indianapolis Power and Light operates wet limestone scrubbers along with SCR, LNB, and OFA on the four units of its Petersburg power plant. Indiana-Michigan Power uses LNB on the two coal-fired units at the Rockport plant.

These emission controls, along with similar controls at many other plants in the Eastern United States, are providing substantial air quality benefits. As explained above, some of the reductions were associated with the now-remanded CAIR. The proposed Transport Rule, if finalized, would similarly require reductions in NO_X and SO_2 from EGUs. The reductions associated with the Transport Rule, if and when it is finalized, may be considered permanent and enforceable.

The modeling for the proposed Transport Rule identified 13 states, including Indiana, that have emissions that significantly affect Evansville area air quality. Table 4 shows state-wide emission estimates for SO_2 and NO_X for 2005, 2012, and 2014 for these states. The values for 2005 reflect base year emissions estimates. Given the timing of attainment in the Evansville area, these values reflect an approximation of statewide emission levels at which the Evansville area attained the $PM_{2.5}$ standard. The values for 2012 reflect estimates for a scenario in which neither CAIR nor a replacement Transport Rule is in effect, reflecting a baseline that EPA used in developing its proposed rule. The values for 2014 reflect estimates for a scenario in which the proposed Transport Rule is finalized as proposed. These estimates are taken from Tables 6–1 (NO_X) and 6–2 (SO_2) of the emissions technical support document for the proposed Transport Rule, available at *http://www.epa.gov/airquality/transport/pdfs/TR_Proposal_Emissions_TSD.pdf.* These estimates exclude emissions from fires, which are a small fraction of the inventory (well under 0.1 percent) that is projected to remain constant and does not materially affect the comparison here.

TABLE 4—SO_2 AND NO_X EMISSIONS FOR STATES IDENTIFIED IN THE PROPOSED TRANSPORT RULE AS SIGNIFICANTLY CONTRIBUTING TO NONATTAINMENT OR INTERFERING WITH MAINTENANCE IN THE EVANSVILLE AREA

[Tons per year]

State	SO_2 emissions			NO_X emissions		
	2005	2012 (w/o Transport Rule)	2014 (w/ Transport Rule)	2005	2012 (w/o Transport Rule)	2014 (w/ Transport Rule)
Indiana	1,047,371	986,601	396,403	614,861	505,039	386,251
Alabama	592,389	461,314	296,138	443,748	360,357	280,763
Georgia	748,020	674,183	214,726	577,858	405,825	337,889
Illinois	516,950	866,376	304,834	773,276	542,886	480,743
Iowa	221,877	250,930	182,875	312,015	251,632	221,442
Kentucky	572,424	780,885	182,630	435,837	345,073	247,270
Michigan	490,190	415,042	300,560	638,546	478,625	410,319
Missouri	421,979	570,575	315,283	505,195	353,407	317,092
Ohio	1,276,270	1,076,470	361,138	816,239	552,864	453,167
Pennsylvania	1,173,296	1,119,680	303,071	704,936	566,301	454,248
Tennessee	388,191	708,905	218,065	471,705	338,154	270,171
West Virginia	535,586	645,431	184,341	294,016	206,630	144,970
Wisconsin	263,615	181,760	159,927	358,787	257,290	228,637
Total	8,250,163	8,740,164	3,419,991	6,949,024	5,166,095	4,232,962

In Table 4, 2005 emissions represent an approximation of emissions at which Evansville attains the standard. Table 4 shows that, in comparison, the proposed Transport Rule would establish enforceable emission restrictions that would be expected to result in emissions in the most pertinent states (as listed in Table 4) that for SO_2 are 4,830,172 tons per year (59 percent) lower and that for NO_X are 2,716,062 tons per year (39 percent) lower. That is, the proposed Transport Rule would provide for permanent and enforceable emission reductions in the Eastern United States that are significantly greater than the reductions needed to assure maintenance in the Evansville area.

Similar results are obtained by comparing emission estimates in 2012 without the proposed Transport Rule to emission estimates in 2014 with the proposed Transport Rule. In the proposed Transport Rule, EPA estimated that total emissions across these states would reflect 5,320,173 tons per year lower SO_2 emissions and 933,133 tons per year lower NO_X emissions in the 2014 controlled case than in the 2012 base case, i.e., emissions that are 61 percent and 18 percent lower, respectively. According to EPA modeling for the proposed Transport Rule, comparing concentrations projected in 2014 with the proposed Transport Rule in place against concentrations projected in 2012 in the absence of a Transport Rule, the Transport Rule achieves approximately a 4 $\mu g/m^3$ air quality improvement in the Evansville area, yielding concentrations well below the annual $PM_{2.5}$ NAAQS and below the concentrations that have been achieved by power plant emission reductions to date.

The modeling for the proposed Transport Rule also projects an Evansville area concentration of about 11 $\mu g/m^3$ in 2014 based on implementation of the proposed Transport Rule, whereas for purposes of this proposed redesignation it is only necessary for the Transport Rule to help provide for the Evansville area to maintain a concentration at or below 15 $\mu g/m^3$.

This proposal is premised on the expectation that the final Transport Rule will be similarly effective as the proposed Transport Rule would be in providing for maintenance of the 1997 $PM_{2.5}$ standard in the Evansville area. Given the substantial margin by which EPA expects the Evansville area to maintain the standard, numerous details

of the final Transport Rule could differ from corresponding features of the proposed Transport Rule without causing changes in the impact on Evansville air quality that are significant for purposes of this proposal to redesignate the Evansville area. This proposal to redesignate the Evansville area is predicated on the final Transport Rule being substantially equivalent for purposes of air quality in the Evansville area to the Transport Rule proposed on August 2, 2010. In EPA's view, this premise will be met if the emission levels expected under the final Transport Rule in states most pertinent to Evansville, and the associated expected air quality benefits in Evansville, are sufficiently similar to the emission levels and associated Evansville air quality benefits expected under the proposed rule so as to provide a comparable degree of confidence that the Evansville area will maintain the standard.

In summary, a limited set of reductions of EGU emissions of SO_2 and NO_X contributed significantly to the air quality improvement in the Evansville area. Given the remanded status of CAIR, this air quality improvement cannot be considered permanent. However, the proposed Transport Rule proposed to mandate even greater reductions than have already occurred and, more importantly, proposed to mandate more reductions than are needed to maintain the standard in the Evansville area. Therefore, with the final promulgation of a Transport Rule that is substantially equivalent to the proposed rule for purposes of maintaining the standard in the Evansville area, in combination with the other measures cited by Indiana, EPA believes that the emission reductions that led the Evansville area to attain the $PM_{2.5}$ air quality standard could be considered as permanent and enforceable for purposes of section 107(d)(3)(E)(iii).

4. Maintenance Plan

Sections 107(d)(3)(E)(iv) and 175A require that the State demonstrate that the area to be redesignated will continue to meet the $PM_{2.5}$ NAAQS for at least a ten-year maintenance period after redesignation in 2011. Indiana's maintenance plan includes emission inventories discussed in section V.2.c above.

The sizeable reductions in SO_2 and NO_X emissions by 2015 and 2022 shown in Table 3 above are due in significant part to restrictions mandated by EPA to reduce power plant emissions of SO_2 and NO_X in the Eastern United States in order to reduce pollutant transport in this region. In this inventory, Indiana used emission projections premised on the implementation of CAIR requirements as an approximation of the emissions levels the State projects to occur following the promulgation of the Transport Rule. As explained above, the DC Circuit found CAIR unlawful and remanded it to EPA. Because CAIR is not in place permanently, and because EPA has not completed final promulgation of the Transport Rule, EPA cannot currently grant final approval to a maintenance plan that relies in significant part on either of these rules.

On the other hand, as noted above, EPA's recently proposed Transport Rule would, if finalized, achieve substantial regional reductions of SO_2 and NO_X emissions. While EPA has not made emission estimates for 2022 that are premised on the implementation of the proposed Transport Rule, Table 4 above shows emission estimates that EPA has made for 2014 that assume the implementation of the proposed Transport Rule. These emission estimates show a substantial decline in SO_2 and NO_X emissions comparable to that shown in Indiana's maintenance plan. Given the substantial degree of control of the various EGUs in the Evansville area both currently and projected into the future, EPA finds Indiana's projection of such emission declines through 2022 to be appropriate forecasts of future emissions, provided EPA promulgates a final Transport Rule whose requirements are substantially equivalent to those in the proposed rule with respect to continued maintenance of the $PM_{2.5}$ annual standard in the Evansville area.

In conjunction with the projections for dramatic declines in Evansville area emissions of SO_2 and NO_X emissions, Indiana's maintenance plan shows an increase in $PM_{2.5}$ emissions. Therefore, further evaluation is needed to judge whether the increase in $PM_{2.5}$ emissions, in combination with the decreases in SO_2 and NO_X emissions, is likely to provide for maintenance of the standard.

Each of these pollutants is characterized by a different relationship between emissions and air quality. Therefore, simply summing up the emissions of these various pollutants does not provide a meaningful indicator of the combined air quality impact of these emission changes. Instead, a more appropriate indicator is the percentage change in emissions for each emitted pollutant, weighted according to the air quality impact for each.

For this purpose, EPA examined speciation data available from its Air Explorer Web site for 2007 and 2008 for the Evansville area. These data suggest that $PM_{2.5}$ in the Evansville area consists of approximately 54 percent sulfate, 7 percent nitrate, 32 percent organic particulate, 4 percent miscellaneous inorganic particulate (sometime labeled "crustal particles"), and 4 percent other types of particulate matter.

EPA used a conservative approach that assumes that the full ambient concentration of organic particulate matter plus miscellaneous inorganic particulate matter will vary in accordance with changes in total nonattainment area emissions of directly emitted $PM_{2.5}$. This analysis thus assumes that the entirety of this component of ambient $PM_{2.5}$ will increase by the 24 percent that Indiana's maintenance plan projects that directly emitted $PM_{2.5}$ emissions will increase. In this analysis, the baseline concentration is conservatively assumed to be 15.0 $\mu g/m^3$, of which directly emitted $PM_{2.5}$ is estimated to include 32 plus 4 or 36 percent, or 5.4 $\mu g/m^3$. Indiana estimates that emissions of directly emitted $PM_{2.5}$ will increase by 24 percent from 2005. EPA's assessment assumes that this increase will cause a corresponding increase in ambient concentrations of $PM_{2.5}$, which would suggest an increase in the concentration of this component by 1.3 $\mu g/m^3$. However, EPA believes that this potential increase will be fully compensated by a greater decrease in sulfate and nitrate concentrations. The precise decrease in sulfate and nitrate concentrations is a complicated result of emission reductions not just in the Evansville area but also in many other parts of the Eastern United States. Nevertheless, modeling conducted by EPA for the proposed Transport Rule estimated that future Evansville area concentrations with the Transport Rule as proposed in place would be about 4 $\mu g/m^3$ below the standard, and the emission reductions that have already occurred have already brought Evansville area concentrations to about 13.0 $\mu g/m^3$ (as shown in Table 4 above). Therefore, the 1.3 $\mu g/m^3$ increase in the components associated with directly emitted $PM_{2.5}$ would not be expected to yield concentrations above the standard. That is, EPA expects that the trends in direct emissions of $PM_{2.5}$ in the Evansville area will not prevent the area from maintaining the standard.

Maintenance of the 1997 annual $PM_{2.5}$ air quality standard in the Evansville area is a function of regional as well as local emissions trends. The regional impacts are dominated by the impacts of SO_2 and NO_X emissions. The previous section (discussing permanent and

enforceable emission reductions) showed that the proposed Transport Rule could be expected to provide for substantial SO_2 and NO_X emission reductions through 2014, reductions that would be maintained throughout and well beyond the period (through 2022) addressed in Indiana's maintenance plan. While EPA in its Transport Rule rulemaking developed emission projections extending to 2020 only for a scenario without regional emission limitations and not for a scenario with a Transport Rule in place, the ongoing downward emission trend evident in EPA's 2020 emission projections in absence of regional emission limitations lends support to Indiana's projection that the scenario with regional emission limitations in place will continue to have low emissions in 2022. With a Transport Rule as proposed, the caps on emissions of SO_2 and NO_X from the power sector will ensure against growth in SO_2 and NO_X emissions from these sources, and in combination with motor vehicle rules and other rules will assure a continuing decline in SO_2 and NO_X emissions. Therefore, EPA believes that available emissions data indicate that, with a Transport Rule substantially equivalent to the one proposed, for purposes of maintaining the standard in the Evansville area, the Evansville area can be expected to maintain the standard through 2022.

Under section 175A of the Clean Air Act, maintenance plans must demonstrate attainment through at least 10 years beyond the date of EPA approval of a state's redesignation request. Indiana's maintenance plan, demonstrating maintenance through 2022, satisfies this requirement.

EPA also has modeling evidence indicating that the Evansville area will continue to attain the $PM_{2.5}$ NAAQS well into the future, provided that EPA promulgates a Transport Rule substantially equivalent for purposes of demonstrating maintenance in the Evansville area to its recently proposed rule. The first modeling evidence is the modeling analysis, referenced above, that Indiana has submitted. As discussed above, EPA disputes Indiana's contention that its modeling demonstrates attainment in the Evansville area in the absence of CAIR, insofar as the analysis was predicated on 2007 emission levels that already include a set of emission reductions attributable to CAIR. However, EPA believes that Indiana's modeling analysis, showing attainment with implementation of a subset of the emission reductions expected from CAIR, supports the conclusion that implementation of the full set of reductions that were expected from CAIR (or a relatively similar set of reductions from a Transport Rule) will also assure that the standard is maintained.

EPA has also conducted its own modeling, provided in support of the Transport Rule proposed rulemaking. This modeling projects that the Evansville area will achieve a $PM_{2.5}$ concentration of 11.1 $\mu g/m^3$ by 2014 if the Transport Rule as proposed is made final. Although EPA did not perform modeling for years later than 2014, the Transport Rule as proposed would provide for utility emissions in 2022 to be similar and in fact slightly lower than emissions in 2014, and more generally EPA expects total emissions to be similar or slightly lower in 2022 than in 2014, so that air quality in 2022 is likely to be similar or slightly better than air quality in 2014 as well. Therefore, these two modeling analyses support the conclusion that should EPA finalize a transport rule that provides for relatively similar air quality in the Evansville area, the Evansville area will maintain the $PM_{2.5}$ standard throughout the maintenance plan period.

Indiana's maintenance plan includes additional elements. These include a commitment to continue to operate an EPA-approved monitoring network, as necessary to demonstrate ongoing compliance with the NAAQS. Indiana currently operates six $PM_{2.5}$ monitors in the Evansville area. Indiana remains obligated to continue to quality assure monitoring data in accordance with 40 CFR part 58 and enter all data into the Air Quality System in accordance with Federal guidelines. Indiana will use these data, supplemented with additional information if necessary, to assure that the area continues to attain the standard. Indiana will also continue to develop and submit periodic emission inventories as required by the Federal Consolidated Emissions Reporting Rule (codified at 40 CFR part 51 subpart A) to track future levels of emissions.

Indiana's maintenance plan also includes a contingency plan as required by section 175A(d). The contingency plan provisions are designed to correct promptly or to prevent a violation of the NAAQS that might occur after redesignation. Section 175A of the Clean Air Act requires that a maintenance plan include such contingency measures as EPA deems necessary to assure that the state will promptly correct a violation of the NAAQS that occurs after redesignation, including all measures that were in the plan prior to redesignation. Under Indiana's plan, if a violation occurs, Indiana will implement an "Action Level Response" to evaluate what measures are warranted to address the violation, in particular considering implementing one or more measures from a list of candidate measures given in the plan. Indiana's candidate contingency measures include diesel retrofit projects, idling restrictions, a wood stove change out program, additional transportation control measures, and additional NO_X and SO_2 emission controls. Under Indiana's plan, control measures are to be adopted and implemented within 18 months from the end of the season in which air quality triggering the Action Level Response occurred. Indiana further commits to conduct ongoing review of its monitored data, and if monitored concentrations or emissions are trending upward, Indiana commits to take appropriate steps to avoid a violation if possible. EPA believes that Indiana's contingency plan satisfies the pertinent requirements of section 175A(d).

As required by section 175A(b) of the Clean Air Act, Indiana commits to submit to the EPA an updated $PM_{2.5}$ maintenance plan eight years after redesignation of the Evansville area to assure maintenance for an additional ten-year period beyond the initial maintenance plan. As required by section 175A of the Clean Air Act, Indiana has also committed to retain the $PM_{2.5}$ control measures contained in the SIP prior to redesignation.

For all of the reasons outlined above, EPA is proposing to approve Indiana's maintenance plan for the Evansville area following the establishment of requirements substantially equivalent to the requirements of EPA's proposed Transport Rule for purposes of maintaining the 1997 annual $PM_{2.5}$ standard in the Evansville area.

5. Motor Vehicle Emission Budgets

Under section 176(c) of the Clean Air Act, transportation plans and transportation improvement programs (TIPs) must be evaluated for conformity with State Implementation Plans. Consequently, Indiana's redesignation request provides MVEBs, conformance with which will assure that motor vehicle emissions are at or below levels that can be expected to provide for attainment and maintenance of the $PM_{2.5}$ NAAQS. Indiana's submittal of April 2008 included emission budgets for NO_X and $PM_{2.5}$ for 2010 and 2020. EPA initiated an adequacy review of the budgets that Indiana included in its April 2008 submittal. As such, a notice of the submission of these budgets was posted on its adequacy web page (*http:*

//www.epa.gov/otaq/stateresources/transconf/currsips.htm). The public comment period closed on July 2, 2008. There were no public comments.

However, Indiana then submitted a replacement set of budgets in its submittals of January and April 2011. These updated budgets address the years 2015 and 2022. (See section V.2.c of this proposal for a discussion related to the development of the onroad inventory for 2022.) Since these budgets replace the budgets submitted in April 2008, EPA will no longer conduct rulemaking on the April 2008 budgets.

Table 5 shows the updated budgets as well as the 2005, 2015, and 2022 emission projections on which these budgets are based. Indiana did not provide emission budgets for SO_2, VOCs, and ammonia because it concluded, consistent with EPA's presumptions regarding these precursors, that emissions of these precursors from motor vehicles are not significant contributors to the area's $PM_{2.5}$ air quality problem.

TABLE 5—MOBILE SOURCE EMISSION PROJECTIONS

[Tons per year]

	NO_X		$PM_{2.5}$	
	Emissions estimate	Budget	Emissions estimate	Budget
2005	6,528.04	.....	117.67	.....
2015	2,503.19	2628.35	54.33	57.05
2022	1,699.86	1869.84	48.93	53.83

Table 5 shows substantial decreases in on-road NO_X and $PM_{2.5}$ emissions from 2005 to 2015 and additional reductions between 2015 and 2022. The emission reductions are expected because newer vehicles, subject to more stringent emission standards, are continually replacing older, dirtier vehicles. Indiana provided emission budgets that for 2015 include a safety margin of 5 percent above projected levels and that for 2022 include a safety margin of 10 percent above projected levels.

In the Evansville area, the motor vehicle budgets and motor vehicle emission projections for both NO_X and $PM_{2.5}$ are lower than base year levels, but the overall emissions of $PM_{2.5}$ summed across all source types is projected to increase. This requires further examination of the question of whether an increase in $PM_{2.5}$ emissions by the amounts requested by Indiana as safety margins would still provide for maintenance of the $PM_{2.5}$ standard.

The discussion of the maintenance plan above describes EPA's rationale for believing that the impact of the projected increase in $PM_{2.5}$ emissions will be more than compensated by the projected decreases in emissions of SO_2 and NO_X. EPA examined whether the same conclusion would apply if the Evansville area used the entire safety margin, i.e., if mobile source $PM_{2.5}$ emissions were higher than projected levels by an amount equal to the safety margin. Using the first approach above, EPA found that if mobile source $PM_{2.5}$ are five tons per year higher than baseline projections, the expected impact of the overall $PM_{2.5}$ emissions increase still rounds to 1.3 $\mu g/m^3$, which EPA again believes is more than compensated by the decrease in sulfate and nitrate concentrations resulting from reductions in SO_2 and NO_X emissions. Similar results are obtained from the second approach for assessing the impact of $PM_{2.5}$ emission trends discussed above. Therefore, EPA believes that the requested budgets, including the requested safety margins, provide for a quantity of mobile source emissions that would be expected to maintain the $PM_{2.5}$ standard.

EPA has posted Indiana's more recently submitted recommended budgets (for 2015 and 2022) on its adequacy findings web page, to provide parallel opportunities for review of these budgets. These budgets have been submitted by IDEM with the intent that these budgets replace the budgets submitted in 2008 that were subject to previous adequacy review. *See* (*http://www.epa.gov/otaq/stateresources/transconf/currsips.htm*).

EPA is not able to complete its adequacy review for the Evansville MVEBs for 2015 and 2022 at this time because EPA has not yet taken final action on the proposed Transport Rule. In the absence of a final Transport Rule, we cannot determine if other emissions sources and the budgets, when considered together, are consistent with applicable requirements for maintenance as required by 40 CFR 93.118(e)(4)(iv). Therefore, EPA cannot at this time find the MVEBs adequate. However, EPA is proposing to approve the Evansville MVEBs into the Indiana SIP because, based on our review of the submitted maintenance plan, we have determined that the maintenance plan and motor vehicle emissions budgets will be approvable if the Transport Rule as finalized is substantially equivalent to the proposed rule in terms of its impact on the maintenance of the standard in the Evansville area. This is consistent with EPA's intentions for acting on the rest of the maintenance plan as described above in this proposal.

The budgets that Indiana submitted were calculated using the MOBILE6.2 motor vehicle emissions model. EPA is proposing to approve the inventory and the conformity budgets calculated using this model because this model was the most current model available at the time Indiana was performing its analysis. Separate from today's proposal, EPA has issued an updated motor vehicle emissions model known as the Motor Vehicle Emission Simulator or MOVES. In its announcement of this model, EPA established a two-year grace period for continued use of MOBILE6.2 in transportation conformity determinations for transportation plans and TIPs (extending to March 2, 2012), after which states and metropolitan planning organizations (other than California) must use MOVES for transportation plan and TIP conformity determinations. (*See* 75 FR 9411, March 2, 2010.)

Additional information on the use of MOVES in SIPs and conformity determinations can be found in the December 2009 Policy Guidance on the Use of MOVES2010 for State Implementation Plan Development, Transportation Conformity, and Other Purposes. This guidance document is available at: *http://www.epa.gov/otaq/models/moves/420b09046.pdf*. During the conformity grace period, the State and MPO(s) should use the interagency consultation process to examine how MOVES2010 will impact their future transportation plan and TIP conformity determinations, including regional emissions analyses. For example, an

increase in emission estimates due to the use of MOVES2010 may affect an area's ability to demonstrate conformity for its transportation plan and/or TIP. Therefore, state and local planners should carefully consider whether the SIP and motor vehicle emissions budget(s) should be revised with MOVES2010 or if transportation plans and TIPs should be revised before the end of the conformity grace period, since doing so may be necessary to ensure conformity determinations in the future.

We would expect that states and metropolitan planning organizations would work closely with EPA and the local Federal Highway Administration and Federal Transit Administration offices to determine an appropriate course of action to address this type of situation if it is expected to occur. If Indiana chooses to revise the Evansville maintenance plan, it should consult Question 7 of the December 2009 Policy Guidance on the Use of MOVES2010 for State Implementation Plan Development, Transportation Conformity, and Other Purposes for information on requirements related to such revisions.

6. Summary of Proposed Actions

In its rulemaking of November 27, 2009, EPA determined that the Evansville area is attaining the 1997 annual $PM_{2.5}$ NAAQS. EPA's review of more recent data indicates that the area continues to attain this standard. Thus EPA is proposing to determine that the area continues to attain the 1997 annual $PM_{2.5}$ standard. EPA is proposing to approve Indiana's maintenance plan, provided EPA promulgates a final Transport Rule substantially equivalent to the Transport Rule as proposed with respect to maintenance of the standard in the Evansville area. EPA proposes to approve the emissions inventory included in Indiana's maintenance plan as satisfying the requirement in section 172(c)(3) for a comprehensive emission inventory. With respect to two criteria for redesignation—-permanent enforceable emissions reductions and a fully approvable maintenance plan—EPA believes that Indiana is currently relying on CAIR for a significant portion of the air quality improvement leading to attainment and a significant portion of the reductions needed to maintain the standard. EPA believes, however, that these two prerequisites for redesignation will be satisfied if and when the Transport Rule that EPA proposed on August 2, 2010 is finalized in a form that is substantially equivalent to the rule as proposed, for purposes of maintenance of the annual $PM_{2.5}$ standard in Evansville. Therefore, EPA proposes that the Evansville area will qualify for redesignation to attainment at such time as the Transport Rule in such a form is finalized and takes effect. Finally, EPA is proposing to approve motor vehicle emission budgets for the Evansville area.

VI. What are the effects of EPA's proposed actions?

If finalized, approval of the redesignation request would change the legal designation of the Evansville area for the 1997 annual $PM_{2.5}$ NAAQS, found at 40 CFR part 81, from nonattainment to attainment. EPA is also proposing to approve several revisions to the Indiana SIP for the Evansville area, including the maintenance plans, the emission inventory submitted with the maintenance plan, and the 2015 and 2022 MVEBs. EPA is proposing to take these actions if and when EPA promulgates the Transport Rule limiting SO_2 and NO_X emissions in the Eastern United States to an extent substantially equivalent in pertinent respects to the Transport Rule proposed August 2, 2010 for purposes of maintaining air quality in Evansville.

VII. Statutory and Executive Order Reviews

Under the Clean Air Act, redesignation of an area to attainment and the accompanying approval of a maintenance plan under section 107(d)(3)(E) are actions that affect the status of a geographical area and do not impose any additional regulatory requirements on sources beyond those imposed by state law. A redesignation to attainment does not in and of itself create any new requirements, but rather results in the applicability of requirements contained in the Clean Air Act for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, these actions:

- Are 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);
- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are 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.*);
- Do 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);
- Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Are not economically significant regulatory actions based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Are not significant regulatory actions subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Are not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Do 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.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Particulate matter.

Dated: May 6, 2011.

Bharat Mathur,

Acting Regional Administrator, Region 5.

[FR Doc. 2011–12609 Filed 5–20–11; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 100825389–1276–01]

RIN 0648–BA13

Fishing Capacity Reduction Program for the Southeast Alaska Purse Seine Salmon Fishery

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 a fishing capacity reduction program and an industry fee system to repay a $23.5 million loan for the Southeast Alaska Purse Seine Salmon Fishery (Reduction Fishery). The fee system involves future landings of the Reduction Fishery. This action's intent is to permanently reduce the most fishing capacity at the least cost and establish the fee system.

DATES: Comments must be submitted in writing on or before June 22, 2011.

ADDRESSES: You may submit comments, identified by 0648–BA13 by either of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov;* or
- *Mail:* Paul Marx, Chief, Financial Services Division, NMFS, Attn: SE Alaska Purse Seine Salmon Rulemaking, 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 (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.

Copies of the Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) prepared for this action may be obtained from the mailing address above or by calling Michael A. Sturtevant (see **FOR FURTHER INFORMATION CONTACT**).

Send comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule to Michael A. Sturtevant at the address specified above and also to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20503 (Attention: NOAA Desk Officer) or e-mail to *OIRA_Submission@omb.eop.gov,* or fax to (202) 395–7825.

FOR FURTHER INFORMATION CONTACT: Michael A. Sturtevant at (301) 713–2390, fax (301) 713–1306, or *michael.a.sturtevant@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Southeast Alaska purse seine salmon fishery is a commercial fishery in Alaska state waters and adjacent Federal waters. It encompasses the commercial taking of salmon with purse seine gear, and participation is limited to fishermen designated by the Alaska Commercial Fisheries Entry Commission (CFEC). A pilot capacity reduction program, conducted by the Southeast Revitalization Association (SRA) in 2008, using a reverse auction, purchased 35 limited entry permits reducing the number of Alaska permits in this fishery to 380. Of this amount, approximately 200 are currently being fished.

This rule proposes to implement a voluntary buyback program for the Southeast Alaska purse seine salmon fishery (Program) that must be approved by a majority of the Alaska permit holders in a referendum conducted by NMFS.

To implement the Program, this proposed rule would establish the administrative process for the Program, including the role of the SRA, application procedures, and evaluation of the Reduction Plan by NMFS, process for conducting the referendum, and fee payment and collection provisions.

This Program is different from other industry financed fishing capacity reduction programs undertaken by NMFS in several aspects: (1) It is the first permit-only buyback, i.e., fishing history is not being retired and there are no restrictions on how the vessel to which the relinquished permit applies can be used; (2) there are no Federal permits involved, whereas all other NMFS supported reduction programs have included the buying and relinquishing of Federal permits; and (3) it is anticipated to attract mainly latent permits.

II. Statutory and Regulatory Basis for the Program

The Southeast Alaska purse seine salmon fishery is managed under Alaska law and regulatory requirements defined under Title 5 Alaska Administrative Code Section 33.100. The Alaska Department of Fish & Game (ADF&G) develops and implements conservation measures for this fishery and a state limited entry permit issued by the CFEC is required for participation in the fishery. The authority for the SRA to conduct this Program is Alaska Statute 16.40.250.

The measures contained in this proposed rule to establish the Program are based on the Consolidated Appropriations Act of 2005 (Section 209 of Title II of Division B of Public Law 108–447). Subsequently, that Federal law was amended by Section 121 of Public Law 109–479 (the Magnuson-Stevens Reauthorization Act of 2006), reducing the loan amount to no more than a $25 million 40-year loan (with repayment fees capped at three percent) and clarifying the respective roles of NMFS and the SRA relative to development and implementation of the Program. On December 26, 2007, Public Law 110–161 appropriated $235,000 for the cost of guaranteeing the loan amount (*i.e.,* loan subsidy cost). Due to a 6 percent rescission to meet Congressional budgetary limits, the original appropriation of $250,000 was reduced to $235,000, thus lowering the maximum loan ceiling to $23.5 million. NMFS' authority to make this loan resides in sections 1111 and 1112 of the Merchant Marine Act, 1936 (46 App. U.S.C. 1279(f) and 1279(g)(MMA)(title XI)).

The Federal statute authorizing this Program waives all of the fishing capacity reduction program requirements of the Magnuson-Stevens Act (Sections 312(b)-(e)) codified at 16 U.S.C. 1801 *et seq.* except for Sections (b)(1)(C) and (d) which state: (1) it must be cost-effective; and (2) it is subject to a referendum approved by a majority of permit holders.

Program Overview

Unlike buybacks conducted under federal statutes where permits are permanently revoked, under the Alaska Constitution, the state may reissue permits in the future if the fishery becomes too exclusive. An "optimum number" study by the CFEC would be required before any decision could be made on whether the fishery has become too exclusive. There is no direct

management of this fishery by NMFS or any other Federal agency.

Participation in the Program is voluntary and would be open to any holder of a valid entry permit issued by the CFEC to operate in the Southeast Alaska purse seine salmon fishery. The Program is essentially divided into six phases: (1) Enrollment; (2) bid selection; (3) plan submission and approval; (4) referendum; (5) implementation; and (6) fee collection. Each of these six phases will be discussed later in this preamble. Only Southeast Salmon Purse Seine Entry Permits voluntarily submitted for removal from the Reduction Fishery will be subject to the reduction effort. Fishing history, the fishing vessel itself, and other assets associated with the permits will not be required to be relinquished as part of this reduction effort. Fees for repayment of the loan will be calculated upon the annual ex-vessel value of all salmon harvested in the Southeast Alaska purse seine fishery and will be collected from those who continue fishing in the Reduction Fishery after implementation of the Program set forth in proposed § 600.1107 of subpart M of part 600 of Title 50 of the Code of Federal Regulations.

III. Enrollment Phase

Participants who wish to relinquish their permits will be required to complete a Bid, Relinquishment Contract, Conditional Notice and Conditional Relinquishment form. A copy of these documents will be mailed by the SRA to each person who is the holder of record of a valid entry permit issued by CFEC to operate in the Reduction Fishery. A copy of those documents is appended to this proposed rule for public comment.

The Bid identifies the eligible bidder and specifies requirements with which the bidder must comply upon acceptance of bid.

The Relinquishment Contract is the agreement entered into by the bidder and the SRA whereby the bidder agrees to relinquish a permit upon acceptance of the bid, and before payment of the bid amount.

The Conditional Notice is the CFEC form restricting renewal and transfer of each permit for which a bid was accepted.

The Conditional Relinquishment is the CFEC form signed by the bidder to voluntarily give up a permit and abide by upon SRA acceptance of the bid.

To participate in the Capacity Reduction Program, a Permit Holder submits a fully completed and executed Bid, Relinquishment Contract, Conditional Notice, and Conditional Relinquishment. Each application must be submitted to the SRA, c/o Elgee, Rehfeld, Mertz, LLC, Professional Plaza Building B, 9309 Glacier Highway, Suite B–200, Juneau, Alaska 99801. The Bid and other required documents must be received by the SRA no later than the bid closing date identified in the above mentioned mailing to Permit Holders. Once submitted, a bid is irrevocable and cannot be withdrawn or amended. If a Permit Holder holds more than one permit, the Permit Holder must submit a separate Bid for each permit that he/she offers to relinquish.

By submitting a Bid, the Permit Holder warrants and represents that he/she has read and understood the terms of the Bid, Relinquishment Contract, Conditional Notice, and Conditional Relinquishment, and has had the opportunity to seek independent legal counsel regarding such documents and the consequences of submitting the Bid.

By submitting the Bid, the permit holder expressly acknowledges that he/she makes an irrevocable offer to relinquish a permit for a specific price to CFEC, and once having submitted the Bid, the bidder is not entitled to withdraw or in any way amend the Bid. The permit would be relinquished for the price set forth in the Bid contingent on acceptance by the SRA at the closing of the Selection Process. Any attempted withdrawal by a bidder will be invalid, and the Bid will remain a binding, irrevocable offer, unaffected by the attempted withdrawal.

IV. Bid Selection Phase

The SRA will begin the Selection Process upon its receipt of the first application and will continue until: (a) The bid closing date specified by SRA; or (b) the ranking of the next lowest bid would cause the total program costs to exceed $23.5 million.

During the selection process, the SRA, in consultation with CFEC, will examine each submitted Bid for consistency and the necessary elements, including the validity of the permit and whether any authorized party holds a security interest in the permit. The SRA will notify the Permit Holder if the Bid is non-conforming and, in such cases, the Permit Holder may submit a revised, conforming Bid if within the prescribed period (i.e., until the bid closing date). A Bid that is submitted by the Permit Holder but is not accepted by the SRA, including a nonconforming bid that is not revised by the bid closing date, will be deemed terminated and both the Permit Holder and the SRA will have no further obligation. The SRA will rank all conforming bids by using a reverse auction in which the SRA ranks the bid with the lowest dollar amount and successively ranks each additional bid with the next lowest dollar amount, until there are no more bids or the ranking of the next lowest bid would cause the total program cost to exceed $23.5 million. In the event of a tie with bids which results in the tied bids exceeding $23.5 million, the SRA will select the tied bid received first.

Upon termination of the selection process, the SRA shall determine whether the number of ranked bids it is willing to accept is sufficient to achieve a substantial reduction in harvest capacity and increases economic efficiencies (i.e., increases harvesting productivity) for those Permit Holders remaining in the fishery. If the SRA makes such a determination and thereafter accepts bids, the SRA will send CFEC the Conditional Notice form restricting renewal and transfer of each permit for which a bid was accepted.

Once the SRA completes the selection process and after the bid closing date, the SRA will sign all accepted Bids and the SRA will notify each Permit Holder, via certified mail, of the effective date of the Bid. While the Bid is an irrevocable offer, it remains subject to the requirement for an industry referendum (VI. below). Bid selection occurs prior to the referendum because the Reduction Plan resulting from the Bid selection process is the course of action upon which the referendum participants are voting.

V. Plan Submission and Approval Phase

Within 30 days after the conclusion of the selection process, the SRA will submit the Reduction Plan to NMFS for final approval on behalf of the Secretary of Commerce (Secretary). The aggregate of all Bids, Relinquishment Contracts, Conditional Notices, and Conditional Relinquishments signed by permit holders whose bids are accepted by the SRA will together, with supporting rationale, constitute the Reduction Plan. The supporting rationale must demonstrate that the Reduction Plan would permanently reduce the most harvesting capacity in the Reduction Fishery at the least cost, increase harvesting productivity for post-reduction permit holders participating in the fishery, and improve flexibility in the conservation and management of the fishery. The Reduction Plan will include a listing of accepted bids arranged by bid amount from lowest to highest bid attended by a statement from the SRA that all other bids received, if any, were higher than the largest dollar amount of the last bid accepted.

The primary requirements for the Assistant Administrator of NMFS, on behalf of the Secretary, to approve a Reduction Plan are specified at § 600.1107(e)(2). Among other requirements, the Assistant Administrator of NMFS must find that the Reduction Plan is consistent with the amended Consolidated Appropriations Act of 2005 and the applicable sections of the Magnuson-Stevens Act.

VI. The Referendum

The current Fishing Capacity Reduction Framework regulatory provisions of § 600.1010 stipulate procedural and other requirements for NMFS to conduct referenda on fishing capacity reduction programs, and § 600.1017(a)(1)–(4) stipulate prohibitions related to voting in a referendum. The proposed § 600.1107(e)(3) makes those framework referenda requirements applicable to this Program.

If NMFS approves the Reduction Plan, NMFS will conduct a referendum to determine the industry's willingness to repay a fishing capacity reduction loan for purchase of the permits identified in the Reduction Plan. NMFS will publish a notice in the **Federal Register** requesting votes by Permit Holders on whether to accept or reject the Reduction Plan for implementation. NMFS will issue ballots to eligible voters, tally votes received, and notify voters on the outcome of the referendum.

A successful referendum by a majority of the Permit Holders in the Reduction Fishery would bind all parties and complete the reduction process. NMFS will publish a notice in the **Federal Register** advising the public that the referendum was successful and that NMFS will begin tendering the reduction program's reduction payments to the selected bidders.

An unsuccessful referendum would void accepted Bids and other supporting documents without further obligation from the SRA or the bidders.

VII. Implementation Phase

Within 60 days after a successful referendum, CFEC will provide notice to NMFS of the permits retired from the Reduction Fishery. NMFS, after receiving the notice of the retired permits, will then tender the accepted bid amounts to the accepted bidders. If the SRA accepts a total number of bids in an aggregate amount less than $23.5 million, any remaining funds could be available for reduction payments as part of a later, separate Reduction Plan.

The Reduction Loan will be amortized over a forty-year term. The Reduction Loan's original principal amount may not exceed $23.5 million, but may be less if the ultimate reduction cost is less. The final Reduction Loan periodic payment amount will be determined by NMFS analysis of the ability of the post-reduction fishery to service the debt. The Reduction Loan's interest rate will be the U.S. Treasury's cost of borrowing equivalent maturity funds plus two percent. The framework provisions of §§ 600.1012–600.1017 will apply to any reduction loan, fee payment and collection set forth in this proposed rule to the extent they do not conflict with this proposed rule.

VIII. Fee Collection

Post-reduction Permit Holders operating in the fishery will be obligated to pay the fee in accordance with § 600.1107(f). The fee will be expressed as a percentage of the ex-vessel price of all salmon harvested and landed in the fishery. For example, if the fee is three percent and the ex-vessel value is $0.50, then the fee per pound of salmon will equal $0.015 per pound. The amount of such fee will be calculated by NMFS on an annual basis as the principal and interest payment amount necessary to amortize the loan over a 40-year term. The maximum fee rate is three percent of total ex-vessel production revenues. In the event that payments made under the Reduction Plan at the maximum fee level are insufficient to repay the Reduction Loan within the 40-year term, NMFS will extend the term of the repayment until the Reduction Loan is paid in full.

Fees must be assessed and collected on all salmon harvested in the fishery. Although the fee could be up to three percent of the ex-vessel price of all post-reduction landings, the fee will be less than three percent if NMFS projects that a lesser rate can amortize the Reduction Loan over the 40-year term.

It is possible that the fishery may not open during some years. Consequently, the fishery will not produce fee revenue with which to service the Reduction Loan during these years. However, interest will continue to accrue on the principal balance. When this happens, if the fee is not already at the maximum three percent, NMFS will increase the fee to the maximum three percent in the next season that the fishery is open, apply all subsequent fee revenue first to the payment of accrued interest, and continue the maximum fee rates until the principal and interest payments become current. Once all principal and interest payments are current, NMFS will make annual determinations on adjusting the fee rate.

The dealer who first purchases the salmon landed in the fishery ("fish buyer") will be responsible for collecting and submitting the repayment fees to NMFS on a monthly basis. Both Alaska Department of Fish and Game daily fish tickets and the State of Alaska's Commercial Operator Annual Report (COAR) produced annually each March following the close of the previous season will be used to monitor fee collection.

The current Fishing Capacity Reduction Framework regulatory provisions of § 600.1013 (Fee payment and collection), § 600.1014 (Fee collection deposits, disbursements, records, and reports), 600.1015 (Late charges), § 600.1016 (Enforcement), § 600.1017 (Prohibitions and penalties), and § 600.1017(a)(8)–(16) in particular, will apply to any fee collection in this fishery.

The framework rule's provisions at § 600.1014 governs how fish buyers must deposit, and later disburse to NMFS, the fees which they have collected as well as how they must keep records of, and report about, collected fees. Under the framework rule's provisions at § 600.1014, fish buyers must, at the end of each business week, deposit collected fees in federally insured accounts. Fees will be submitted to NMFS monthly and are due no later than fifteen (15) calendar days following the end of each calendar month. Fee collection reports must accompany these disbursements. Fish buyers must maintain specified fee collection records for at least three years and submit to NMFS annual reports of fee collection and disbursement activities by February 1 of each calendar year.

Under § 600.1015, the late charge to fish buyers for fee collection, deposit, and/or disbursement will be one and one-half (1.5) percent per month of the fee due. The full late charge will apply to the fee for each month or portion of a month that the fee remains unpaid.

To provide more accessible services, streamline collections, and save taxpayer dollars, fish buyers may disburse collected fee deposits to NMFS by using a secure Federal system on the Internet known as *Pay.gov. Pay.gov* enables fish buyers to use their checking accounts to electronically disburse their collected fee deposits to NMFS. Fish buyers who have access to the Internet should consider using this quick and easy collected fee disbursement method. Fish buyers may access *Pay.gov* at: *https://www.pay.gov/paygov/*.

Fish buyers who do not have access to the Internet or who simply do not wish to use the *Pay.gov* electronic system must disburse collected fee deposits to NMFS by sending a check to our lockbox at: NOAA Fisheries Southeast Alaska Salmon Purse Seine Buyback, P.O. Box XXXX, St. Louis, MO 63197–9000.

Fish buyers must complete a fee collection report for each disbursement. Fish buyers using *Pay.gov* will find an electronic fee collection report form to accompany electronic disbursements. Fish buyers who do not use *Pay.gov* must include a hard copy fee collection report with each of their disbursements and may access the NMFS website for a PDF version of the fee collection report at: *http://www.nmfs.noaa.gov/mb/financial_services/buyback.htm.*

Before the fee's effective date, NMFS will separately mail a copy of the final rule, along with detailed fee payment, collection, deposit, disbursement, recording, and reporting information and guidance, to each fish seller and buyer of whom NMFS has notice. The fact that any fish seller or buyer might not, for whatever reason, receive a copy of the notice or of the information and guidance does not relieve the fish seller or buyer from his/her fee obligations under the applicable regulations.

All parties interested in this action should carefully read the following framework rule sections, whose detailed provisions apply to the fee system for repaying the reduction program's loan:

1. § 600.1012;
2. $ 600.1013;
3. § 600.1014;
4. § 600.1015;
5. § 600.1016; and
6. § 600.1017.

NMFS, in accordance with the framework rule's provisions at § 600.1013(d), establishes the initial fee for the program's reduction fishery as 3 percent of the annual ex-vessel value of all salmon harvested in the fishery.

Please see the framework rule's provisions at § 600.1000 for the definition of "delivery value" and of the other terms relevant to this proposed rule. Each disbursement of the reduction loan's principal amount will begin accruing interest as of the date of each such disbursement. This loan's interest rate is the applicable rate, plus two percent, which the U.S. Treasury determines at the end of the fiscal year.

IX. Specific Performance

The proposed regulatory provisions at § 600.1107(g) mirror the Bid's provisions for Specific Performance. Development of a capacity reduction program provides a unique opportunity for permit holders to manage capacity themselves. Failure of an accepted bidder to perform the obligations under the Relinquishment Contract will result in irreparable damage to the SRA and other Permit Holders. Therefore, money damages are inadequate to redress the harm caused to the bidders by a breach of contract. Specific performance is the only adequate remedy.

X. Enforcement/Prohibitions and Penalties

The provisions and requirements of § 600.1016 and § 600.1017 shall also apply to fish sellers and fish buyers subject to this fishery. Specifically, the proposed rule to amend § 600.1017 by adding language that prohibits buyers from buying fish from reduction fishery participants who do not pay the required landing fee and prohibits reduction fishery participants from selling fish to buyers who do not collect the fees.

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 provisions of the Magnuson-Stevens Act, and Title II, Section 209 of Public Law 108–447 as amended by Section 121 of Public Law 109–479, subject to further consideration after public comment.

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

In addition to public comment about the proposed rule's substance, NMFS also seeks public comment on any ambiguity or unnecessary complexity arising from the language used in this proposed rule.

In compliance with the National Environmental Policy Act, NMFS prepared an environmental assessment (EA) for this proposed rule. The assessment discusses the impact of this proposed rule on the natural and human environment and integrates a Regulatory Impact Review (RIR) and an Initial Regulatory Flexibility Analysis (IRFA). NMFS will send the assessment, the review and analysis to anyone who requests a copy (see **ADDRESSES**).

NMFS prepared an IRFA, as required by section 603 of the Regulatory Flexibility Act (RFA), to describe the economic impacts this proposed rule, if adopted, would have on small entities. NMFS intends the analysis to aid us in considering regulatory alternatives that could minimize the economic impact on affected small entities. The proposed rule does not duplicate or conflict with other Federal regulations.

Summary of IRFA

The Small Business Administration (SBA) has defined small entities as all fish harvesting businesses that are independently owned and operated, not dominant in its field of operation, and with annual receipts of $4 million or less. In addition, processors with 500 or fewer employees for related industries involved in canned or cured fish and seafood, or preparing fresh fish and seafood, are also considered small entities. Small entities within the scope of this proposed rule include individual U.S. vessels, Permit Holders, and dealers. There are no disproportionate impacts between large and small entities.

Description of the Number of Small Entities

Most firms operating in the Reduction Fishery have annual gross revenues of less than $4 million. The IRFA analysis estimates that most of the 212 active vessels that participated in 2008 are considered small entities. The ownership characteristics of vessels operating in the Reduction Fishery are not available and therefore it is not possible to determine with certainty, if they are independently owned and operated, or affiliated in one way or another with a larger parent company. Furthermore, because analysts cannot quantify the exact number of small entities that may be directly regulated by this action, a definitive finding of non-significance for the proposed action under the RFA is not possible. However, because the proposed action would not result in changes to allocation percentages and participation is voluntary, net effects would be expected to be minimal relative to the status quo.

The proposed rule's impact would be positive for both those whose bids NMFS accepts and for post-reduction harvesters whose landing fees repay the reduction loan because the Bidders and harvesters would have voluntarily assumed the impact:

1. Bidders would have volunteered to make bids at dollar amounts of their own choice. Presumably, no Bidder would volunteer to make a bid with an amount that is inconsistent with the Bidder's interest; and

2. Reduction loan repayment landing fees would be authorized, and NMFS could complete the Reduction Program, only if a majority of Permit Holders voted in favor of the Reduction Plan. Presumably, harvesters who are not selected would not vote in favor of the Reduction Plan unless they concluded that the Reduction Program's prospective capacity reduction was

sufficient to enable them to increase their post-reduction revenues enough to justify the fee.

3. Those participants remaining in the fishery after the buyback will incur additional fees of up to 3 percent of the ex vessel production value of post reduction landings. However, the additional costs should be mitigated by increased harvest opportunities by post reduction fishermen. NMFS believes that this proposed rule would affect neither authorized harvest levels nor harvesting practices.

NMFS rejected the no action alternative considered in the EA because if it failed to act, NMFS would not be in compliance with the mandate of Section 209 of the authorizing legislation to establish a buyback program. In addition, the Southeast Alaska purse seine salmon fishery would remain overcapitalized. Overcapitalization reduces the potential net value that could be derived from the salmon resource by dissipating rents, driving variable operating costs up, and imposing economic externalities on the fishermen. Overcapitalization has diminished the economic viability of members of the fleet and increased the economic and social burden on fishery dependent communities.

This proposed rule contains information collection requirements subject to the Paperwork Reduction Act (PRA). The Office of Management and Budget (OMB) previously approved this information collection under OMB Control Number 0648–0376 with requirements for 878 respondents with a total response time of 38,653 hours. NMFS estimates that the public reporting burden for this information collection would average 4 hours for submitting a Bid (which includes executing the Bid Agreement and the Reduction Contract) and 4 hours for voting in a referendum. Persons affected by this proposed rule would also be subject to other collection-of-information requirements referred to in the proposed rule and also approved under OMB Control Number 0648–0376. These requirements and their associated response times are: Completing and filing a fish ticket (10 minutes), submitting monthly fish buyer reports (2 hours), submitting annual fish buyer reports (4 hours), and fish buyer/fish seller reports when a person fails either to pay or to collect the loan repayment fee (2 hours).

NMFS amends the existing OMB control number as a result of the implementation of this capacity reduction program. The revision has been submitted to OMB for approval. These response estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the information collection. Public comment is sought regarding: Whether this 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 burden estimate; 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, including through the use of automated collection techniques or other forms of information technology. Interested persons may send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to both NMFS and OMB (see **ADDRESSES**).

Notwithstanding any other provision of law, no person is required to respond to, and no person is subject to a penalty for failure to comply with, an information collection subject to the PRA requirements unless that information collection displays a currently valid OMB control number.

This action would not result in any adverse effects on endangered species or marine mammals.

List of Subjects in 50 CFR Part 600

Fisheries, Fishing capacity reduction, Fishing permits, Fishing vessels, Intergovernmental relations, Loan programs—business, Reporting and recordkeeping requirements.

Dated: May 17, 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 600, subpart M, is proposed to be amended as follows:

PART 600—MAGNUSON-STEVENS ACT PROVISIONS

Subpart M—Specific Fishery or Program Fishing Capacity Reduction Regulations

1. The authority citation for 50 CFR part 600, subpart M, is revised to read as follows:

Authority: 5 U.S.C. 561, 16 U.S.C. 1801 *et seq.,* 16 U.S.C. 1861a(b) through (e), 46 App. U.S.C. 1279f and 1279g, section 144(d) of Division B of Pub. L. 106–554, section 2201 of Pub. L. 107–20, and section 205 of Pub. L. 107–117, Pub. L. 107–206, Pub. L. 108–7, Pub. L. 108–199, Pub. L. 108–447, Pub. L. 109–479, Pub. L. 110–161, Section 209 of Title II of Division B of Pub. L. 108–447, Section 121 of Pub. L. 109–447, Section 121 of Pub. L. 109–479, Pub. L. 110–161, and 46 U.S.C. 53701 *et seq.*

2. Section 600.1107 is added to subpart M to read as follows:

§ 600.1107 Southeast Alaska Purse Seine Salmon Fishery capacity reduction program, including fee payment and collection system.

(a) *Purpose.* This section implements the fishing capacity reduction program for the Southeast Alaska purse seine salmon fishery enacted by Section 209 of Public Law 108–447 and amended by Section 121 of Public Law 109–479, with appropriations authorized by Section 121 of Public Law 109–479 and Public Law 110–161. The intent of the program is to permanently reduce, through an industry-financed permit buyback, the most harvesting capacity in the Reduction Fishery at the least cost, increase harvesting productivity for post-reduction Permit Holders and improve flexibility in the conservation and management of the fishery. Fishery participants will finance this program through a federal loan that will be repaid over 40 years through a fee collection system. The intent of the fee collection system is to establish the post-reduction Permit Holders' obligation to repay the Reduction Loan's principal and accrued interest over the repayment term, and to ensure repayment of the loan.

(b) *Definitions.* Unless otherwise defined in this section, the terms defined in § 600.1000 of subpart L of this part expressly apply to this section. The following terms have the following meanings for the purpose of this section:

Acceptance means SRA acceptance of a bid.

Act means Section 209 of Title II of Division B of Public Law 108–447, Consolidated Appropriations Act of 2005, as amended by Section 121 of Public Law 109–447, Magnuson-Stevens Reauthorization Act of 2006.

Authorized party means the individuals authorized by the Permit Holder on the application form to execute and submit Bids, protests and other documents and/or notices on behalf of the Permit Holder.

Bid means a bidder's irrevocable offer to relinquish a permit.

Bid amount means the dollar amount submitted by a bidder.

Bidder means a permit holder who submits a bid.

Commercial Fisheries Entry Commission (CFEC) means the Alaska state commission mandated to conserve and maintain the economic health of Alaska's commercial fisheries by

limiting the number of participating fishers, by issuing permits and vessel licenses to qualified individuals in both limited and unlimited fisheries, and by providing due process hearings and appeals.

CFEC documents means any documents issued by the CFEC in connection with the Southeast Alaska purse seine salmon fishery.

Conditional notice means the CFEC form that any Bidder must sign and agree to abide by upon submission of a Bid Agreement (Attachment 2 in the Appendix to this § 600.1107).

Conditional relinquishment means the CFEC form that any Permit Holder, agreeing to relinquish a permit, must sign and agree to abide by upon SRA acceptance of the bid (Attachment 3 in the Appendix to this § 600.1107).

Fishery means the Southeast Alaska administrative area as defined under Title 5 Alaska Administrative Code Section 33.100 for salmon with purse seine gear.

Magnuson-Stevens Act means the Magnuson-Stevens Fishery Conservation and Management Act codified at 16 U.S.C. 1801 *et seq.*

Permit (Southeast Salmon Purse Seine Entry Permit) means a valid entry permit issued by CFEC to operate in the Southeast Alaska purse seine salmon fishery.

Permit holder means an individual who at the time of bidding is the holder of record of a permit.

Reduction fishery means the Southeast Alaska Purse Seine Salmon Fishery.

Reduction loan means the loan used to purchase the relinquished permits pursuant to the approved Reduction Plan.

Reduction loan amount means the Reduction Loan's original principal amount up to $23,500,000.

Reduction plan means the aggregate of all Bids, Relinquishment Contracts, Conditional Notices, Conditional Relinquishments, and supporting documents and rationale, submitted to the Secretary for approval.

Relinquishment contract means the contract that any Permit Holder agreeing to relinquish a permit pursuant to Alaska Statute (A.S. 16.43.150(i)) must sign and agree to abide by upon acceptance of the Bid, and before payment of the bid amount (Attachment 1 in the Appendix to this § 600.1107).

Secretary means the Secretary of Commerce or his/her designee.

Southeast Revitalization Association (SRA) means the qualified fishery association authorized to develop and implement this capacity reduction program under Alaska Statute 16.40.250 and Federal law.

(c) *Enrollment in the capacity reduction program*—(1) *Distribution.* The SRA shall mail a copy of the following four documents via certified mail to each Permit Holder: Bid; Fleet Consolidation Relinquishment Contract (Relinquishment Contract); Conditional Notice to CFEC and Request by Permit Holder; and Conditional Relinquishment of Southeast Salmon Purse Seine Entry Permit. Such mailing shall include a closing date after which the SRA will not accept new bids.

(2) *Application.* Any Permit Holder, regardless of whether having received the mailing described in paragraph (c)(1) of this section, may participate in the Capacity Reduction Program by submitting all of the following documents to the SRA no later than the bid closing date:

(i) A fully executed Bid consistent with the Appendix to this section;

(ii) A photocopy of the permit evidencing the applicant's qualification as a participant in the fishery;

(iii) A fully executed Relinquishment Contract: Southeast Alaska Salmon Purse Seine Permit Holders consistent with the appendix B to this section;

(iv) A fully executed Conditional Notice to CFEC and Request by Permit Holder consistent with the appendix C to this section; and

(v) A fully executed Conditional Relinquishment of Southeast Salmon Purse Seine Entry Permit consistent with the appendix D to this section.

(A) The submitted Bid shall include the following information: name, address, telephone number, social security number, and (if available) electronic mail address of the submitting Permit Holder, permit number, and whether any authorized party holds a security interest in the permit. Each application must be submitted to the SRA, c/o Elgee, Rehfeld, Mertz, LLC, Professional Plaza Building B, 9309 Glacier Highway, Suite B–200, Juneau, Alaska 99801.

(B) The SRA will notify the Permit Holder if the Bid is non-conforming and, in such cases, the Permit Holder may submit a revised, conforming Bid within the prescribed period (i.e., until the bid closing date).

(3) *Enrollment period.* Applications that meet all requirements will be accepted until the bid selection process is completed but no later than the bid closing date specified by SRA.

(4) *Effective date.* The effective date of any Bid shall be when the SRA has completed the selection process and signed the Bid.

(5) *Notice.* The SRA will notify each Accepted Bidder, via certified mail, of the effective date of the Bid Agreement.

(6) *Conflicts.* Where terms and conditions in the Bid, Relinquishment Contract, Conditional Notice, and Conditional Relinquishment conflict with this regulation, the terms and conditions in the regulation are controlling.

(d) *Bid selection process.* The fishing capacity removed by the Reduction Plan shall be represented by the total number of valid CFEC permits, whether active or latent, that are voluntarily offered by Permit Holders and selected by the SRA up to an aggregate amount of $23.5 million. Due to a rescission of funds, the underlying appropriations for this Reduction Program were reduced from $250,000 to $235,000, resulting in a loan ceiling of $23.5 million.

(1) *Overview.* The Selection Process shall begin upon the receipt by SRA of the first application and shall continue until: The bid closing date specified by SRA (§ 600.1107(c)(1)); or the ranking of the next lowest bid would cause the total program costs to exceed $23.5 million. When either one of these events is reached, the Selection Process shall be completed.

(i) During the selection process, the SRA in consultation with the CFEC shall examine each submitted Bid for consistency and the necessary elements, including the validity of the permit and whether any authorized party holds a security interest in the permit.

(ii) [Reserved]

(2) *Bids.* By submitting the Bid, the bidder expressly acknowledges that he makes an irrevocable offer to relinquish to CFEC a permit for a specific price, and once having submitted the Bid, the bidder is not entitled to withdraw or in any way amend the Bid. The permit will be relinquished for the price set forth in the Bid contingent on such Bid being accepted by the SRA at the closing of the Selection Process. Any attempted withdrawal by a bidder shall be invalid, and the Bid shall remain a binding, irrevocable offer, unaffected by the attempted withdrawal. Any bid that is submitted by a Permit Holder but is not accepted by the SRA shall be deemed terminated and both the Permit Holder and the SRA will have no further obligation with respect to the Bid.

(i) If a Permit Holder holds more than one permit, the Permit Holder must submit a separate Bid for each permit that he/she offers to relinquish.

(ii) By submitting a Bid, the Permit Holder warrants and represents that he/she has read and understands the terms of the Program Regulations, Bid, Relinquishment Contract, Conditional

Notice and Conditional Relinquishment, and has had the opportunity to seek independent legal counsel regarding such documents and the consequences of submitting the Bid Agreement.

(3) *Ranking.* The SRA shall rank all conforming bids by using a reverse auction in which the SRA ranks the Bid with the lowest dollar amount and successively ranks each additional Bid with the next lowest dollar amount until there are no more Bids or the ranking of the next lowest bid would cause the total program cost to exceed $23.5 million. In the event of a tie with bids which results in the tied bids exceeding $23.5 million, the SRA will select the tied bid first received.

(4) *Acceptance and post-acceptance restriction of renewals and transfers.* Upon expiration of the bid closing date, the SRA shall determine whether the number of ranked bids it is willing to accept is sufficient to achieve a substantial reduction in harvest capacity and increased economic efficiencies for those Permit Holders remaining in the fishery. If the SRA makes such a determination and thereafter accepts bids, SRA shall send CFEC the Conditional Notice form restricting renewal and transfer of each permit for which a bid was accepted. The Bid, Relinquishment Contract, Conditional Notice and Conditional Relinquishment are terminated for any rejected bid and the applicant is no longer bound by the terms of these documents.

(e) *Plan submission and approval*—(1) *Submitting the reduction plan.* Within 30 days of concluding the selection process, the SRA shall submit the Reduction Plan, consisting of the aggregate of all Bid Agreements, Relinquishment Contracts, Conditional Notices and Conditional Relinquishments, together with supporting documents and rationale, to NMFS for final approval on behalf of the Secretary. The Reduction Plan shall include a listing of accepted bids arranged by bid amount from lowest to highest bid, attended by a statement from the SRA that all other bids received were higher than the largest dollar amount of the last bid accepted.

(2) *Required findings.* In order to approve a Reduction Plan, the Assistant Administrator of NMFS, on behalf of the Secretary, must find that: The Reduction Plan is consistent with the amended Consolidated Appropriations Act of 2005 and applicable sections of the Magnuson-Stevens Act, particularly that it is cost-effective; the Reduction Plan will result in the maximum sustained reduction in fishing capacity at the least cost; and the Reduction Plan will increase harvesting productivity for post-reduction Permit Holders participating in the fishery.

(3) *The referendum.* If NMFS approves the Reduction Plan and subsequent to the publication of a final rule resulting from this proposed rule, NMFS shall conduct a referendum to determine the industry's willingness to repay a fishing capacity reduction loan to purchase the permits identified in the Reduction Plan. NMFS shall publish a notice in the **Federal Register** requesting votes by Permit Holders on whether to accept or reject the Reduction Plan for implementation. The notice shall state the starting and ending dates and times of the voting period, which shall be not less than three (3) nor more than seven (7) calendar days from the date of such notice.

(i) Such notice shall state the name and address of record of each eligible voter, as well as the basis for having determined the eligibility of those voters. This shall constitute notice and opportunity to respond about adding eligible voters, deleting ineligible voters, and/or correcting any voter's name and address of record. If, in NMFS' discretion, the comments received in response to such notice warrants it, or for other good cause, NMFS may modify such list by publishing another notice in the **Federal Register**. NMFS shall issue ballots to eligible voters, tally votes, and notify voters whether the referendum was successful or unsuccessful in approving the Reduction Plan consistent with the provisions of § 600.1010.

(ii) A successful referendum by a majority of the Permit Holders in the Reduction Fishery shall bind all parties and complete the reduction process. NMFS shall publish a notice in the **Federal Register** advising the public that the referendum was successful and that NMFS will begin tendering the reduction program's reduction payments to the selected bidders. Thereafter the Reduction Program shall be implemented.

(iii) The provisions of § 600.1010 and § 600.1017(a)(1)–(4) shall apply to any referendum on the Reduction Plan of this section to the extent that they do not conflict with this section or with subpart M of this part.

(f) *Implementation*—(1) *Reduction payments.* Within 60 days of a successful referendum, the CFEC will provide notice to NMFS of the permits retired from the Reduction Fishery. Upon receiving such notification, NMFS will then tender the accepted bid amounts to the Permit Holders. Reduction payments may not exceed $23.5 million and if the SRA accepts a total number of bids in an aggregate amount less than $23.5 million, any remaining funds would be available for reduction payments as part of a later, separate Reduction Plan conforming to these regulations. Upon NMFS tendering the reduction program's payments to the selected Permit Holders, each such Permit Holder must permanently stop all fishing with the relinquished permit(s).

(2) *Repayment term.* As authorized by the Act, the Reduction Loan shall be amortized over a forty (40) year term. The Reduction Loan's original principal amount may not exceed $23.5 million, but may be less if the ultimate reduction cost is less. The final Reduction Loan periodic payment amount will be determined by NMFS' analysis of the ability of the post-reduction fishery to service debt. The provisions of §§ 600.1012–600.1017 shall apply to any reduction loan, fee payment and collection under this section to the extent they do not conflict with this section or with subpart M of this part.

(3) *Loan repayment.* Permit Holders operating in the fishery shall be obligated to pay the fee in accordance with this section. In the event that payments made under the Reduction Plan are insufficient to pay the Reduction Loan within the 40-year term, NMFS shall extend the term of the repayment until the Reduction Loan is paid in full.

(i) *Interest.* The Reduction Loan's interest rate will be the U.S. Treasury's cost of borrowing equivalent maturity funds plus two percent. NMFS will determine the Reduction Loan's initial interest rate when NMFS borrows from the U.S. Treasury the funds with which to disburse reduction payments. Interest will begin accruing on the Reduction Loan from the date on which NMFS disburses such loan. The initial interest rate will change to a final interest rate at the end of the Federal fiscal year in which NMFS borrows the funds from the U.S. Treasury. The final interest rate will be two percent plus a weighted average, throughout that fiscal year, of the U.S. Treasury's cost of borrowing equivalent maturity funds. The final interest rate will be fixed and will not vary over the remainder of the reduction loan's 40-year term. The Reduction Loan will be subject to a level debt amortization. There is no prepayment penalty.

(ii) *Fees.* Post-reduction Permit Holders operating in the fishery shall be obligated to pay the fee in accordance with § 600.1107(f). The amount of such fee will be calculated by NMFS on an annual basis as the principal and interest payment amount necessary to amortize the loan over a 40-year term. The fee shall be expressed as a

percentage of the ex-vessel value of all salmon harvested and landed in the fishery. In the event that payments made under the Reduction Plan are insufficient to repay the Reduction Loan within the 40-year term, NMFS shall extend the term of the repayment until the Reduction Loan is paid in full.

(A) Fees must be assessed and collected on all salmon harvested in the fishery. Although the fee could be up to three percent of the ex-vessel price of all post-reduction landings, the fee will be less than three percent if NMFS projects that a lesser rate can amortize the Reduction Loan over the 40-year term. To verify that the fees collected do not exceed three percent of the fishery revenues, NMFS will compare the annual total of principal and interest due with the latest available annual revenues in the fishery to ensure that it is equal to or less than three percent of the total ex-vessel production revenues. In the event that any of the components necessary to calculate the next year's fee are not available, or postponed, the fee will remain at the previous year's amount until such time as new calculations are made and communicated to the post-reduction fishery participants.

(B) If the fishery does not open during a year, interest will continue to accrue on the principal balance even though no fee revenue will be generated. When this happens, if the fee is not already at the maximum three percent, NMFS shall increase the fee to the maximum three percent, apply all subsequent fee revenue first to the payment of accrued interest, and continue the maximum fee rates until the principal and interest payments become current. Once all principal and interest payments are current, NMFS will make a determination about adjusting the fee rate.

(iii) *Collection.* The buyer who first purchases the salmon landed in the fishery shall be responsible for collecting and submitting the repayment fees to NMFS monthly. The fees shall be submitted to NMFS no later than fifteen (15) calendar days following the end of each calendar month.

(iv) *Recordkeeping and reporting.* The dealer who first purchases the salmon landed in the fishery shall be responsible for compliance with the applicable recordkeeping and reporting requirements.

(A) All requirements and penalties set forth in the provisions of §§ 600.1013 (Fee payment and collection), 600.1014 (Fee collection deposits, disbursements, records, and reports), 600.1015 (Late charges), and 600.1017 (Prohibitions and penalties) shall apply to any dealer who purchases salmon in the fishery, and to any fee collection under this section, to the extent they do not conflict with this section or with subpart M of this part.

(B) [Reserved]

(g) *Specific performance under the relinquishment contract.* The parties to the Relinquishment Contract have agreed that the opportunity to develop and submit a capacity reduction program for the fishery under the terms of the Act is both unique and finite. The failure of a Permit Holder, whose bid was accepted, to perform the obligations under the Relinquishment Contract will result in irreparable damage to the SRA and all the other Permit Holders. Accordingly, the parties to the Relinquishment Contract expressly acknowledge that money damages are an inadequate means of redress and agree, that upon failure of the Permit Holder to fulfill his obligations under the Relinquishment Contract, that specific performance of those obligations may be obtained by suit in equity brought by the SRA in any court of competent jurisdiction without obligation to arbitrate such action.

(h) *Enforcement for Failure to Pay Fees.* The provisions and requirements of § 600.1016 (Enforcement) shall also apply to fish sellers and fish buyers subject to this fishery.

(i) *Prohibitions and Penalties.* § 600.1017 is amended as follows: Fish buyers are prohibited from purchasing fish from fish sellers who do not pay the required landing fees. Fish sellers are prohibited from selling to fish buyers who do not pay the required landing fees.

Appendix A to § 600.1107—BID

This Bid (Bid) is entered between the individual named in section III, 11(a) of the Agreement and the Southeast Revitalization Association (SRA).

I. Definitions

Unless otherwise defined, the following terms have the following meanings for the purpose of this Agreement.

Acceptance means SRA acceptance of a Bid.

Act means Section 209 of Title II of Division B of Public Law 108–447, Consolidated Appropriations Act of 2005; as amended by Section 121 of Public Law 109–447, Magnuson-Stevens (MSA) Reauthorization Act of 2006.

Bid means a bidder's irrevocable offer to relinquish a permit.

Bid amount means the dollar amount submitted by a bidder.

Bidder means a permit holder who submits a bid.

Conditional notice means the Commercial Fisheries Entry Commission (CFEC) form that any Bidder must sign and agree to abide by upon submission of a Bid Agreement.

Conditional relinquishment means the CFEC form that any Permit Holder, agreeing to relinquish a permit, must sign and agree to abide by upon SRA acceptance of the bid.

Fishery means the Southeast Alaska administrative area as defined under Title 5 Alaska Administrative Code Section 33.100 for salmon with purse seine gear.

Permit means a valid entry permit issued by CFEC to operate in the Southeast Alaska purse seine salmon fishery.

Permit holder means an individual who at the time of bidding is the holder of record of a permit.

Reduction plan means the aggregate of all Bids, Relinquishment Contracts (Appendix B), Commercial Fisheries Entry Commission ("CFEC") Conditional Notice and Conditional Relinquishment (Appendices C & D), and supporting documents and rationale; submitted to the Secretary for approval.

Referendum means the voting procedure to determine the Permit Holder's willingness to repay a fishing capacity reduction loan to purchase the permits identified in the Plan.

Relinquishment contract means the contract that any bidder agreeing to relinquish a permit pursuant to Alaska Statute (A.S. 16.43.150(i)) must sign and agree to abide by upon acceptance of the Bid, and before payment of the bid amount.

Secretary means the Secretary of Commerce or his/her designee.

Southeast Revitalization Association (SRA) means the qualified fishery association authorized to develop and implement this capacity reduction program under Alaska Statute 16.40.250 and Federal law.

II. Recitals

Whereas Alaska Statute 16.40.250 and the Act authorize a fishing capacity reduction program for the fishery;

Whereas, within 30 days of concluding the selection process, the SRA shall submit the Reduction Plan, together with supporting documents and rationale, to NMFS for final approval on behalf of the Secretary;

Whereas, the reduction Plan's express objective is to reduce fishing capacity by permanently revoking permits thereby promoting economic efficiency, improving flexibility in the conservation and management of the fishery and obtain the maximum reduction in permits at the least cost;

Whereas, the SRA can implement the Reduction Plan only after giving notice to all Permit Holders and subsequent approval of the reduction Plan by referendum;

Whereas, the Agreement submitted by the bidder and the SRA is an integral element of the Reduction Plan;

Now, therefore, for good and valuable consideration, the sufficiency of which is hereby acknowledged, the SRA and bidder agree as follows:

III. Terms and Conditions

1. *Form.* By completing and submitting this Bid to the SRA the bidder hereby offers to permanently relinquish, and have the CFEC revoke, the permit. The SRA signing the Bid and subsequent NMFS payment to bidder in the exact bid amount set forth in section III, 11(f) of the Bid is full and complete consideration.

2. *Irrevocable.* The bidder expressly acknowledges that by submitting the Bid he/she makes an irrevocable offer to relinquish the permit and once having submitted the Bid is not entitled to withdraw or in any manner amend the Bid. The receipt date that the SRA marks on the Bid constitutes the date of the bidder's submittal.

3. *Warranty.* The bidder warrants and represents that he/she is the holder of record of the permit, according to the CFEC records, and that he/she has read and understands the terms of the Program Regulations, Bid, Relinquishment Contract, Conditional Notice and the Conditional Relinquishment and has had the opportunity to seek independent legal counsel regarding such documents and the consequences of submitting the Bid.

4. *Validity.* The SRA, in consultation with the CFEC, shall examine each Bid for completeness and consistency. The SRA shall notify the bidder if the Bid is non-conforming. In such cases, the bidder may submit a revised, conforming Bid within the prescribed period (i.e., until the bid closing date).

5. *Ranking.* The SRA shall rank the bid amount entered in section III, 11(f) of this Bid by using a reverse auction in which the SRA ranks the Bid with the lowest dollar amount and successively ranks each additional Bid with the next lowest dollar amount until there are no more Bids or the ranking of the next lowest Bid would exceed the total program cost. In the event of a tie with bids which results in the tied bids exceeding $23.5 million, the SRA will select the tied bid first received.

6. *Acceptance and Rejection.* If the Bid is accepted, the SRA shall formally notify the bidder in writing. If the SRA rejects the Bid, the SRA will formally notify the bidder in writing and the Bid shall terminate without further obligation.

7. *Restriction of Transfer of permit:* Upon acceptance, the SRA will send the CFEC the Conditional Notice, restricting transfer of the permit until such time as: the SRA notifies the bidder that the Plan is not in compliance with the Act and will not be approved; or NMFS notifies the bidder the referendum was unsuccessful.

8. *Payment.* Within 60 days from the close of the voting period of a successful referendum, the CFEC will provide notice to NMFS of the permits retired from the Reduction Fishery. Upon receiving such notice, NMFS will then tender the accepted bid amounts to the Permit Holders.

9. *Specific Performance.* The failure of a bidder whose Bid was accepted to comply with the terms of this Bid will result in irreparable damage to the SRA and its members because the Bid was part of the basis for the Plan submitted to the Secretary for approval. Accordingly, the SRA and bidder expressly acknowledge that money damages are an inadequate means of redress and agree that specific performance of those obligations may be obtained by suit in equity brought by the SRA in any court of competent jurisdiction without obligation to arbitrate such action.

10. *Submission.* This Bid must be submitted within the prescribed period to the SRA, c/o Elgee, Rehfeld, Mertz, LLC, Professional Plaza Building B, 9309 Glacier Highway, Suite B–200, Juneau, AK 99801.

11. *Complete Bid Information:* To fully and accurately complete this Bid, the bidder must fully complete the following questions and provide an exact photocopy of the permit. The Bidder must further sign this form, Appendices B, C, and D and acknowledge the signature before a notary public.

(a) BIDDER'S NAME. This must be the full and exact legal name of record of the person bidding. Insert the name of the bidder.

(b) BIDDER'S ADDRESS OF RECORD. Insert the full and exact address of record for the bidder.

(c) BIDDER'S TELEPHONE NUMBER. Insert the full and exact telephone number of the bidder.

(d) BIDDER'S ELECTRONIC MAIL ADDRESS (if available). Insert the full and exact e-mail address of the bidder.

(e) PERMIT. Insert the full and exact permit number(s) of the bidder. Enclose with this Bid an exact photocopy of the permit.

(f) BID AMOUNT. Insert, in U.S. dollars, the bid's full and exact amount, both in words and numbers.

In words	In numbers
	$ $ $

(g) SECURITY INTERESTS. Insert the name of any authorized third party that may hold a security interest in the permit.

(h) SOCIAL SECURITY NUMBER. Insert the full and exact Social Security Number of the bidder.

(i) BID SIGNATURE. In compliance with applicable law and this Bid, the bidder submits the above bid amount as an offer to the SRA for the permanent relinquishment of his/her permit. By completing the sections above and signing below, the bidder acknowledges that the bidder has completely reviewed this Bid and attachments. The bidder warrants that the bidder is fully able to enter into the Relinquishment Contract. The bidder expressly warrants and attests that all information included herein is accurate.

Signature Printed Name Date of Signature	

State of: _____

County/Borough of: _____

I certify that _____ is the person who appeared before me and said person acknowledged that he/she signed this Bid and on oath stated that he/she was authorized to execute such document and acknowledged it to be the free and voluntary act of him/her for the uses and purposes mentioned in such document.

Notary Public's Signature: _____

Dated: _____

My Commission Expires: _____

12. SRA SIGNATURE. By signing below, the SRA acknowledges acceptance of this Bid, including the bidder's bid amount.

Signature ..... Printed Name ..... Date of Signature	

Appendix B to § 600.1107—Relinquishment Contract: Southeast Alaska Salmon Purse Seine Permit Holders

This Relinquishment Contract ("Contract") and agreement is entered into between the Southeast Revitalization Association ("SRA") and the bidder named in Section 11(a) of the Bid. The contract is effective when the bidder signs the Bid and this contract and, thereby, agrees to relinquish his/her permit, issued by the Alaska Commercial Fisheries Entry Commission ("CFEC") for the Southeast Alaska salmon purse seine fishery ("fishery").

Whereas Alaska Statute 16.40.250 and Federal law authorize a fishing capacity reduction program for the fishery;

Whereas, upon accepting and signing the Bid, the SRA shall submit a Reduction Plan to NMFS;

Whereas, the Reduction Plan's express objective is to reduce fishing capacity by permanently revoking permits thereby promoting economic efficiency, improving flexibility in the conservation and management of the fishery and obtain the maximum reduction in permits at the least cost;

Whereas, this contract is subject to the terms and conditions set forth herein, including the CFEC forms marked as Appendices C & D;

Now, therefore, for valuable consideration and the covenants hereinafter set forth, the parties hereto agree as follows:

1. The foregoing, including the Bid and specifically the definitions under section 1, are expressly incorporated herein by this reference.

2. Under AS 16.43.150(i), the Bidder agrees to permanently relinquish and have the CFEC revoke the permit.

3. The Bidder represents that, as of the date of submitting the contract, he or she is the holder of record of the permit according to the CFEC official permit records.

4. Upon notification by the SRA to the Bidder that the SRA accepted the bid; the SRA will submit to the CFEC the Permit Holder's executed notice form (Appendix C) and executed relinquishment form (Appendix D).

5. In the event an authorized third party holds a security interest in the permit, NMFS will not make payment until receiving notice of written consent by the third party to the SRA and the CFEC on a form provided by the CFEC.

6. NMFS payment to the accepted bidder in the exact amount of the accepted bid amount is full and complete consideration for the CFEC revoking the permit.

7. The bidder shall, upon the SRA or the CFEC request, furnish such additional documents, information, or take such other actions as may be reasonably required to enable the CFEC to implement relinquishment of the permit.

8. The bidder consents to the public release of any information provided in connection with the contract or program requirements after completion of the plan.

9. The contract contains the final terms and conditions of this agreement between the parties and represents the entire and exclusive agreement between them.

10. The contract terms are severable, and, in the event that any portion of the contract is held to be unenforceable, the remaining portion shall remain fully enforceable against the parties.

11. Any and all disputes involving the contract shall be governed by laws of the State of Alaska. The bidder expressly acknowledges that by submitting the Bid, he/she makes an irrevocable offer to relinquish the permit, and once having submitted the Bid, is not entitled to withdraw or in any way amend the Bid.

12. The failure of a bidder to perform his/her obligations under the Bid will result in irreparable damage to the SRA and its members upon submittal of the Plan to the Secretary for approval. Accordingly, the SRA and the bidder expressly acknowledge that money damages are an inadequate means of redress and agree that upon failure of the bidder to fulfill his/her obligations under the Bid that specific performance of those obligations may be obtained by suit in equity brought by the SRA in any court of competent jurisdiction without obligation to arbitrate such action.

Bidder's Signature and Notary's Acknowledgement and Certification

Bidder signature	Notary signature
(1) Sign. (2) Print the following: (a) signer's name (b) signing date (c) state and city/borough	(1) Sign. (2) Print the following: (a) name (b) signing date (3) date commission expires, and State and city/borough. Each notary signature attests to the following: "I certify that I know or have satisfactory evidence that the person who is signed in the 1st column of this same row is the person who appeared before me and: (1) acknowledged his/her signature; (2) on oath, stated that he/she was authorized to sign; and (3) acknowledged that he/she did so freely and voluntarily."
(1)	(1)
(2)(a)	(2)(a)
(2)(b)	(2)(b)
(2)(c)	(3)

II. Southeast Revitalization Association Signature Southeast Revitalization Association

Dated: _____

By: _____

Appendix C to § 600.1107—Conditional Notice to CFEC and Request by Permit Holder

In support of my Bid to the Southeast Revitalization Association (SRA), I have executed this Conditional Notice and request and authorize the Southeast Revitalization Association (SRA) to submit this executed document to the Alaska Commercial Fisheries Entry Commission (CFEC) in the event that the SRA accepts my bid to permanently relinquish my Southeast Salmon Purse Seine Entry Permit under AS 16.43.150(i).

I hereby notify the CFEC that the SRA has accepted my Bid to permanently relinquish my Southeast Salmon Purse Seine Entry Permit #_____.

I request the CFEC: (1) not to renew my above-identified entry permit; and (2) not to authorize any transfer of my entry permit.

DATED this ____ day of _____, 2011.

_____

(Permit Holder/Bidder)

SUBSCRIBED AND SWORN TO before me this ____ day of _____, 2011.

_____

Notary Public, State of _____

My commission expires: _____

Appendix D to § 600.1107—Conditional Relinquishment of Southeast Salmon Purse Seine Entry Permit [as 16.43.150(i)]

Upon satisfaction of the conditions that the Southeast Revitalization Association (SRA) accepts my bid and that NMFS agrees to pay my full bid amount to me, the SRA may submit this executed Conditional Relinquishment of Southeast Salmon Purse Seine Entry Permit to the Commercial Fisheries Entry Commission.

I fully understand this relinquishment of my permanent entry permit # _____ under AS 16.43.150(i) is permanent, and I will not be able to reinstate the permit.

DATED this ____ day of_____, 2011.

_____

(Permit Holder/Bidder)

SUBSCRIBED AND SWORN TO before me this ____ day of _____, 2011.

_____

Notary Public, State of _____

My commission expires: _____

[FR Doc. 2011–12650 Filed 5–20–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

RIN 0648–BA23

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Annual Catch Limits and Accountability Measures

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

ACTION: Availability of proposed fishery management plan amendments; request for comments.

SUMMARY: NMFS announces that the Mid-Atlantic Fishery Management Council (Council) has submitted an omnibus amendment containing the following amendments to implement annual catch limits (ACLs) and accountability measures (AMs) for Council managed resources: Amendment 13 to the Atlantic Mackerel, Squids, and Butterfish FMP; Amendment 3 to the Atlantic Bluefish FMP; Amendment 2 to the Spiny Dogfish FMP; Amendment 15 to the Summer Flounder, Scup, and Black Sea Bass FMP; Amendment 16 to the Surfclam and Ocean Quahog FMP, and Amendment 3 to the Tilefish FMP. These amendments, hereafter referred to as the Omnibus Amendment, have been submitted for review by the Secretary of Commerce (Secretary) for conformance with the FMPs, FMP amendments, the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and other applicable laws. In turn, as part of the Secretarial review process, NMFS is requesting comments on the Omnibus Amendment from the public.

DATES: Comments must be received on or before July 22, 2011.

ADDRESSES: You may submit comments, identified by RIN 0648–BA23, 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.
- *Mail and hand delivery:* Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope: Comments on Mid-Atlantic ACL/AM Omnibus Amendment.

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.

Copies of the draft Omnibus Amendment document, including the Environmental Assessment and Regulatory Impact Review (EA/RIR) and other supporting documents for the Omnibus Amendment are available from Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 North State Street, Dover, DE 19901. The draft Omnibus Amendment, as submitted to NMFS by the Council, is also accessible via the Internet at *http://www.nero.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Michael Ruccio, Fishery Policy Analyst, (978) 281–9104.

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Act requires that each Regional Fishery Management Council submit any FMP amendment it prepares to NMFS for review and approval, disapproval, or partial approval. The Magnuson-Stevens Act also requires that NMFS, upon receiving an FMP amendment, publish a notice in the **Federal Register** that the amendment is available for public review and comment.

Background

The Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (MSRA) amended the Magnuson-Stevens Act to include new requirements for ACLs and AMs and the formal incorporation of scientific advice provided to Regional Fishery Management Councils from their respective Scientific and Statistical Committees (SSCs).

The Council conducted public scoping and development of the Omnibus Amendment in 2009 and 2010. The development process included several meetings of the full Council, joint meetings with the Council and Atlantic States Marine Fisheries Commission, the Council's SSC and its scientific uncertainty subcommittee, the Omnibus Amendment Fishery Management Action Team, and public hearings. Now, the Council has submitted the Omnibus Amendment for Secretarial review, approval as needed, and implementation. The Omnibus Amendment is necessary to bring all Council FMPs into compliance with the requirements of the Magnuson-Stevens Act. The intent is to establish a comprehensive framework for all Council FMPs to more formally receive and utilize scientific recommendations in the establishment of annual catch levels, to establish a system to derive ACLs with AM backstops from that scientific advice, and to establish processes for revisiting and modifying the measures that would be established by the respective FMP amendments so that overfishing is prevented, stocks are rebuilt, and Optimum Yield (OY) may be achieved for all managed stocks.

If approved by NMFS, this amendment would establish Acceptable Biological Catch (ABC) control rules for use by the Council's SSC in recommending ABC to the Council; a risk policy for use in conjunction with the ABC control rules to inform the SSC of the Council's preferred tolerance for the risk of overfishing a stock; ACLs for all Council-managed stocks except *Loligo* and *Illex* squids, which are exempt from the ACL/AM requirements due to annual life cycles; comprehensive AMs for all established ACLs; descriptions of the process to review ACL and AM performance; and establishment of processes to modify the measures to be implemented through the Omnibus Amendment.

Public comments are being solicited on the Council's Omnibus Amendment and its incorporated documents through the end of the comment period stated in this notice of availability. A proposed rule that would implement the Omnibus Amendment's measures if approved, will be published in the **Federal Register** for public comment, following NMFS's evaluation of the proposed rule under the procedures of the Magnuson-Stevens Act. Public comments on the proposed rule must be received by the end of the comment period provided in this notice of availability of the Omnibus Amendment to be considered in the approval/disapproval decision on the amendment. All comments received by July 22, 2011, whether specifically directed to the Omnibus Amendment or the proposed rule, will be considered by NMFS in the approval/disapproval decision on the Omnibus Amendment. In reviewing, approving, and implementing Council-recommended amendment actions, NMFS is constrained to approval, disapproval, or partial approval only.

Comments received after the specified date will not be considered in the decision to approve, partially approve, or disapprove the Omnibus Amendment. To be considered, comments must be received by close of business on the last day of the comment period; that does not mean postmarked or otherwise transmitted by that date.

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

Dated: May 17, 2011,

Margo Schulze-Haugen,

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

[FR Doc. 2011–12665 Filed 5–23–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

RIN 0648–AY27

Western Pacific Pelagic Fisheries; American Samoa Longline Gear Modifications To Reduce Turtle Interactions

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

ACTION: Notice of availability of fishery ecosystem plan amendment; request for comments.

SUMMARY: NMFS announces that the Western Pacific Fishery Management Council (Council) proposes to amend the Fishery Ecosystem Plan for Pelagic Fisheries of the Western Pacific Region (FEP). If approved by the Secretary of Commerce, Amendment 5 would establish gear configuration requirements for the U.S. pelagic longline fishery based in American Samoa. The proposed action is intended to reduce interactions between the fishery and Pacific green sea turtles, which will enable American Samoa longline fishing vessels to continue operations, while providing for the long-term survival, recovery, and sustainability of Pacific green sea turtle populations.

DATES: Comments on Amendment 5, including an environmental assessment, must be received by July 22, 2011.

ADDRESSES: Copies of Amendment 5, including an environmental assessment, identified by 0648–AY27, 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*. Comments on the amendment, including the environmental assessment, may be sent 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:* Mail written comments to Michael D. Tosatto, Regional Administrator, NMFS, Pacific Islands Region (PIR), 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814–4700.

Instructions: Comments must be submitted to one of the above two addresses 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.

FOR FURTHER INFORMATION CONTACT: Adam Bailey, NMFS PIR Sustainable Fisheries Division, 808–944–2248.

SUPPLEMENTARY INFORMATION: Pelagic fisheries in the U.S. western Pacific are managed under the FEP, developed by the Council, and approved and implemented by NMFS. The Council prepared Amendment 5 to address pelagic fishing concerns in American Samoa, and submitted the amendment to NMFS for review under the Magnuson-Stevens Fishery Conservation and Management Act.

The pelagic longline fishery based in American Samoa is predominantly composed of longline vessels over 40 ft (12 m) in length. Longline vessels set 30–50 miles (48–80 km) of monofilament main line and around 3,000 hooks per day. In 2010, 26 vessels made a total of 4,328 sets, and landed about 222,400 albacore (most destined for the Pago Pago cannery), and smaller amounts of skipjack, yellowfin and bigeye tunas. The fishery also takes wahoo, oilfish, blue marlin, blue sharks, and other pelagic fish.

The American Samoa longline fishery occasionally interacts with (hooks or entangles) Pacific green sea turtles (*Chelonia mydas*), which are listed as threatened under the Endangered Species Act. Most of the interactions occur in near-surface waters, that is, shallower than 100 m, and most injuries to green sea turtles are fatal. To reduce these interactions, the Council proposes to amend the FEP to require longline fishermen to use a suite of gear configurations designed to ensure that longline hooks are set to fish at a depth of 100 meters or deeper, away from the primary turtle habitat.

This action would require fishermen on the large vessels (Classes B, C, and D) to use float lines that are at least 30 meters long, and maintain a distance of

70 m between floats and adjacent branch lines with hooks. Fishermen on these large vessels would be required to deploy at least 15 branch lines with hooks between floats. The possession or landing of more than 10 swordfish, which tend to inhabit near-surface waters, would also be prohibited to help ensure that shallower longline fishing does not occur.

While green sea turtles are expected to benefit from the proposed gear modifications, the action is not expected to change the conduct of the fishery in terms of the number of vessels, areas fished, and fish targeted. Thus, there would not likely be adverse impacts on target and non-target species. No negative impacts are expected on seabirds, marine mammals, essential fish habitat, habitat areas of particular concern, marine protected areas, fishing communities, or safety at sea.

Comments on Amendment 5 must be received by July 22, 2011 to be considered by NMFS in the decision to approve, partially approve, or disapprove the amendment. NMFS soon expects to publish and request public comment on a proposed rule that would implement the measures recommended in Amendment 5.

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

Dated: May 17, 2011.

Margo Schulze-Haugen,

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

[FR Doc. 2011–12648 Filed 5–20–11; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 76, No. 99

Monday, May 23, 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

May 17, 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) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Housing Service

Title: RD 3550–28, "Authorization Agreement for Preauthorization Payments"; RD 1951–65, "Customer Initiated Payments (CIP)" and RD 1951–66, "Fedwire Worksheet".

OMB Control Number: 0575–0184.

Summary of Collection: Rural Development (RD) uses electronic methods for receiving and processing loan payments and collections. These electronic collection methods are approved by Treasury and include Preauthorized Debits (PAD), Customer Initiated Payments (CIP), and FedWire. These electronic collection methods provide the borrower the ability to submit their loan payments the day prior to, or the day of their installment due date. To administer these electronic payment methods, RD will use approved agency forms for collecting financial institution routing information. Form RD 3550–28, Authorization Agreement for Preauthorized Payments, is prepared by the borrower to authorize RD to electronically collect regular loan payments from a borrower's account at a financial institution (FI) as preauthorized debits. Form RD 1951–65, is prepared by the borrower to enroll in CIP. CIP is an electronic collection method that enables borrowers to input payment data to a contract bank via telephone (touch tone and voice) or computer terminal. Form RD 1951–66, FedWire Worksheet, is completed by the borrower to establish an electronic FedWire format with their FI.

Need and Use of the Information: RD will request that borrowers make payments electronically via PAD, CIP, or FedWire. The information is collected only once unless the FI routing information changes. If the information were not collected, RD would be unable to collect loan payments electronically.

Description of Respondents: Not-for-profit institutions; business or other for-profit; State, Local or Tribal Government.

Number of Respondents: 4,991.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 2,291.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2011–12540 Filed 5–20–11; 8:45 am]

BILLING CODE 3410–XT–P

DEPARTMENT OF AGRICULTURE

Farm Service Agency

Information Collection: Volunteer Programs

AGENCY: Farm Service Agency, USDA.

ACTION: Notice; request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Farm Service Agency (FSA) is seeking comments from all interested individuals and organizations on an extension of a currently approved information collection associated with the Volunteer Programs.

DATES: We will consider comment that we received by July 22, 2011.

ADDRESSES: We invite you to submit comments on this notice. In your comment, include volume, date and page number of this issue of the **Federal Register**. You may submit comments by any of the following methods:

E-mail: Send comments to: *Janice.Barnes@wdc.usdc.gov.*

Fax: (202) 205–9068.

Mail: Ms. Janice Barnes, USDA, FSA, Human Resources Division, PAB—Stop 0590, 1400 Independence Ave., SW., Washington, DC 20250–0590.

Comments also should be sent to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Ms. Janice Barnes, Human Resources Specialist, phone: (202) 401–0391.

SUPPLEMENTARY INFORMATION:

Title: Volunteer Programs.

OMB Control Number: 0560–0232.

Expiration Date for Approval: October 31, 2011.

Type of Request: Extension of a Currently Approved Information Collection.

Abstract: Section 1526 of the Food and Agriculture Act of 1981 (7 U.S.C. 2272) permits the Secretary of Agriculture to establish a program to use volunteers to perform a wide range of

activities to carry out the programs of, or supported by the Department of Agriculture. 5 U.S.C. 3111 grants agencies the authority to establish programs designed to provide educationally related work assignments for students in non-pay status. The volunteer program will provide a valuable service to the Farm Service Agency (FSA).

In FSA volunteer program, each individual must follow the same responsibilities and guidelines to conduct to which Federal Government employees are expected to follow. The individuals, who are mainly students participating in the sponsored volunteer program, must complete the "Service Agreement and Attendance Records," and other forms, with providing required supporting documents. The collected information is to allow FSA to effectively recruit, train, and accept volunteers to carry out programs supported by the Department of Agriculture.

Without the collected information, FSA would be unable to document services without compensation in the program. FSA is reporting the collected information to the Department of Agriculture and the Office of Personnel Management that request information on volunteer programs.

Estimate of Burden: The recordkeeping requirements in this request are normal business records and, therefore, have no burden. Public reporting burden for this information collection is estimated to average 15 minutes per response. The average travel time, which is included in the total annual burden, is estimated to be 1 hour per respondent.

Type of Respondents: Individuals.

Estimated Number of Respondents: 60.

Estimated Number of Responses per Respondent: 1.33.

Estimated Total Annual Reponses: 80.

Estimated Total Annual Burden Hours: 30 hours.

We are requesting comments on all aspects of this information collection to help us to:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility and clarity of the information to be collected;

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the request for OMB approval.

Signed in Washington, DC, on May 17, 2011.

Carolyn B. Cooksie,

Acting Administrator, Farm Service Agency.

[FR Doc. 2011–12521 Filed 5–20–11; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Forest Service

Lost River and Challis-Yankee Fork Ranger Districts, Salmon-Challis National Forest; ID; Lost River/Lemhi Grazing Allotments Environmental Impact Statement

AGENCY: Forest Service, USDA.

ACTION: Withdrawal of notice of intent to prepare an environmental impact statement.

SUMMARY: The Forest Service proposed to prepare an Environmental Impact Statement for the Lost River/Lemhi Grazing Allotments on National Forest System lands managed by the Salmon-Challis National Forest. This project has been cancelled. This notice terminates the environmental analysis process for the Lost River/Lemhi Grazing Allotments.

DATES: The Notice of Intent to prepare the Lost River/Lemhi Grazing Allotment EIS was published in the **Federal Register** on July 31, 2003, Vol. 68, No. 147. The Notice of Availability for the Draft EIS was published in the **Federal Register** on November 3, 2006, Vol. 71, No. 213 and amended on December 15, 2006, Vol. 71, No. 241. This project has been cancelled.

FOR FURTHER INFORMATION CONTACT: Karen E. Dunlap, Forest Environmental Coordinator, Public Lands Center, 1206 S. Challis Street, Salmon, ID 83467; *telephone:* 208–756–5192; *fax:* 208–756–5555.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

Responsible Official

Frank Guzman, Forest Supervisor. Salmon-Challis National Forest, 1206 S. Challis St., Salmon, ID 83467.

Dated: May 6, 2011.

Frank V. Guzman,

Forest Supervisor.

[FR Doc. 2011–12420 Filed 5–20–11; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Shasta County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Shasta County Resource Advisory Committee (RAC) will meet in Redding, California. 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 Title II of the Act. The meeting is open to the public. The purpose of the June 29th meeting is review project presentations and vote on project proposals. The purpose of the September 7th meeting is to discuss project updates and proposals, and information on monitoring efforts. Any remaining projects will be voted on in this meeting. The purpose of the November 30th meeting is to discuss project updates, field trips, monitoring efforts, and accounting.

DATES: The meetings will be held Wednesday, June 29; Wednesday, September 7th; and Wednesday, November 30. All meetings will start at 8:30 a.m.

ADDRESSES: The meetings will be held at the USDA Service Center, 3644 Avtech Parkway, Redding, California 96002. Written comments may be submitted as described under Supplementary Information.

FOR FURTHER INFORMATION CONTACT: Donna Harmon, Resource Advisory Committee Designated Federal Official, at (530) 226–2335 or *dharmon@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 meeting is open to the public. Public input sessions will be provided and individuals will have the opportunity to address the Shasta County Resource Advisory Committee.

Dated: May 12, 2011.

J. Sharon Heywood,

Forest Supervisor, Shasta-Trinity National Forest.

[FR Doc. 2011–12574 Filed 5–20–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Forest Service

Madera County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Madera County Resource Advisory Committee will be meeting in North Fork, California on June 15, 2011. The purpose of the meeting will be to update the committee on the status of projects that were recommended for funding at the March 30, 2011 meeting, and to vote on contingency proposals for funding and as authorized under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 110–343) for expenditure of Payments to States Madera County Title II funds.

DATES: The meeting will be held on June 15, 2011.

ADDRESSES: The meeting will be held at the Bass Lake Ranger District, 57003 Road 225, North Fork, California, 93643. Send written comments to Julie Roberts, Madera County Resource Advisory Committee Coordinator, c/o Sierra National Forest, Bass Lake Ranger District, at the above address, or electronically to *jaroberts@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Julie Roberts, Madera County Resource Advisory Committee Coordinator, (559) 877–2218 ext. 3159.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Committee discussion is limited to Forest Service staff and Committee members. However, persons who wish to bring Payments to States Madera County Title II project matters to the attention of the Committee may file written statements with the Committee staff before or after the meetings.

Dated: May 16, 2011.

Dave Martin,

District Ranger.

[FR Doc. 2011–12613 Filed 5–20–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Northern New Mexico Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Northern New Mexico Resource Advisory Committee (NNMRAC) will meet in Albuquerque, New Mexico. 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 review agenda, persentation of appointment certificates to RAC members, monitoring report, proposal presentations by proponents (5 minutes), questions from committee members (3 minutes), review and ranking of project proposals by Category Groups, recommendation for funding of projects to Designated Federal Official, set date for next meeting, provide for public comment.

DATES: The meeting will be held on June 28, 2011 beginning at 10 a.m. and ending at 5 p.m. and on June 29, 2011 beginning at 8 am and ending at 5 p.m.

ADDRESSES: The meeting will be held at Cibola National Forest Supervisors Office at 2113 Osuna Rd., NE., Albuquerque, NM 87113 in the conference room. 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 Carson National Forest, 208 Cruz Alta Road Taos, New Mexico. Please call ahead to 575–758–6344 to facilitate entry into the building to view comments.

FOR FURTHER INFORMATION CONTACT: Ignacio Peralta, RAC Coordinator, Carson National Forest, 575–758–6344, *iperalta@fs.fed.us.* Ruben Montes, RAC Coordinator, Santa Fe National Forest, 505–438–5356, *rmontes@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: review agenda, persentation of appointment certificates to RAC members, monitoring report, proposal presentations by proponents (5 minutes), questions from committee members (3 minutes), review and ranking of project proposals by Category Groups, recommendation for funding of projects to Designated Federal Official, set date for next meeting, provide for public comment. 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 June 21, 2011 to be scheduled on the agenda. Written comments and requests for time for oral comments must be sent to 208 Cruz Alta Road, or by e-mail to *iperalta@fs.fed.us,* or via facsimile to 575–758–6213.

Dated: May 17, 2011.

Kendall Clark,

Forest Supervisor, Carson National Forest.

[FR Doc. 2011–12588 Filed 5–20–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Elko Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Elko Resource Advisory Committee (RAC) will meet in Elko, Nevada. 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 meetings are open to the public.

DATES: The June meeting will be held on Friday, June 10th, 2011 and will begin at 1 p.m. The July meeting will be held on Friday, July 8th, 2011 and will begin at 1 p.m.

ADDRESSES: Both meetings will be held in the Forest Service office at 2035 Last Chance Road, Elko, NV 89801.

FOR FURTHER INFORMATION CONTACT: Doug Clarke, RAC Coordinator, USDA, Humboldt-Toiyabe National Forest, Mountain City Ranger District, 2035 Last Chance Road, Elko, NV 89801 (775) 778–6127; *e-mail: dclarke@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: Agenda items for June 10th meeting include: (1) Brief review of Secure Rural Schools and Community Self-Determination Act; (2) Review roles of RAC committee members and Committee Chairman; (3) Overview of project selection process; (4) Presentation and review of submitted proposals, and (5) Public Comment. Agenda items for July 8th meeting include: (1) Overview of project selection process; (2) Presentation and review of submitted proposals, (3) Selection of recommended proposals by RAC, and (4) Public Comment.

Both meetings are open to the public. Public input opportunity will be provided and individuals will have the opportunity to address the Committee at that time.

Project submittals by qualified entities must be received no later than 5:00 p.m. on June 24th, 2011. Project forms and instructions are available on the Secure Rural Schools Web site—*https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf.*

Dated: May 12, 2011.

JoEllen J. Keil,

Acting Forest Supervisor, Humboldt-Toiyabe National Forest.

[FR Doc. 2011–12287 Filed 5–20–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Southwest Montana Resource Advisory Committee Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106–393) the Beaverhead-Deerlodge National Forest's Southwest Montana Resource Advisory Committee will meet on Wednesday, June 15, 2011, from 10 a.m. until 5 p.m., in Dillon, Montana. The purpose of the meeting is to review funding proposals for Title II funding.

DATES: Wednesday, June 15, 2011, from 10 a.m. until 5 p.m.

ADDRESSES: The meeting will be held at the Beaverhead-Deerlodge Forest Headquarters located at 420 Barrett Street, Dillon, Montana (MT 59725).

FOR FURTHER INFORMATION CONTACT: Patty Bates, Committee Coordinator, Beaverhead-Deerlodge National Forest, 420 Barrett Street, Dillon, MT 59725 (406) 683–3979; e-mail *pbates@fs.fed.us.*

SUPPLEMENTARY INFORMATION: Agenda for this meeting includes discussion about new project proposals seeking funding. The meeting is open to the public. Public input opportunity will be provided and individuals will have the opportunity to address the Committee throughout the meeting.

Dated: May 13, 2011.

David R. Myers,

Designated Federal Official.

[FR Doc. 2011–12421 Filed 5–20–11; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Tri-County Advisory Committee Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106–393) the Beaverhead-Deerlodge National Forest's Tri-County Resource Advisory Committee will meet on Thursday June 16, 2011, from 5 p.m. until 8 p.m., in Deer Lodge, Montana. The purpose of the meeting is to review funding proposals for Title II funding.

DATES: Thursday, June 16, 2011, from 5 p.m. until 8 p.m.

ADDRESSES: The meeting will be held at the USDA building located 1002 Hollenback Road, Deer Lodge, Montana (MT 59722).

FOR FURTHER INFORMATION CONTACT: Patty Bates, Committee Coordinator, Beaverhead-Deerlodge National Forest, 420 Barrett Street, Dillon, MT 59725 (406) 683–3979; e-mail *pbates@fs.fed.us.*

SUPPLEMENTARY INFORMATION: Agenda for this meeting include discussion about budget, priorities and funding for new project proposals. The meeting is open to the public. Public input opportunity will be provided and individuals will have the opportunity to address the Committee at that time.

Dated: May 13, 2011.

David R. Myers,

Designated Federal Official.

[FR Doc. 2011–12422 Filed 5–20–11; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Lyon-Mineral Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Lyon-Mineral Resource Advisory Committee will meet in Yerington, NV. 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 to listen to project proponents presentations and begin review of project proposals.

DATES: The meeting will be held June 17, 2011, 9 a.m.

ADDRESSES: The meeting will be held at Lyon County Government Complex, Commissioners Chambers, located at 27 South Main Street, Yerington, Nevada. 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 Bridgeport Ranger Station, Bridgeport, CA. Please call ahead to 760–932–5853 to facilitate entry into the building to view comments.

FOR FURTHER INFORMATION CONTACT: Sherri Lisius, RAC Coordinator, Bridgeport Ranger District, 760–932–5853, *sherrilisius@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: Acceptance of notes from 04/25/11 meeting, presentation of projects by project proponents, review of projects, and public comments. A full agenda may be found at *https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf,* by selecting the Lyon-Mineral RAC at the bottom of the webpage. Anyone who would like to bring related matters to the attention of the committee may file written statements with the chairperson 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 June 14, 2011 to be scheduled on the agenda. Written comments and requests for time for oral comments must be sent to Sherri Lisius, Forest Service, HC 62 Box 1000, Bridgeport, CA 93517, or by email to *sherrilisius@fs.fed.us,* or via facsimile to 760–932–5899.

Dated: May 16, 2011.

Jeanne M. Higgins,

Forest Supervisor.

[FR Doc. 2011–12589 Filed 5–20–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

Bureau of the Census

Federal Economic Statistics Advisory Committee Meeting

AGENCY: Bureau of the Census, Department of Commerce.

ACTION: Notice of Public Meeting.

SUMMARY: The Bureau of the Census (Census Bureau) is giving notice of a meeting of the Federal Economic Statistics Advisory Committee (FESAC). The Committee will advise the Directors of the Economics and Statistics Administration's (ESA) two statistical agencies, the Bureau of Economic Analysis (BEA) and the Census Bureau, and the Commissioner of the Department of Labor's Bureau of Labor Statistics (BLS) on statistical methodology and other technical matters related to the collection, tabulation, and analysis of federal economic statistics. Last minute changes to the agenda are possible, which could prevent giving advance public notice of schedule adjustments.

DATES: June 17, 2011. The meeting will begin at approximately 8:30 a.m. and adjourn at approximately 5 p.m.

ADDRESSES: The meeting will be held at the Bureau of Labor Statistics, 2 Massachusetts Avenue, NE., Conference Rooms 1–3, Washington, DC 20212–0001.

FOR FURTHER INFORMATION CONTACT: Barbara K. Atrostic, Designated Federal Official, Department of Commerce, U.S. Census Bureau, Center for Economic Studies, Room 2K135, 4600 Silver Hill Road, Washington, DC 20233, telephone 301–763–6442. For TTY callers, please use the Federal Relay Service 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Members of the FESAC are appointed by the Secretary of Commerce. The Committee provides scientific and technical expertise, as appropriate, to the Directors of the BEA, the Census Bureau, and the Commissioner of the Department of Labor's BLS, on statistical methodology and other technical matters related to the collection, tabulation, and analysis of federal economic statistics. The Committee has been established in accordance with the Federal Advisory Committee Act (Title 5, United States Code, Appendix 2, and Section 10).

The meeting is open to the public, and a brief period is set aside for public comments and questions. Persons with extensive questions or statements must submit them in writing at least three days before the meeting to the Designated Federal Official named above. If you plan to attend the meeting, please register by Monday, June 13, 2011. You may access the online registration form with the following link: *http://www.regonline.com/fesac_jun2011.* Seating is available to the public on a first-come, first-served basis.

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should also be directed to the Designated Federal Official as soon as known, and preferably two weeks prior to the meeting.

Dated: May 17, 2011.

Robert M. Groves,

Director, Bureau of the Census.

[FR Doc. 2011–12644 Filed 5–20–11; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1762]

Reorganization and Expansion of Foreign-Trade Zone 50 Under Alternative Site Framework; Long Beach, CA

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Board adopted the alternative site framework (ASF) (74 FR 1170, 01/12/09; correction 74 FR 3987, 01/22/09; 75 FR 71069–71070, 11/22/10) as an option for the establishment or reorganization of general-purpose zones;

Whereas, the Board of Harbor Commissioners of the Port of Long Beach, California, grantee of Foreign-Trade Zone 50, submitted an application to the Board (FTZ Docket 65–2010, filed 11/08/2010) for authority to reorganize and expand under the ASF with a service area of Orange County and portions of Los Angeles and San Bernardino Counties, California, within and adjacent to the Los Angeles/Long Beach U.S. Customs and Border Protection port of entry, FTZ 50's existing Sites 1 through 8, 10 and 14 through 18 would be categorized as magnet sites, and existing Sites 9 and 11 through 13 would be categorized as usage-driven sites, and the grantee proposes five additional usage-driven sites (Sites 19 through 23);

Whereas, notice inviting public comment was given in the **Federal Register** (75 FR 69621–69622, 11/15/2010) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to reorganize and expand FTZ 50 under the alternative site framework is approved, subject to

the FTZ Act and the Board's regulations, including Section 400.28, to the Board's standard 2,000-acre activation limit for the overall general-purpose zone project, to a five-year ASF sunset provision for magnet sites that would terminate authority for Sites 1, 3 through 8, 10 and 14 through 18 if not activated by May 31, 2016, and to a three-year ASF sunset provision for usage-driven sites that would terminate authority for Sites 9, 11 through 13 and 19 through 23 if no foreign-status merchandise is admitted for a *bona fide* customs purpose by May 31, 2014.

Signed at Washington, DC, this 13th day of May 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2011–12660 Filed 5–20–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1761]

Reorganization of Foreign-Trade Zone 244 Under Alternative Site Framework, Riverside County, CA

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Board adopted the alternative site framework (ASF) (74 FR 1170, 01/12/2009; correction 74 FR 3987, 01/22/2009; 75 FR 71069–71070, 11/22/2010) as an option for the establishment or reorganization of general-purpose zones;

Whereas, the March Joint Powers Authority, grantee of Foreign-Trade Zone 244, submitted an application to the Board (FTZ Docket 45–2010, filed 07/14/2010) for authority to reorganize under the ASF with a service area of western Riverside County, California, adjacent to the Los Angeles/Long Beach U.S. Customs and Border Protection port of entry, and FTZ 244's existing Site 1 would be categorized as a magnet site;

Whereas, notice inviting public comment was given in the **Federal Register** (75 FR 42377, 07/21/2010) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to reorganize FTZ 244 under the alternative site framework is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28, and to the Board's standard 2,000-acre activation limit for the overall general-purpose zone project.

Signed at Washington, DC, this 13th day of May 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2011–12661 Filed 5–20–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Application(s) for Duty-Free Entry of Scientific Instruments

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be postmarked on or before June 13, 2011. Address written comments to Statutory Import Programs Staff, Room 3720, U.S. Department of Commerce, Washington, DC 20230. Applications may be examined between 8:30 a.m. and 5 p.m. at the U.S. Department of Commerce in Room 3720.

Docket Number: 11–022. *Applicant:* Lawrence Technological University, 21000 W. 10 Mile Road, Southfield, MI 48075. *Instrument:* FEI Quanta 450 FEG Electron Microscope. Manufacturer: FEI Company, Brno, Czech Republic. *Intended Use:* The instrument will be used to study polymers for biomedical applications; metals and ceramics used in orthopaedic implants; cement used in construction; lubricated components in automotives; and electrode materials in lithium ion batteries. *Justification for Duty-Free Entry:* There are no instruments of the same general category being manufactured in the United States. *Application accepted by Commissioner of Customs:* May 9, 2011.

Docket Number: 11–027. *Applicant:* U.C. Davis, One Shields Avenue, Davis, CA 95616. *Instrument:* Sacher Lasertechnik Laser System. *Manufacturer:* Sacher Lasertechnik, LLC, Marburg, Germany. *Intended Use:* The instrument will be used for scientific research related to the development of a new optical technique for analyzing biological cells, for applications in biological and biomedical sciences. *Justification for Duty-Free Entry:* There are no instruments of the same general category being manufactured in the United States. *Application accepted by Commissioner of Customs:* May 3, 2011.

Dated: May 17, 2011.

Gregory W. Campbell,

Director, Subsidies Enforcement Office, Office of Policy, Import Administration.

[FR Doc. 2011–12657 Filed 5–20–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA446

Gulf of Mexico Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will convene a public meeting.

DATES: The meeting will be held June 6–10, 2011.

ADDRESSES: The meeting will be held at the Marriott Beachside Hotel, 3841 N. Roosevelt Boulevard, Key West, FL 33040; telephone: (305) 296–8100.

Council address: Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607.

FOR FURTHER INFORMATION CONTACT: Dr. Stephen Bortone, Executive Director, Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION:

Council

Wednesday, June 8, 2011

4 p.m.—The Council meeting will begin with a review of the agenda and approval of the minutes.

4:15 p.m.–4:30 p.m.—The Council will receive a presentation titled "Fisheries 101".

4:30 p.m.–5:15 p.m.—The Council will review and discuss reports from the committee meetings as follows: Advisory Panel Selection; Data Collection; Budget/Personnel. The Council will conclude its meeting at approximately 5:15 p.m.

Thursday, June 9, 2011

8:30 a.m.–12:30 p.m.—The Council will receive public testimony on exempted fishing permits (EFPs), if any; Final Action on the Reef Fish Amendment 32; Generic Annual Catch Limits/Accountability Measures Amendment; and Joint Spiny Lobster Amendment 10; South Atlantic Portion of Joint Amendment 18 to the Coastal Migratory Pelagics Fishery Management Plan; and hold an open public comment period regarding any other fishery issues of concern. People wishing to speak before the Council should complete a public comment card prior to the comment period.

2 p.m.–5 p.m.—The Council will review and discuss the Reef Fish Committee Report.

Friday, June 10, 2011

8:30 a.m.–11:30 a.m.—The Council will review and discuss reports from the committee meetings as follows: Sustainable Fisheries/Ecosystem.

1 p.m.–2:15 p.m.—The Council will receive presentations on the Revised National Standard 10 Guidelines and on the Gulf Coast Ecosystems Restoration Task Force.

2:15 p.m.–4:15 p.m.—The Council will continue to review and discuss reports from the committee meetings as follows: Joint Gulf and South Atlantic Full Councils re: Spiny Lobster and Mackerel.

4:15 p.m.–4:45 p.m.—Other Business items will follow. The Council will conclude its meeting at approximately 4:45 p.m.

Committees

Monday, June 6, 2011

8:30 a.m.–12 noon & 1:30 p.m.–5 p.m.—The Reef Fish Management Committee will discuss Reef Fish Amendment 32; Re-run of Gag and Red Grouper Projections using 2009 and 2010 Landings; Re-run of Red Snapper Projections using 2009 and 2010 Landings; review SEDAR 22 Yellowedge Grouper and Tilefish (Golden) Stock Assessments; Options Paper for a Greater Amberjack Amendment to Adjust TAC; Draft to Eliminate Fixed Fall Red Snapper Closed Season; Options Paper for Earned Income and Crew Size; Discuss consultant-Based Fishing; discuss a Open Red Snapper IFQ to all U.S. Citizens.

—Recess—

Tuesday, June 7, 2011

8:30 a.m.–11:30 a.m.—The Joint Gulf & South Atlantic Spiny Lobster Management Committees will review and potentially take final action on Joint Spiny Lobster Amendment 10.

1 p.m.–1:30 p.m.—The Data Collection Committee will meet to receive a summary and recommendations of the Vessel Monitoring Systems Advisory Panel.

1:30 p.m.–4:30 p.m.—The Sustainable Fisheries/Ecosystem Management Committee will review and potentially take final action on the Generic Annual Catch Limits/Accountability Measures Amendment. The Committee will also review the Circle Hook Symposium report.

4:30 p.m.–5 p.m.—Closed Session—The Advisory Panel Selection Committee/Full Council will meet to appoint an Ad Hoc Headboat IFQ Advisory Panel and possibly a replacement to the Shrimp Advisory Panel.

—Recess—

Wednesday, June 8, 2011

8:30 a.m.–9:30 a.m.—The Budget/Personnel Committee will receive a report on the 2011 Council budget.

9:30 a.m.–11:30 a.m.—The Sustainable Fisheries/Ecosystem Management Committee will continue to review the Generic Annual Catch Limits/Accountability Measures Amendment and Circle Hook Symposium report.

1 p.m.–4 p.m.—The Joint Gulf & South Atlantic Mackerel Management Committees will review Public Hearing Draft Amendment 18 to the Coastal Migratory Pelagics Fishery Management Plan.

—Recess—

Although other non-emergency issues not on the agendas may come before the Council and Committees for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during these meetings. Actions of the Council and Committees will be restricted to those issues specifically identified in the agendas and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take action to address the emergency. The established times for addressing items on the agenda may be adjusted as necessary to accommodate the timely completion of discussion relevant to the agenda items. In order to further allow for such adjustments and completion of all items on the agenda, the meeting may be extended from, or completed prior to the date/time established in this notice.

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: May 18, 2011.

Tracey L. Thompson,

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

[FR Doc. 2011–12550 Filed 5–20–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA447

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council's (Council) Groundfish Committee, Plan Development Team and Advisory Panel will hold a workshop to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

DATES: The workshop will be held on Thursday, June 9, 2011 at 9 a.m.

ADDRESSES: The meeting will be held at the Crowne Plaza Boston North Shore, 50 Ferncroft Road, Danvers, MA 01923; telephone: (978) 777–2500; fax: (978) 750–7991.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The items of discussion in the workshop's agenda are as follows:

The Groundfish Oversight Committee, in conjunction with the Groundfish Advisory Panel, Plan Development Team, and socio-economic experts of the Council's Scientific and Statistical Committee, will hold a meeting on the subject of accumulation limits for the Northeast Multispecies Fishery Management Plan (FMP). This meeting will be in a facilitated format and will not follow the Committee's standard decision-making process. The purpose of the workshop is to explore issues associated with accumulation limits and relevant fleet diversity measures. This group will not revisit the allocation structure for Potential Sector Contributions determined in Amendment 16 to the Northeast Multispecies FMP. Recommendations on a potential action to manage excessive shares in the fishery will be developed for the Council to consider at its June 2011 meeting.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens 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

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting date.

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

Dated: May 18, 2011.

Tracey L. Thompson,

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

[FR Doc. 2011–12559 Filed 5–20–11; 8:45 am]

BILLING CODE 3510–22–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meeting—Change of Time

The following notice of a time change for scheduled meetings is published pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, 5 U.S.C. 552b.

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: The Commission has changed the start time of previously scheduled meetings on the following dates:

May 20, 2011; May 27, 2011.[1]
June 3, 2011; June 10, 2011; June 17, 2011; June 24, 2011.[2]
From: 11 a.m.
To: 10 a.m. (one hour earlier).

PLACE: Three Lafayette Center, 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance and Enforcement Matters. In the event that the times or dates of these or any future meetings change, an announcement of the change, along with the new time and place of the meeting will be posted on the Commission's Web site at *http://www.cftc.gov.*

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, Assistant Secretary of the Commission, 202–418–5084.

Sauntia S. Warfield,

Assistant Secretary of the Commission.

[FR Doc. 2011–12761 Filed 5–19–11; 4:15 pm]

BILLING CODE 6351–01–P

[1] These meetings were announced previously at 76 FR 24463.

[2] These meetings were announced previously at 76 FR 28425.

DEPARTMENT OF DEFENSE

Office of the Secretary

Meeting of the Department of Defense Military Family Readiness Council (MFRC)

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, DoD.

ACTION: Notice.

SUMMARY: Pursuant to Section 10(a), Public Law 92–463, as amended, notice is hereby given of a forthcoming meeting of the Department of Defense Military Family Readiness Council (MFRC). The purpose of the Council meeting is to review the military family programs which will be the focus for the Council for next year, review the status of warrior care, and address selected concerns of military family organizations.

DATES: June 13, 2011, 2 p.m.–4 p.m.

ADDRESSES: Pentagon Conference Center B6 (escorts will be provided from the Pentagon Metro entrance).

FOR FURTHER INFORMATION CONTACT: Ms. Melody McDonald or Ms. Betsy Graham, Office of the Deputy Under Secretary (Military Community & Family Policy), 4000 Defense Pentagon, Room 2E319, Washington, DC 20301–4000. Telephones (571) 256–1738; (703) 697–9283 and/or e-mail: *FamilyReadinessCouncil@osd.mil.*

SUPPLEMENTARY INFORMATION: Meeting agenda.

Monday, June 13, 2011

Welcome & Administrative Remarks.
Review and Comment on Council Action from December meeting.
Priority Areas Briefings.
Intentions for the 2011 activities and meetings.
Closing Remarks.
Note: Exact order may vary.

The meeting is open to the public, subject to the availability of space. Persons desiring to attend may contact Ms. Melody McDonald at 571–256–1738 or e-mail *FamilyReadinessCouncil@osd.mil* no later than 5 p.m. on Monday, June 6, 2011 to arrange for parking and escort into the conference room inside the Pentagon.

Interested persons may submit a written statement for consideration by the Council. Persons desiring to submit a written statement to the Council must notify the point of contact listed above no later than 5 p.m., Wednesday, June 8, 2011.

Dated: May 17, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–12520 Filed 5–20–11; 8:45 am]

BILLING CODE 5001–06–P

ELECTION ASSISTANCE COMMISSION

Sunshine Act Notice

AGENCY: U.S. Election Assistance Commission.

ACTION: Notice of public meeting for EAC Board of Advisors.

DATE AND TIME: Monday, June 6, 2011, 8:30 a.m.–5:30 p.m. and Tuesday, June 7, 2011, 8:30 a.m.–3:30 p.m.

PLACE: Westin Washington, DC City Center Hotel, 1400 M Street, NW., Washington, DC 20005, Phone number (202) 429–1700.

PURPOSE: The U.S. Election Assistance Commission (EAC) Board of Advisors

will meet to receive updates on EAC's program activities and budget. The Board will receive updates on the Voting System Testing and Certification program. The Board will hear updates from a special committee on Defining Issues of Voting System Sustainability. The Board will hear presentations by the National Institute of Standards and Technology (NIST) and the Federal Voting Assistance Program (FVAP) on UOCAVA Internet voting and common data format. The Board will receive updates on EAC grants programs including: The Accessible Voting Technology Initiative; and the Pre-Election Logic and Accuracy Testing and Post-Election Audit Initiative. The Board will receive updates on EAC research and studies. The Board will hear a presentation on a Rutgers report on Voter Participation of People with Disabilities in 2010. The Board will hear other committee reports, elect officers and consider motions. The Board will consider other administrative matters.

Members of the public may observe but not participate in EAC meetings unless this notice provides otherwise. Members of the public may use small electronic audio recording devices to record the proceedings. The use of other recording equipment and cameras requires advance notice to and coordination with the EAC's Communications Office.

This meeting will be open for public observation.

PERSON TO CONTACT FOR INFORMATION: Bryan Whitener, *Telephone:* (202) 566–3100.

Thomas R. Wilkey,

Executive Director, U.S. Election Assistance Commission.

[FR Doc. 2011–12667 Filed 5–19–11; 11:15 am]

BILLING CODE 6820–KF–P

DEPARTMENT OF ENERGY

Notice of Intent To Prepare an Environmental Impact Statement and Notice of Potential Floodplain and Wetlands Involvement for the FutureGen 2.0 Program

AGENCY: Department of Energy.

ACTION: Notice of Intent and Notice of Potential Floodplain and Wetlands Involvement.

SUMMARY: The U.S. Department of Energy (DOE or the Department) announces its intent to prepare an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA) of 1969 (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 DOE's proposed action: providing approximately $1 billion in Federal funding (most of it appropriated by the American Recovery and Reinvestment Act, or "ARRA") for the FutureGen 2.0 program. DOE has prepared this Notice of Intent (NOI) to inform interested parties of the pending EIS and to invite public comments on the proposed action, including: (1) The range of environmental issues, (2) the alternatives to be analyzed, and (3) the impacts to be considered in the EIS. The NOI also provides notice in accordance with 10 CFR Part 1022 (DOE's regulations for compliance with floodplain and wetland review requirements) that the proposed project may involve potential impacts to floodplains and wetlands.

The FutureGen 2.0 program would provide financial assistance for the repowering of an existing electricity generator with clean coal technologies integrated with a pipeline that would transport carbon dioxide (CO_2) to a sequestration site where it would be injected and stored in a deep geologic formation. DOE entered into separate cooperative agreements with Ameren Energy Resources (Ameren) and with the FutureGen Alliance (the Alliance) that define DOE's proposed action. This program consists of an Oxy-Combustion Large Scale Test undertaken by Ameren at its Meredosia Power Station in west central Illinois and a Pipeline and CO_2 Storage Reservoir undertaken by the Alliance. In addition, the Alliance would construct and operate facilities for research, training, and visitors in the vicinity of the sequestration site. The Alliance has identified its preferred sequestration site in Morgan County, Illinois, and two alternative sites, one in Christian County, Illinois and one in Douglas County, Illinois. The program would provide performance and emissions data as well as establish operating and maintenance experience that would facilitate future large-scale commercial deployment of these technologies. DOE would provide technical and programmatic guidance to Ameren and the Alliance and oversee activities for compliance with the terms of the cooperative agreements. DOE is responsible for NEPA compliance activities.

DOE encourages government agencies, private-sector organizations, and the general public to participate in the FutureGen 2.0 program through the NEPA process. DOE will consult with interested Native American Tribes and Federal, state, regional and local agencies during preparation of the EIS. Further, DOE invites agencies with jurisdiction by law or special expertise to participate as cooperating agencies in the preparation of this EIS.

DATES: DOE invites comments on the proposed scope and content of the EIS from all interested parties. To ensure consideration in the preparation of the EIS, comments must be received by June 22, 2011. DOE will consider late comments to the extent practicable. In addition to receiving comments in writing and by e-mail [See **ADDRESSES** below], DOE will conduct public scoping meetings during which government agencies, private-sector organizations, and the general public are invited to present oral and written comments with regard to DOE's proposed action, alternatives, and potential impacts of the proposed FutureGen 2.0 program. DOE will consider these comments in developing the EIS. Public scoping meetings will be held on June 7, 8, and 9, 2011 [See "Public Scoping Process" under **SUPPLEMENTARY INFORMATION** below].

ADDRESSES: Written comments on the scope of the EIS and requests to participate in the public scoping meetings should be addressed to: Mr. Cliff Whyte, U.S. Department of Energy, National Energy Technology Laboratory, P.O. Box 880, Morgantown, West Virginia 26507–0880. Individuals and organizations who would like to provide oral or written comments should contact Mr. Whyte by mail at the above address; telephone (toll-free) 1–877–338–5689; fax 304–285–4403; or electronic mail (*FG2.EIS@netl.doe.gov*).

Oral comments will be heard during the formal portion of the scoping meetings [See "Public Scoping Process" under **SUPPLEMENTARY INFORMATION** below]. Various displays and other information about DOE's NEPA process and the FutureGen 2.0 program will be available, and representatives from DOE and the project partners will be present at an informal session to discuss the FutureGen 2.0 program and the EIS process.

FOR FURTHER INFORMATION CONTACT: For further information about this project, contact Mr. Whyte as described above. For general information about 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

On February 27, 2003, President George W. Bush proposed that the United States undertake a $1 billion, 10-year project to build the world's first coal-fueled plant to produce electricity and hydrogen with near-zero emissions. In response to that announcement, DOE developed plans for the original FutureGen project, which would establish the technical and economic feasibility of producing electricity and hydrogen from coal—a low-cost and abundant energy resource—while capturing and geologically storing the CO_2 generated in the process. DOE issued a Final EIS for the original FutureGen project (DOE/EIS–0394) in November 2007 and an associated Record of Decision in July 2009 (74 FR 35174). The proposed action would have resulted in the construction and operation of a 330–MWe (gross) integrated gasification combined cycle (IGCC) plant near Mattoon, Illinois, with capture and storage of more than 1 million tons of CO_2 per year in the Mount Simon geologic formation. The total cost of the original FutureGen Project proved to be higher than acceptable, however, causing a funding gap that could not be filled by Federal or state governments or private industry. As a result DOE refocused its approach. The FutureGen 2.0 program consists of the two separate Cooperative Agreements with Ameren and the Alliance. Ameren's partners include Babcock & Wilcox Power Generation Group (B&W) and Air Liquide Process & Construction, Inc. (AL). The Alliance is a non-profit corporation that represents a global coalition of coal producers, coal users and coal equipment suppliers, including full members: Alpha Natural Resources, Inc.; Anglo American, LLC; CONSOL Energy, Inc.; Louisville Gas and Electric Company and Kentucky Utilities Company (LG&E and KU); Peabody Energy Corporation; Rio Tinto Energy America; and Xstrata, PLC.

Purpose and Need for DOE Action

In pursuing the United States' goal of providing safe, affordable and clean energy for its citizens, coal plays an important role in the nation's energy supply. However, without carbon capture and sequestration, the combustion of coal and other fossil fuels leads to increased releases of CO_2 into the atmosphere. Because power plants are large stationary sources, it is generally considered to be more feasible to capture CO_2 from them and store it rather than attempting to capture it from mobile sources such as automobiles.

To this end, DOE has sought to support near-zero emissions technologies that would produce electric power from coal while permanently storing CO_2 in deep geologic formations. The technical, economic, and environmental feasibility of producing electric power from coal coupled with geologic storage technology must be proven. DOE believes that oxy-combustion technology has the potential to help open a market for repowering in many of the world's existing pulverized coal power plants. In the absence of the proven operation of a repowered, near-zero emissions plant, the contribution of coal to the nation's energy supply could be reduced. This could potentially increase the use of higher cost and/or nondomestic energy resources and impact the domestic economy as well as energy security.

Proposed Action

DOE proposes to provide financial assistance (approximately $1 billion) to Ameren and the Alliance to support implementation of their projects, which if successful would provide critical performance and emissions data as well as establish operating, permitting, maintenance, and other experience needed for future commercial deployment of these technologies.

The FutureGen 2.0 program seeks to continue the work of the original FutureGen project by advancing technology that can make the United States a world leader in carbon capture and storage (CCS). In formulating its proposal for FutureGen 2.0, DOE sought to reduce the project's overall cost by changing the technology from coal gasification to oxy-combustion. The inherent scalability of oxy-combustion technology allows a reduction in power plant size with substantial cost benefits. Studies by DOE's National Energy Technology Laboratory have identified oxy-combustion technology as a potentially cost-effective approach to implement carbon capture at existing coal-fueled facilities. It also has the potential for use in new power plants as well as in repowering a large cross-section of the world's existing pulverized coal plants.

The FutureGen 2.0 program would proceed through 2020 with design, construction, operation, and monitoring. Performance and economic test results would be shared among all participants, industry, the environmental community, and the public. The Alliance has an open membership policy to encourage the addition of other coal producers, coal users and coal equipment suppliers, both domestic and international. Consistent with the original FutureGen project, DOE encourages participation from international organizations to maximize the global applicability and acceptance of FutureGen 2.0's results, helping to support an international consensus on the role of coal and geologic storage in addressing global greenhouse gas emissions and energy security.

Oxy-Combustion Large Scale Test

For the Oxy-Combustion Large Scale Test, Ameren and its team would repower Unit 4 at Ameren's Meredosia Power Station in west central Illinois using advanced oxy-combustion technology. The oxy-combustion facility may be capable of running on a range of coals and operating conditions. The data generated would be used to expand the market for oxy-combustion technology. The project is also expected to provide performance and emissions data as well as establish operating and maintenance experience that will facilitate future large-scale commercial projects.

The scope of this test includes project definition, design, procurement, manufacture, installation, startup, commercial operation and testing of an integrated oxy-combustion coal boiler with CO_2 capture, purification, and compression. The plant would generate approximately 200 MWe gross with a net output estimated at approximately 140 MWe. The CO_2 would be cleaned, compressed for transport, and delivered to a terminal point for transfer to the Alliance's project.

Meredosia Power Station: The Meredosia Power Station is located adjacent to the east side of the Illinois River, south of Meredosia, Illinois, approximately 18 miles west of Jacksonville, Illinois. The plant includes four generating units, three of which are coal-fired and one of which is oil-fired. Unit 4, built in 1975, is an oil-fired unit that is currently idle. The steam turbine and generator have low operating hours and could be placed into service as part of the repowered oxy-combustion design. The station contains existing infrastructure that could support the operation of the oxy-combustion system including interconnection to the electrical grid, water supply and intake structures, wastewater outfalls, coal storage and handling areas, and barge and truck delivery systems for coal. The 5,300-foot western boundary of the 260-acre Meredosia Power Station fronts the Illinois River, where the station's oil and coal barge unloading facilities are located. The land immediately adjacent to the station on the north, northeast and southeast is railroad property; other

immediately adjacent property is roadway. Beyond and in addition to the railroad property and roadways, land use is primarily residential to the north and northeast, scattered residential and agricultural to the east, and industrial to the south.

Oxy-Combustion Technology: This technology involves designing the power plant's boiler to combust coal with a mixture of nearly pure oxygen and recycled flue gas (which is primarily CO_2) rather than air. An air separation unit produces the oxygen. The concentrated stream of CO_2 that leaves the boiler would be ready for processing by environmental cleanup equipment (to remove other captured emissions) and the compression and purification unit. The concentrated and compressed CO_2 would then be transferred to a pipeline for transmission to the Alliance's storage location. The oxy-combustion technology during normal operations would produce near-zero emissions of oxides of nitrogen (NO_X), oxides of sulfur (SOx), mercury, particulate matter and other pollutants typical of a conventional coal-fired boiler. The plant would be designed to capture approximately 1.3 million metric tons of CO_2 per year from the oxy-combustion system and is targeted to achieve a CO_2 capture rate exceeding 90 percent.

Pipeline and CO_2 Storage Reservoir

For the Pipeline and CO_2 Storage Reservoir project, the Alliance would design, construct, and operate a transmission pipeline and geologic injection and storage facility. The Alliance's work involves selection of a suitable storage site, development of the subsurface storage field, development of CO_2 transport infrastructure (pipeline), and construction of the associated research and training facilities, including a visitor center. The Alliance has identified its preferred site in Morgan County, Illinois, for the injection facility, and two other sites (one in Christian County and one in Douglas County, Illinois) as potential alternate locations should the preferred site prove infeasible. The Alliance's preferred site for geologic storage in Morgan County, Illinois is approximately 30 miles from the Meredosia Power Station, and the Alliance's alternate sites in Christian County and Douglas County, Illinois are approximately 75 and 125 miles from the plant site, respectively. All three sites would be evaluated in the EIS unless DOE determines that they are not reasonable alternatives.

The Alliance would construct a pipeline to transport CO_2 from the Meredosia Power Station to the selected storage site where it would be injected through deep wells into the target geologic formation. The pipeline and storage reservoir would be designed to inject and store approximately 39 million metric tons over a 30-year operating period. Depending on stakeholder and landowner acceptance, the Alliance may also consider other sources of CO_2 in addition to that from Ameren's plant for injection. Research would include site characterization, injection and storage, and CO_2 monitoring and measurement.

The target formation for CO_2 injection and storage is the Mount Simon sandstone formation, which is one of the Illinois Basin's major deep saline formations. The formation's positive characteristics for CO_2 storage include its isolation from other strata, as well as its depth, lateral continuity, and relative permeability. The Mount Simon is bounded below by a Pre-Cambrian igneous rock and above by the Eau Claire formation, which is a mixture of tightly layered shales with low permeability, as well as by secondary caprock formations above the Eau Claire. The Alliance would implement a monitoring, verification, and accounting (MVA) program to monitor the injection and storage of CO_2 within the geologic formations to verify that it stays within the target formation. The MVA program would meet injection control permitting and requirements that DOE may impose. In accordance with the Safe Drinking Water Act, the Alliance would be required to obtain a Class VI underground injection control permit from the U.S. Environmental Protection Agency. The MVA program consists of the following components: (1) Injection system monitoring; (2) containment monitoring (via monitoring wells, mechanical integrity testing, and other means); (3) CO_2 plume tracking via multiple techniques; (4) CO_2 injection simulation modeling; and (5) perhaps new experimental techniques not yet in practice.

Proposed Project Schedules

The Oxy-Combustion Large Scale Test would initiate operations (including CO_2 capture, purification and compression) in 2016 and complete federally-funded project activities (operational testing) in 2018. The Pipeline and CO_2 Storage Reservoir would become operational at the same time (2016) and complete federally-funded project activities (operational testing and two-years of additional federally-funded MVA activities) in 2020. CO_2 capture, pipeline transport, injection, and MVA activities are expected to operate (without federal funding) for approximately 30 years. MVA activities would take place during injection and continue beyond its cessation as prescribed by regulatory requirements. The schedule is contingent upon Ameren and the Alliance receiving the necessary permits and regulatory approvals, as well as financial closing on all the necessary funding sources, including DOE's financial assistance. DOE's proposal to provide full financial assistance for detailed design, procurement of equipment, construction, and operations is contingent upon DOE's completion of the NEPA process, and achievement of the permitting and financial requirements listed above by Ameren and the Alliance.

Connected and Cumulative Actions

The components of the FutureGen 2.0 program will be evaluated individually and collectively within the EIS. Although injection of other sources of CO_2 is not currently proposed, such injection is reasonably foreseeable and will be evaluated in the EIS. DOE will also consider the cumulative impacts of the program, which will include the analysis of emissions (including greenhouse gas emissions) and other incremental impacts. Cumulative impacts are impacts on the environment which result from the incremental impacts of an action when added to other past, present, and reasonably foreseeable future actions.

Alternatives

NEPA requires that an EIS evaluate the range of reasonable alternatives to an agency's proposed action. DOE's range of reasonable alternatives includes the No Action Alternative, which is to withhold financial assistance for the FutureGen 2.0 program, and the Action Alternative, which is to provide financial assistance to the FutureGen 2.0 program.

DOE has developed the range of reasonable alternatives for FutureGen 2.0 program based on evaluation of various clean coal technologies through the Clean Coal Power Initiative program; analysis of the original FutureGen Project in terms of technology, costs, and suitability for geologic storage; data obtained and reviewed through various funding opportunity announcements; data obtained for the original FutureGen Project and a related project called Restructured FutureGen; and the interest of industry to participate in projects to support FutureGen 2.0 based on these evaluations. In particular, DOE's current proposal to advance the programmatic goal of CO_2 storage in the

Mount Simon Formation in Illinois through the FutureGen Program was addressed in its *Final Environmental Impact Statement for the FutureGen Project* (DOE/EIS–0394 [November 2007]) and associated Record of Decision (74 FR 35174 (2009)).

Through review and consideration of these data and analysis, the repowering of an existing power plant with oxy-combustion technology was identified as the approach that would meet cost and technology advancement objectives of FutureGen Program. Furthermore, DOE determined that due to cost and technical advantages obtained through efforts conducted by the FutureGen Alliance under the original FutureGen Project, that the Alliance's choice of geologic storage formations would be limited to the Mount Simon Formation. Given these factors, reasonable alternatives were limited to potential oxy-combustion repowering projects at a location from which it would remain economically viable to transport captured CO_2 for injection into the Mount Simon Formation.

The range of reasonable alternatives for a financial assistance project that is proposed by industrial participants is limited to the alternatives or project options under consideration by the participants or that are reasonable within the confines of the project as proposed (*e.g.,* the particular location of the processing units, pipelines, injection sites on land proposed for the project, and potential measures to mitigate potential environmental impacts) and a "no-action" alternative. Regarding the no action alternative, DOE assumes for purposes of the EIS that, if DOE decides to withhold financial assistance, the project would not proceed.

DOE will evaluate the two projects that constitute the FutureGen 2.0 program with and without any mitigating conditions that DOE may identify as reasonable and appropriate. Alternatives considered in developing respective components of the proposed FutureGen 2.0 program and eliminated from further consideration will also be discussed in the EIS.

The sequestration site would be designed to accept and store at a minimum the CO_2 captured at Ameren's Meredosia Power Station over its 30-year design life. The Alliance undertook a site selection process in October 2010 with the issuance of a Request for Proposals seeking a site upon which the Alliance would construct and operate the CO_2 storage project. The Alliance hosted two public meetings, one for prospective site offerors and a subsequent meeting for the general public, on October 28, 2010, in Springfield, Illinois. Representatives for 16 proposed sites attended the meeting, and the Alliance received proposals from six sites in November 2010. In December 2010, the Alliance selected four of the six sites for further evaluation and subsequently identified three candidate sites, one preferred and two alternates, which will be evaluated in the EIS.

DOE will also consider a no-action alternative whereby the Department would not fund the FutureGen 2.0 program and the project would not proceed. In the absence of DOE funding, it would be unlikely that the project proponents, or industry in general, would soon undertake the utility-scale integration of CO_2 capture and geologic storage with a coal-fired power plant repowered with oxy-combustion. Absent DOE's investment in a utility-scale facility, the development of oxy-combustion repowered plants integrated with CO_2 capture and geologic storage would occur more slowly or not at all.

Decision Making Process

DOE will consider public scoping comments in preparing a Draft EIS, which will be issued for public comment. DOE will consider public comments on the Draft EIS and respond as appropriate in the Final EIS. No sooner than 30 days following completion of the Final EIS, DOE would announce its decision regarding whether to provide financial assistance to these projects in a Record of Decision (ROD). If DOE decides to provide financial assistance, the Alliance would develop its pipeline and storage site. Similarly, Ameren would proceed with detailed design and construction activities at the Meredosia site.

Floodplains and Wetlands

Activities required to implement the FutureGen 2.0 program, such as those required to repower Unit 4 at the Meredosia Power Station, would be undertaken to avoid or minimize potential impacts to wetlands or floodplains. The Meredosia Power Station site includes low lying areas to the west, north, and south, which are located in the floodplain. However, the existing generating units as well as proposed locations for the new oxy-combustion unit are located above the floodplain elevation. Any wetland and floodplain impacts that might result from installation of monitoring and injection wells, or the construction of CO_2 pipelines or other linear features required for this program, will be described in the EIS. In the event that DOE were to identify wetlands and floodplains that would be affected by the FutureGen 2.0 program as a result of pipelines, injection facilities, or connected actions, DOE would prepare a floodplain and wetland assessment in accordance with its regulations at 10 CFR Part 1022, and include the assessment in the Draft EIS.

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 proposed FutureGen 2.0 program and any connected actions. This list is neither intended to be all-inclusive, nor a predetermined set of potential impacts. DOE invites comments on whether this is an appropriate list of issues that should be considered in the EIS. 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 repowered Unit 4 at the Meredosia plant or CCS facilities and other related facilities on local or regional air quality;

Climate change: Potential impacts from emissions of CO_2 and other greenhouse gas emissions;

Water resources: Potential impacts from water utilization and consumption, plus potential impacts from stream crossings and wastewater discharges;

Infrastructure and land use: Potential environmental and socioeconomic impacts associated with the project, including delivery of feed materials and distribution of products (*e.g.,* access roads, pipelines);

Visual resources: Potential impacts to the view shed, scenic views (*e.g.,* impacts from the injection wells, pipelines, and support facilities for the injection wells and pipelines), and perception of the community or locality;

Solid wastes: Pollution prevention and waste management issues (generation, treatment, transport, storage, disposal or use), including potential impacts from the generation, treatment, storage, and management of hazardous materials and other solid wastes;

Biological resources: Potential impacts to vegetation, wildlife, threatened or endangered species, and ecologically sensitive habitats;

Floodplains and wetlands: Potential wetland and floodplain impacts from construction of project facilities;

Traffic: Potential impacts from the construction and operation of the facilities, including changes in local traffic patterns, deterioration of roads, traffic hazards, and traffic controls;

Historic and cultural resources: Potential impacts related to site development and the associated linear facilities (*e.g.,* pipelines);

Geology: Potential impacts from the injection and storage of CO_2 on underground resources such as ground water supplies, mineral resources, and fossil fuel resources, and the fate and stability of CO_2 being stored;

Health and safety issues: Potential impacts associated with use, transport, and storage of hazardous chemicals, as well as CO_2 capture and transport to the sequestration site;

Socioeconomics: Potential impacts to schools, housing, public services, and local revenues, including the creation of jobs;

Environmental justice: Potential for disproportionately high and adverse impacts on minority and low-income populations;

Noise and light: Potential disturbance impacts from construction, transportation of materials, and facility operations;

Connected actions: Potential impacts from the integrated operations of the oxy-combustion project and sequestration project, as well as potential development of support facilities or supporting infrastructure;

Cumulative effects that could result from the incremental impacts of the proposed project when added to other past, present, and reasonably foreseeable future actions;

DOE will also address compliance with regulatory and environmental permitting requirements and environmental monitoring plans associated with the carbon capture facility and CO_2 geologic storage activities.

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 with respect to the proposed FutureGen 2.0 program, DOE seeks public input to define the scope of the EIS. The public scoping period will end June 22, 2011. Interested government agencies, Native American Tribes, private-sector organizations, and the general public 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 June 22, 2011 (see **ADDRESSES**). DOE will consider late comments to the extent practicable.

DOE will conduct public scoping meetings according to the following schedule:

June 7, 2011—Taylorville High School, 815 W. Springfield Road, Taylorville, IL 62568.

June 8, 2011—Ironhorse Golf Club, 2000 Ironhorse Drive, Tuscola, IL 61953.

June 9, 2011—The Jacksonville Elks Lodge, 231 West Morgan Street, Jacksonville, IL 62650.

Each public scoping meeting will include an informal session from 5 to 7 p.m, followed by a formal presentation at 7 p.m.

Oral comments will be heard during the formal portion of the scoping meetings. The public is also invited to learn more about the project at an informal session at each location. DOE requests that anyone who wishes to speak at the public scoping meetings should contact Mr. Whyte, 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 would be given an opportunity to speak after previously scheduled speakers. Speakers will be given approximately five minutes to present their comments. Those speakers who want more than five 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 five minutes initially and provide additional opportunity as time permits. Individuals may also provide written materials in lieu of, or supplemental to, their presentations. DOE will give equal consideration to oral and written comments.

DOE will begin the formal meeting with an overview of the proposed FutureGen 2.0 program. 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 18th day of May 2011.

Charles D. McConnell,

Chief Operating Officer, Office of Fossil Energy.

[FR Doc. 2011–12632 Filed 5–20–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Oak Ridge Reservation

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Oak Ridge Reservation. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, June 8, 2011, 6 p.m.

ADDRESSES: DOE Information Center, 475 Oak Ridge Turnpike, Oak Ridge, Tennessee 37830.

FOR FURTHER INFORMATION CONTACT: Patricia J. Halsey, Federal Coordinator, Department of Energy Oak Ridge Operations Office, P.O. Box 2001, EM–90, Oak Ridge, TN 37831. Phone (865) 576–4025; Fax (865) 576–2347 or e-mail: *halseypj@oro.doe.gov* or check the Web site at *http://www.oakridge.doe.gov/em/ssab.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda: The main meeting presentation will be on the 2011 Oak Ridge Reservation Remediation Effectiveness Report and the upcoming CERCLA Five-Year Review.

Public Participation: The EM SSAB, Oak Ridge, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Patricia J. Halsey at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to the agenda item should contact Patricia J. Halsey at the address or telephone number listed

above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Patricia J. Halsey at the address and phone number listed above. Minutes will also be available at the following Web site: *http://www.oakridge.doe.gov/em/ssab/minutes.htm.*

Issued at Washington, DC, on May 17, 2011.

LaTanya R. Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2011–12594 Filed 5–20–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Proposed Agency Information Collection

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

ACTION: Notice and request for comments.

SUMMARY: The Department of Energy (DOE) invites public comment on a proposed collection of information that DOE is developing for submission to the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995. 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, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments regarding this proposed information collection must be received on or before July 22, 2011. If you anticipate difficulty in submitting comments within that period, contact the person listed in **ADDRESSES** as soon as possible.

ADDRESSES: Written comments may be sent to Carol Hellmann, 1617 Cole Boulevard, Building 17, Golden, CO 80401 or by e-mail at *BudgetJustForm@go.doe.gov* or by fax at 720–356–1550.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Carol Hellmann, 1617 Cole Boulevard, Building 17, Golden, CO 80401, or by email at *BudgetJustForm@go.doe.gov.* The information collection instrument may also be viewed at *http://www.eere.energy.gov/golden/Reading_Room.aspx.*

SUPPLEMENTARY INFORMATION: This information collection request contains: (1) *OMB No.* New; (2) *Information Collection Request Title:* Detailed Budget Justification; (3) *Type of Request:* New; (4) *Purpose:* This collection of information is necessary in order for DOE to identify allowable, allocable, and reasonable recipient project costs eligible for Grants and Cooperative Agreements under EERE programs; (5) *Annual Estimated Number of Respondents:* 406; (6) *Annual Estimated Number of Total Responses:* 406; (7) *Annual Estimated Number of Burden Hours:* 24 hours, one response; (8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* The estimated cost for the one time response is $875.76.

Authority: 10 CFR 600.112.

Issued in Washington, DC, on April 27, 2011.

Jamie Harris,

Director, Office of Acquisition and Financial Assistance, Golden Field Office.

[FR Doc. 2011–12593 Filed 5–20–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. CAC–032]

Petition for Waiver From LG Electronics, Inc. and Granting of the Interim Waiver From Commercial Package Air Conditioner and Heat Pump Test Procedures

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

ACTION: Notice of petition for waiver, granting of application for interim waiver, and request for comments.

SUMMARY: This notice announces receipt of and publishes a petition for waiver from LG Electronics, Inc. (LG). The petition for waiver (hereafter "petition") requests a waiver from the U.S. Department of Energy (DOE) test procedure applicable to commercial package air-source and water-source central air conditioners and heat pumps. The petition is specific to the variable capacity Multi V SYNC II and Multi V Water II (commercial) multi-split heat pump models specified in LG's petition. Through this document, DOE: (1) Solicits comments, data, and information with respect to the LG petition; and (2) announces the grant of an interim waiver to LG from the existing DOE test procedure for the subject commercial multi-split air conditioners and heat pumps.

DATES: DOE will accept comments, data, and information with respect to the LG petition until, but no later than June 22, 2011.

ADDRESSES: You may submit comments, identified by case number "CAC–032," by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: AS_Waiver_Requests@ee.doe.gov.* Include the case number [CAC–032] in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J/1000 Independence Avenue, SW., Washington, DC 20585–0121. *Telephone:* (202) 586–2945. Please submit one signed original paper copy.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024. Please submit one signed original paper copy.

Docket: For access to the docket to review the background documents relevant to this matter, you may visit the U.S. Department of Energy, 950 L'Enfant Plaza, SW., Washington, DC, 20024; (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except on Federal holidays. *Available documents include the following items:* (1) This notice; (2) public comments received; (3) the petition for waiver and application for interim waiver; and (4) prior DOE rulemakings and waivers regarding similar central air conditioning and heat pump equipment. Please call Ms. Brenda Edwards at the

above telephone number for additional information.

FOR FURTHER INFORMATION CONTACT: Dr. Michael G. Raymond, U.S. Department of Energy, Building Technologies Program, Mail Stop EE–2J, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0121. *Telephone:* (202) 586–9611. *E-mail: AS_Waiver_Requests@ee.doe.gov.*

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–71, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0103. *Telephone:* (202) 586–7796. *E-mail: mailto: Elizabeth.Kohl@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Authority

Title III of the Energy Policy and Conservation Act (EPCA) sets forth a variety of provisions concerning energy efficiency, including Part B of Title III, which establishes the "Energy Conservation Program for Consumer Products Other Than Automobiles." (42 U.S.C. 6291–6309) part C of Title III provides for a similar energy efficiency program titled "Certain Industrial Equipment," which includes commercial air conditioning equipment, package boilers, water heaters, and other types of commercial equipment.[1] (42 U.S.C. 6311–6317)

Today's notice involves commercial equipment under part C. Part C specifically includes definitions (42 U.S.C. 6311), test procedures (42 U.S.C. 6314), labeling provisions (42 U.S.C. 6315), energy conservation standards (42 U.S.C. 6313), and the authority to require information and reports from manufacturers (42 U.S.C. 6316). With respect to test procedures, part C authorizes the Secretary of Energy (the Secretary) to prescribe test procedures that are reasonably designed to produce results that measure energy efficiency, energy use, and estimated annual operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6314(a)(2))

For commercial package air-conditioning and heating equipment, EPCA provides that "the test procedures shall be those generally accepted industry testing procedures or rating procedures developed or recognized by the Air-Conditioning and Refrigeration Institute [ARI] or by the American Society of Heating, Refrigerating and Air-Conditioning Engineers [ASHRAE], as referenced in ASHRAE/IES Standard 90.1 and in effect on June 30, 1992." (42 U.S.C. 6314(a)(4)(A)) Under 42 U.S.C. 6314(a)(4)(B), if the industry test procedure for commercial package air-conditioning and heating equipment is amended, EPCA directs the Secretary to amend the corresponding DOE test procedure unless the Secretary determines, by rule and based on clear and convincing evidence, that such a modified test procedure does not meet the statutory criteria set forth in 42 U.S.C. 6314(a)(2) and (3).

On December 8, 2006, DOE published a final rule adopting test procedures for commercial package air-conditioning and heating equipment, effective January 8, 2007. 71 FR 71340. Table 1 to Title 10 of the Code of Federal Regulations (10 CFR) 431.96 directs manufacturers of commercial package air conditioning and heating equipment to use the appropriate procedure when measuring energy efficiency of those products. For small commercial packaged air conditioning and heating water-source heat pumps with capacities less than 135,000 Btu/h, ISO Standard 13256–1 (1998) is the applicable test procedure. For commercial package air-source equipment with capacities between 65,000 and 760,000 Btu/h, ARI Standard 340/360–2004 is the applicable test procedure.

DOE's regulations for covered products permit a person to seek a waiver from the test procedure requirements for covered commercial equipment if at least one of the following conditions is met: (1) The petitioner's basic model contains one or more design characteristics that prevent testing according to the prescribed test procedures; or (2) the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption as to provide materially inaccurate comparative data. 10 CFR 431.401(a)(1). Petitioners must include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption. 10 CFR 431.401(b)(1)(iii). The Assistant Secretary for Energy Efficiency and Renewable Energy (Assistant Secretary) may grant a waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 431.401(f)(4). Waivers remain in effect pursuant to the provisions of 10 CFR 431.401(g).

The waiver process also permits parties submitting a petition for waiver to file an application for interim waiver of the applicable test procedure requirements. 10 CFR 431.401(a)(2). The Assistant Secretary will grant an interim waiver request if it is determined that the applicant will experience economic hardship if the application for interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver. 10 CFR 431.401(e)(3). An interim waiver remains in effect for 180 days or until DOE issues its determination on the petition for waiver, whichever occurs first. It may be extended by DOE for an additional 180 days. 10 CFR 431.401(e)(4).

II. Petition for Waiver

On April 8, 2011, LG filed a petition for waiver from the test procedures at 10 CFR 431.96 applicable to commercial package air-source and water-source central air conditioners and heat pumps, as well as an application for interim waiver. LG's petition requested a waiver for the LG Multi V SYNC II multi-split heat pumps with capacities range from 76,400 Btu/h to 310,000 Btu/h. The applicable test procedure for these air-source heat pumps is ARI 340/360–2004. LG's petition also requested a waiver for the LG Multi V Water II water-source products with capacities ranging from 72,000 Btu/h to 573,400 Btu/h. The applicable test procedure for these products with capacities less than 135,000 Btu/h is ISO Standard 13256–1 (1998). The LG water-source products with capacities greater than or equal to 135,000 Btu/h are not covered by this waiver because the DOE test procedure only covers water-source heat pumps with capacities less than 135,000 Btu/h. Manufacturers are directed to use these test procedures pursuant to Table 1 of 10 CFR 431.96.

LG seeks a waiver from the applicable test procedures under 10 CFR 431.96 on the grounds that its Multi V SYNC II and Multi V Water II multi-split heat pumps contain design characteristics that prevent testing according to the current DOE test procedures. Specifically, LG asserts that the two primary factors that prevent testing of its Multi V SYNC II and Multi V Water II multi-split variable speed products are the same factors stated in the waivers that DOE granted to Mitsubishi Electric & Electronics USA, Inc. (Mitsubishi) and other manufacturers for similar lines of commercial multi-split air-conditioning systems:

- Testing laboratories cannot test products with so many indoor units; and

[1] For editorial reasons, upon codification in the U.S. Code, parts B and C were re-designated parts A and A–1, respectively.

• There are too many possible combinations of indoor and outdoor units to test.

See, e.g., 72 FR 17528 (April 9, 2007) (Mitsubishi); 76 FR 19069 (April 6, 2011) (Daikin); 76 FR 19078 (April 6, 2011) (Mitsubishi).

The Multi V SYNC II and Multi V Water II systems have operational characteristics similar to the commercial multi-split products manufactured by Mitsubishi, Samsung, Sanyo, Fujitsu and Daikin. As indicated above, DOE has already granted waivers for these products. The Multi V SYNC II and Multi V Water II system consists of multiple indoor units connected to an air-cooled outdoor unit. These multi-splits are used in zoned systems where an outdoor or water-source unit can be connected with up to 16–64 separate indoor units, which need not be the same models. According to LG, the various indoor and outdoor models can be connected in a multitude of configurations, with many thousands of possible combinations. Consequently, LG requested that DOE grant a waiver from the applicable test procedures for its Multi V SYNC II and Multi V Water II product designs until a suitable test method can be prescribed.

III. Application for Interim Waiver

On April 8, 2011, LG also submitted an application for an interim waiver from the test procedures at 10 CFR 431.96 for its Multi V SYNC II and Multi V Water II equipment. DOE determined that LG's application for interim waiver does not provide sufficient market, equipment price, shipments, and other manufacturer impact information to permit DOE to evaluate the economic hardship LG might experience absent a favorable determination on its application for an interim waiver. DOE understands, however, that if it did not issue an interim waiver, LG's products would not be tested and rated for energy consumption in the same manner as equivalent products for which DOE previously granted waivers. Furthermore, DOE has determined that it appears likely that LG's petition for waiver will be granted and that is desirable for public policy reasons to grant LG immediate relief pending a determination on the petition for waiver. DOE believes that it is likely LG's petition for waiver for the new Multi V SYNC II and Multi V Water II multi-split models will be granted because, as noted above, DOE has previously granted a number of waivers for similar product designs. The two principal reasons supporting the grant of the previous waivers also apply to LG's Multi V SYNC II and Multi V Water II products: (1) Test laboratories cannot test products with so many indoor units; and (2) it is impractical to test so many combinations of indoor units with each outdoor unit. In addition, DOE believes that similar products should be tested and rated for energy consumption on a comparable basis. For these same reasons, DOE also determined that it is desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver.

Therefore, it is ordered that:

The application for interim waiver filed by LG is hereby granted for LG's Multi V SYNC II and Multi V Water II multi-split heat pumps, subject to the specifications and conditions below.

1. LG shall not be required to test or rate its Multi V SYNC II and Multi V Water II commercial multi-split products on the basis of the existing test procedures under 10 CFR 431.96, which incorporates by reference ARI 340/360–2004 (SYNC II) and ISO Standard 13256–1 (1998) (Water II).

2. LG shall be required to test and rate its Multi V SYNC II and Multi V Water II commercial multi-split products according to the alternate test procedure as set forth in section IV(3), "Alternate test procedure."

The interim waiver applies to the following basic model groups:

Multi V Series Air-Source Heat Pumps Heat Recovery Units

SYNC II 3Ø 460V 60 Hz models: ARUB076DT2, ARUB096DT2, ARUB115DT2, ARUB134DT2, ARUB154DT2, ARUB173DT2, ARUB192DT2, ARUB211DT2, ARUB230DT2, ARUB250DT2, ARUB270DT2, ARUB290DT2, ARUB310DT2, with normally rated cooling capacities of 76,400, 95,900, 114,700, 133,800, 152,900, 172,000, 191,100, 211,000, 230,000, 250,000, 270,000, 290,000, and 310,000 Btu/h respectively. The maximum number of connectable indoor units is 13, 16, 20, 23, 26, 29, 32, 35, 39, 42, 49, and 52 respectively.

Multi V Series Water-Source Heat Pumps Water-Source Units

Water II 3Ø 460V 60 Hz model: ARWN096DA2 with nominally rated cooling capacity of 95,900 Btu/h. The maximum number of connectable indoor units is 16.

Water II 3Ø 208/230V 60 Hz model: ARWN072BA2 with nominally rated cooling capacity of 72,000 Btu/h. The maximum number of connectable indoor units is 16.

Water II Heat Recovery 3Ø 208/230V 60 Hz model: ARWB072BA2 with nominally rated cooling capacity of 72,000 Btu/h. The maximum number of connectable indoor units is 16.

Water II Heat Recovery 3Ø 460V 60 Hz model: ARWB096DA2 with nominally rated cooling capacity of 95,900 Btu/h. The maximum number of connectable indoor units is 16.

Compatible Indoor Units for the Above-Listed Air-Source and Water-Source Units

Wall Mounted: ARNU073SEL2, ARNU093SEL2, ARNU123SEL2, ARNU153SEL2, ARNU183S5L2, and ARNU243S5L2, with nominally rated cooling capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Art Cool Mirror: ARNU073SE*2, ARNU093SE*2, ARNU123SE*2, ARNU153SE*2, ARNU183S3*2, and ARNU243S3*2, with nominally rated cooling capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

4 Way Cassette: ARNU073TEC2, ARNU093TEC2, ARNU123TEC2, ARNU153TEC2, ARNU183TEC2, ARNU243TPC2, ARNU283TPC2, ARNU363TNC2, ARNU423TMC2, and ARNU483TMC2, with nominally rated cooling capacities of 7,500, 9,600, 12,300, 15,400, 19,100, 24,200, 28,000, 36,200, 42,000, and 48,100 Btu/h respectively.

2 Way Cassette: ARNU183TLC2 and ARNU243TLC2, with nominally rated capacities of 19,100 and 24,200 Btu/h respectively.

1 Way Cassette: ARNU073TJC2, ARNU093TJC2, and ARNU123TJC2, with nominally rated capacities of 7,500, 9,600, and 12,300 Btu/h respectively.

Ceiling Concealed Duct—Low Static: ARNU073B1G2, RNU093B1G2, ARNU123B1G2, ARNU153B1G2,ARNU183B2G2, and ARNU243B2G2, with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Ceiling Concealed Duct—Built-in: ARNU073B3G2, ARNU093B3G2, ARNU123B3G2, ARNU153B3G2, ARNU183B4G2, and ARNU243B4G2, with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Ceiling Concealed Duct—High Static: ARNU073BHA2, ARNU093BHA2, ARNU123BHA2, ARNU153BHA2, ARNU183BHA2, ARNU243BHA2, ARNU283BGA2, ARNU363BGA2, ARNU423BGA2, ARNU483BRA2, URNU763B8A2, and URNU963B8A2, with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100,

24,200, 28,000, 36,200, 42,000, 48,100, 76,400, and 95,500 Btu/h respectively.

Ceiling & Floor: ARNU093VEA2 and ARNU123VEA2, with nominally rated capacities of 9,600 and 12,300 Btu/h respectively.

Ceiling Suspended: ARNU183VJA2 and ARNU243VJA2, with nominally rated capacities of 19,100 and 24,200 Btu/h respectively.

Floor Standing with Case: ARNU073CEA2, ARNU093CEA2, ARNU123CEA2, ARNU153CEA2, ARNU183CFA2, and ARNU243CFA2, with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Floor Standing without Case: ARNU073CEU2, ARNU093CEU2, ARNU123CEU2, ARNU153CEU2, ARNU183CFU2, and ARNU243CFU2, with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Vertical Air Handler: ARNU183NJA2, ARNU243NJA2, ARNU303NJA2, ARNU363NJA2, ARNU423NKA2, ARNU483NKA2, and ARNU543NKA2, with nominally rated capacities of 18,000, 24,000, 30,000, 36,000, 42,100, 48,000 and 54,000 Btu/h respectively.

This interim waiver is issued on the condition that the statements, representations, and documents provided by the petitioner are valid. DOE may revoke or modify this interim waiver at any time if it determines the factual basis underlying the petition for waiver is incorrect or the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics.

DOE makes decisions on waivers and interim waivers for only those models specifically set out in the petition, not future models that may be manufactured by the petitioner. LG may submit a new or amended petition for waiver and request for grant of interim waiver, as appropriate, for additional models of commercial package air conditioners and heat pumps for which it seeks a waiver from the DOE test procedure. In addition, DOE notes that grant of an interim waiver or waiver does not release a petitioner from the certification requirements set forth at 10 CFR part 429.

IV. Alternate Test Procedure

In responses to two petitions for waiver from Mitsubishi, DOE specified an alternate test procedure to provide a basis from which Mitsubishi could test and make valid energy efficiency representations for its R410A CITY MULTI products, as well as for its R22 multi-split products. Alternate test procedures related to the Mitsubishi petitions were published in the **Federal Register** on April 9, 2007. See 72 FR 17528 and 72 FR 17533. For reasons similar to those published in these prior notices, DOE believes that an alternate test procedure is appropriate in this instance.

DOE understands that existing testing facilities have limited ability to test multiple indoor units simultaneously. This limitation makes it impractical for manufacturers to test the large number of possible combinations of indoor and outdoor units for some variable refrigerant flow zoned systems. We further note that after DOE granted a waiver for Mitsubishi's R22 multi-split products, ARI formed a committee to discuss testing issues and to develop a testing protocol for variable refrigerant flow systems. The committee has developed a test procedure which has been adopted by AHRI—"ANSI/AHRI 1230—2010: Performance Rating of Variable Refrigerant Flow (VRF) Multi-Split Air-Conditioning and Heat Pump Equipment" and incorporated into ASHRAE 90.1—2010. The commercial multisplit waivers that DOE has granted to Mitsubishi and several other manufacturers and the alternate test procedure set forth in those waivers are consistent with ANSI/AHRI 1230–2010. The waivers use a definition of "tested combination" that is substantially the same as the definition in ANSI/AHRI 1230–2010. As a result, DOE is considering prescribing ANSI/AHRI 1230–2010 in the subsequent decision and order as the alternate test procedure for this LG waiver. For the interim waiver, however, DOE will continue to require the use of the alternate test procedure prescribed in previous multisplit waivers.

Therefore, as a condition for granting this interim waiver to LG, DOE is including an alternate test procedure similar to those granted to Mitsubishi for its R22 and R410A products. This alternate test procedure will allow LG to test and make energy efficiency representations for its Multi V SYNC II and Multi V Water II products. DOE has applied a similar alternate test procedure to other waivers for similar residential and commercial central air conditioners and heat pumps manufactured by Mitsubishi (72 FR 17528, April 9, 2007); Samsung (72 FR 71387, Dec. 17, 2007); Fujitsu (72 FR 71383, Dec. 17, 2007); Daikin (73 FR 39680, July 10, 2008); Daikin (74 FR 15955, April 8, 2009); Daikin (74 FR 16193, April 9, 2009); Daikin (74 FR 16373, April 10, 2009); Mitsubishi (74 FR 66311, 66315, December 15, 2009) and LG (74 FR 66330, December 15, 2009).

The alternate test procedure developed in conjunction with the Mitsubishi waiver permits LG to designate a "tested combination" for each model of outdoor unit. The indoor units designated as part of the tested combination must meet specific requirements. For example, the tested combination must have from two to eight indoor units so that it can be tested in available test facilities. (The "tested combination" was originally defined to consist of one outdoor unit matched with between 2 and 5 indoor units. The maximum number of indoor units in a tested combination is increased in this instance from 5 to 8 to account for the fact that these larger-capacity products can accommodate a greater number of indoor units.) The tested combination must be tested according to the applicable DOE test procedure, as modified by the provisions of the alternate test procedure as set forth below. The alternate test procedure also allows manufacturers of such products to make valid and consistent representations of energy efficiency for their air-conditioning and heat pump products.

DOE is including the following waiver language in the interim waiver for LG's Multi V SYNC II and Multi V Water II commercial multi-split water-source heat pump models:

(1) The petition for waiver filed by LG Corporation is hereby granted as set forth in the paragraphs below.

(2) LG shall not be required to use existing test procedures to test or rate its Multi V SYNC II and Multi V Water II variable capacity multi-split heat pump products listed above, but shall be required to test and rate such products according to the alternate test procedure as set forth in paragraph (3).

(3) *Alternate test procedure.*

(A) LG shall be required to test the products listed in section III above according to the test procedures for central air conditioners and heat pumps prescribed by DOE at 10 CFR 431.96, except that LG shall test a tested combination selected in accordance with the provisions of subparagraph (B) of this paragraph. For every other system combination using the same outdoor unit as the tested combination, LG shall make representations concerning the Multi V SYNC II and Multi V Water II products covered in this waiver according to the provisions of subparagraph (C) below.

(B) Tested combination. The term tested combination means a sample basic model comprised of units that are production units, or are representative of production units, of the basic model being tested. For the purposes of this

waiver, the tested combination shall have the following features:

(1) The basic model of a variable refrigerant flow system used as a tested combination shall consist of one outdoor unit, with one or more compressors, that is matched with between two and five indoor units. (For systems with nominal cooling capacities greater than 150,000 Btu/h, as many as eight indoor units may be used, to enable testing of non-ducted indoor unit combinations). For multi-split systems, each of these indoor units shall be designed for individual operation.

(2) The indoor units shall—

(i) Represent the highest sales model family or another indoor model family if the highest sales model family does not provide sufficient capacity (see ii);

(ii) Together, have a nominal cooling capacity that is between 95% and 105% of the nominal cooling capacity of the outdoor unit;

(iii) Not, individually, have a nominal cooling capacity that is greater than 50% of the nominal cooling capacity of the outdoor unit;

(iv) Operate at fan speeds that are consistent with the manufacturer's specifications; and

(v) Be subject to the same minimum external static pressure requirement while being configurable to produce the same static pressure at the exit of each outlet plenum when manifolded as per § 2.4.1 of 10 CFR part 430, subpart B, appendix M.

(C) *Representations.* In making representations about the energy efficiency of its Multi V SYNC II and Multi V Water II variable capacity multi-split heat pump products for compliance, marketing, or other purposes, LG must fairly disclose the results of testing under the DOE test procedure in a manner consistent with the provisions outlined below:

(1) For Multi V SYNC II and Multi V Water II combinations tested in accordance with this alternate test procedure, LG may make representations based on these test results.

(2) For Multi V SYNC II and Multi V Water II combinations that are not tested, LG may make representations of non-tested combinations at the same energy efficiency level as the tested combination. The outdoor unit must be the one used in the tested combination. The representations must be based on the test results for the tested combination. The representations may also be determined by an Alternative Rating Method approved by DOE.

V. Summary and Request for Comments

Through today's notice, DOE announces receipt of the LG petition for waiver from the test procedures applicable to the Multi V SYNC II and Multi V Water II commercial multi-split heat pump products specified in LG's petition. For the reasons articulated above, DOE also grants LG an interim waiver from those procedures. As part of this notice, DOE is publishing LG's petition for waiver in its entirety. The petition contains no confidential information. Furthermore, today's notice includes an alternate test procedure that LG is required to follow as a condition of its interim waiver. In this alternate test procedure, DOE is defining a tested combination that LG could use in lieu of testing all retail combinations of its Multi V SYNC II and Multi V Water II multi-split heat pump products.

DOE is interested in receiving comments on the issues addressed in this notice. Pursuant to 10 CFR 431.401(d), any person submitting written comments must also send a copy of such comments to the petitioner, pursuant to 10 CFR 431.401(d). The contact information for the petitioner is: John I. Taylor, Vice President, Government Relations and Communications, LG Electronics USA, Inc., 1776 K Street NW., Washington, DC 20006. All submissions received must include the agency name and case number for this proceeding. Submit electronic comments in WordPerfect, Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. DOE does not accept telefacsimiles (faxes).

According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies: one copy of the document including all the information believed to be confidential, and one copy of the document with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Issued in Washington, DC, on May 16, 2011.

Kathleen Hogan,

Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.

April 8, 2011.

The Honorable Dr. Henry Kelly, Acting Assistant Secretary and Principal Deputy Assistant Secretary, Energy Efficiency and Renewable Energy, United States Department of Energy, Forrestal Building, 1000 Independence Avenue, S.W., Washington, DC 20585–0121.

Re: Petition for Waiver and Application for Interim Waiver, LG Electronics *Multi V Multi-Split Air-Source and Water-Source Heat Pump Systems*

Dear Assistant Secretary Kelly: LG Electronics, Inc. (LG) respectfully submits this Petition for Waiver and Application for Interim Waiver, pursuant to 10 CFR 431.401, for certain LG Multi V variable refrigerant flow (VRF) multi-split air-source heat recovery systems, specifically the Multi V SYNC II heat recovery (3Ø 460V 60 Hz), and LG Multi V VRF multi-split water-source heat pump systems, specifically the Multi V Water II and Multi V Water II heat recovery systems listed in Appendix A hereto. This request adds models to the waiver that DOE already granted to LG for Multi V SYNC II and Multi V Water II systems. 74 FR 66330 (Dec. 15, 2009); see also id. 20688 (May 5, 2009) (interim waiver).

Among other things, the applicable DOE test procedure does not provide a method for testing and rating a system that utilizes so many indoor units; the applicable test procedure does not provide a method for rating systems where the type and capacity of the indoor unit can be mixed in the same system; and no testing laboratories can test products with so many indoor units. See, e.g., 75 FR 41845, 41848 (July 19, 2010) (existing testing facilities "have a limited ability to test multiple indoor units simultaneously," and "it is impractical to test some variable refrigerant flow zoned systems").

Waiver relief has been granted for many other comparable commercial multi-splits, including LG, Mitsubishi, Samsung, Fujitsu, Sanyo, and Daikin. See 69 FR 52660 (Aug. 27, 2004) (Mitsubishi); 70 FR 9629 (Feb. 28, 2005) (Samsung); 71 FR 14858 (March 24, 2006) (Mitsubishi); 72 FR 17528 (April 9, 2007) (Mitsubishi); id. 71387 (Dec. 17, 2007) (Samsung); id. 71383 (Dec. 17, 2007) (Fujitsu); 73 FR 179 (Jan. 2, 2008) (Sanyo); id. 1207, 1213 (Jan. 7, 2008) (Daikin); id. 39680 (July 10, 2008) (Daikin); id. 75408 (Dec. 11, 2008) (Mitsubishi); 74 FR 15955 (April 8, 2009) (Daikin); id. 16373 (April 10, 2009) (Daikin); id. 20688 (May 5, 2009) (LG); id. 66330 (Dec. 15, 2009) (LG); id. 66324 (Dec. 15, 2009) (Daikin); id. 66311, 66315 (Dec. 15, 2009) (Mitsubishi); 75 FR 4795 (Jan. 29, 2010) (Daikin); id. 13114 (March 18, 2010) (Sanyo); id. 22581 (April 29, 2010) (Daikin); id. 25224 (May 7, 2010) (Daikin); id. 41845 (July 19, 2010) (Sanyo); 76 FR 19069 (April 6, 2011) (Daikin); id. 19078 (April 6, 2011) (Mitsubishi). As stated above, LG's current

request simply adds additional models to the waiver relief already granted to LG.

LG is a manufacturer of digital appliances, as well as mobile communications, digital displays, and digital media products. Its appliances include air-conditioners, washing machines, clothes dryers, refrigerators, refrigerator-freezers, air cleaners, ovens, microwave ovens, dishwashers, and vacuum cleaners and are sold worldwide, including in the United States. LG's U.S. operations are LG Electronics USA, Inc., with headquarters at 1000 Sylvan Avenue, Englewood Cliffs, NJ 07632 (tel. 201–816–2000). Its worldwide headquarters are located at LG Twin Towers 20, Yoido-dong, Youngdungpo-gu Seoul, Korea 150–721 (tel. 011–82–2–3777–1114) URL: http.www.LGE.com. LG's principal brands include LG® and OEM brands, including GE® and Kenmore®. LG's appliances are produced in Korea and Mexico.

LG's Multi V VRF systems are beneficial products, each consisting of a single outdoor or water source unit, using a scroll type inverter compressor with variable capacity, that can connect to multiple indoor units and that uses VRF and control systems. (In certain high capacity applications [152,900 Btu/h and above], a consumer can choose between a system using a single outdoor or water-source unit and a system using two or three outdoor or water-source units.) These multi-splits are intended to be used in zoned systems where an outdoor or water-source unit can be connected with up to between 16 and 64 separate indoor units, which need not be the same models. The operating characteristics allow each indoor unit to have a different set temperature and a different mode of operation (i.e., on/off/fan). All of the indoor units are capable of operating independently, with their own temperature and fan speed setting. Based on those controls, the outdoor or water-source unit will then determine the cooling or heating capacity delivered into the zones. The system therefore offers great flexibility and convenience to the consumer, permitting precise space conditioning control throughout the building, and thus saving energy. The cooling capacities of the systems are between 72,000 and 573,400 Btu/h.[1]

The variable speed, constant speed or dual compressors and the associated system controls can direct refrigerant flow throughout the system to precisely meet the various heating or cooling loads required in the conditioned areas. The compressor is capable of reducing its operating capacity to as little as 10 percent of its rated capacity. The outdoor fan motor also has a variable speed drive to properly match the outdoor coil to indoor loads. Zone diversity enables the system to have a total connected indoor unit capacity of up to 130 percent of the capacity of the outdoor or water-source unit.

As discussed above, up to between 16 and 64 indoor units can be matched with each related outdoor or water-source unit. Thus, for each outdoor or water-source unit there is a multitude of possible combinations of indoor units that can be matched in a system configuration. And since there are so many outdoor or water-source units and indoor units, there is an enormous total of possible combinations.

A waiver and interim waiver for the specified LG Multi V VRF systems are warranted because test procedures under the Energy Policy and Conservation Act (EPCA), 42 U.S.C. 6291 *et seq.,* namely 10 CFR 431.96, evaluate the basic models in a manner so unrepresentative of their true energy consumption characteristics as to provide materially inaccurate comparative data, and/or the basic models contain one or more design characteristics that prevent testing of the basic model according to the prescribed test procedures. In such circumstances DOE "will grant" waiver relief. 10 CFR 431.401(e)(3), (f)(4). In that regard:

—The test procedure provides for testing of a pair of indoor and outdoor assemblies making up a typical split system, but does not specify how LG Multi V VRF systems, with so many combinations of indoor units for each outdoor or water-source unit, could be evaluated. The situation is further complicated by the fact that there are so many outdoor or water-source units. It is not practical to test each possible combination, and the test procedure provides no alternative rating method for generating efficiency ratings for systems with more than one indoor unit. Thus, the test procedure does not contemplate, and cannot practically be applied to, LG Multi V VRF systems. DOE has already recognized this by granting waiver relief to LG, and to other manufacturers for comparable systems.

—Testing laboratories cannot test products with so many indoor units. In that regard, the testing of multi-splits when all indoor units are connected cannot be physically located in a single room.

—The test procedure provides for testing "matched assemblies," which does not apply to LG Multi V VRF systems. Indoor and outdoor coils in split systems are typically balanced; that is, the capacity of the outdoor coil is equivalent to the capacity of the indoor coil. The test procedure's application to "matched assemblies" contemplates such a balance between indoor and outdoor coil capacity. With the Multi V VRF systems, however, the sum of the capacity of the indoor units connected into the system can be as much as 130 percent of the capacity of the outdoor coil. Such unbalanced combinations of LG indoor and outdoor or water-source units are permitted by the zoning characteristics of the system, the use of electronic expansion valves to precisely control refrigerant flow to each indoor coil, and the system intelligence for overall system control. The test procedure designed for "matched assemblies" therefore does not contemplate or address testing for substantially unbalanced zoning systems such as the LG Multi V VRF systems.

—The indoor units are designed to operate at many different external static pressure values, which compounds the difficulty of testing LG Multi V VRF systems. A test facility could not maintain proper airflow at several different external static pressure values for the many indoor units that would be connected to the outdoor unit.

* * * * *

For all of these reasons, the existing test procedures evaluate the LG Multi V VRF systems in a manner so unrepresentative of their true energy consumption characteristics as to provide materially inaccurate comparative data and/or the basic models contain one or more design characteristics that prevent testing of the basic model according to the prescribed test procedures. Therefore, DOE should grant a waiver for the LG Multi V VRF systems set forth in Appendix A. See 10 CFR 431.401(a)(1). The waiver should continue until a test procedure can be developed and adopted that will provide the U.S. market with a fair and accurate assessment of the LG Multi V VRF system energy consumption and efficiency levels. LG intends to work with DOE, stakeholders, and the Air-Conditioning, Heating and Refrigeration Institute (AHRI) to develop the appropriate test procedure.

There are no alternative test procedures known to LG that could evaluate these products in a representative manner (other than perhaps the procedures provided by DOE in its waiver decisions for comparable products).

That a waiver is warranted is borne out by the fact that DOE has granted waiver relief to LG, as well as to Mitsubishi, Samsung, Fujitsu, Sanyo, and Daikin for comparable commercial multi-splits.

Manufacturers of all other basic models marketed in the United States and known to LG to incorporate similar design characteristics as found in the LG Multi V VRF systems include Mitsubishi Electric and Electronics USA, Samsung Air Conditioning, Fujitsu General Limited, SANYO North America Corp., and Daikin AC (Americas), Inc.

LG also requests immediate relief by grant of an interim waiver. Grant of an interim waiver is fully justified:

—The petition for waiver is likely to be granted, as evidenced not only by its merits, but also because DOE has already granted waiver relief to LG, Mitsubishi, Samsung, Fujitsu, Sanyo, and Daikin for their commercial VRF multi-splits. In such instances, it is in the public interest to have similar products tested and rated for energy consumption on a comparable basis.

—Without waiver relief, LG will be at a competitive disadvantage in the market and suffer economic hardship. LG would be placed in an untenable situation: the Multi V VRF systems involved here would be subject to a set of regulations that DOE already acknowledges should not apply to such a product, while at the same time other manufacturers are allowed to operate relieved from such regulations.

[1] DOE has taken the position that water-source products with capacities greater than or equal to 135,000 Btu/h do not require a waiver because the DOE test procedure only covers water-source heat pumps with capacities less than 135,000 Btu/h. See, e.g., 75 FR 41845, 41846 (July 19, 2010) (Sanyo); id. 22581 (April 29, 2010) (Daikin). While LG believes that it can rely on DOE's position in this regard, it is nonetheless including products with capacities greater than or equal to135,000 Btu/h in this waiver request as a precautionary measure.

—Significant investment has already been made in LG Multi V VRF systems. Lack of relief would not allow LG to recoup this investment as it relates to the models involved here and would deny LG anticipated sales revenue. This does not take into account significant losses in goodwill and brand acceptance.

—The basic purpose of EPCA is to foster purchase of energy-efficient products, not hinder such purchases. LG Multi V VRF systems produce a benefit to consumers and are in the public interest. To encourage and foster the availability of these products is in the public interest. Standards programs should not be used as a means to block innovative, improved designs.[2] DOE's rules should accommodate and encourage—not act to block—such a product.

—Granting the interim waiver and waiver would also eliminate a non-tariff trade barrier.

—Grant of relief would also help enhance economic development and employment, including not only LG Electronics USA's operations in New Jersey, Georgia, Texas, California, Illinois and Alabama, but also at major national retailers and regional dealers that carry LG products. Furthermore, continued employment creation and ongoing investments in its marketing, sales and servicing activities will be fostered by approval of the interim waiver. Conversely, denial of the requested relief would harm the company and would be anticompetitive.

Conclusion

LG respectfully requests that DOE grant a waiver and interim waiver from existing test standards for LG Multi V VRF multi-split systems set forth in Appendix A hereto until such time as a representative test procedure is developed and adopted for such products.

We would be pleased to discuss this request with DOE and provide further information as needed.

We hereby certify that all manufacturers of domestically marketed units of the same product type have been notified by letter of this petition and application, copies of which letters are attached (Appendix B hereto).

Sincerely,

John I. Taylor,

Vice President, Government Relations and Communications, LG Electronics USA, Inc., 1776 K Street NW., Washington, DC 20006, Phone: 202–719–3490, Fax: 847–941–8177, E-mail: john.taylor@lge.com.

Of counsel:

John A. Hodges, Wiley Rein, *LLP, 1776 K Street NW., Washington, DC 20006, Phone: 202–719–7000, Fax: 202–719–7049, E-mail: jhodges@wileyrein.com.*

Appendix A—Multi V Series Air-Source Heat Pumps Heat Recovery Units

SYNC II 3Ø 460V 60 Hz models: ARUB076DT2, ARUB096DT2, ARUB115DT2, ARUB134DT2, ARUB154DT2, ARUB173DT2, ARUB192DT2, ARUB211DT2, ARUB230DT2, ARUB250DT2, ARUB270DT2, ARUB290DT2, ARUB310DT2, with normally rated cooling capacities of 76,400, 95,900, 114,700, 133,800, 152,900, 172,000, 191,100, 211,000, 230,000, 250,000, 270,000, 290,000, and 310,000 Btu/h respectively. The maximum number of connectable indoor units is 13, 16, 20, 23, 26, 29, 32, 35, 39, 42, 49, and 52 respectively.

Multi V Series Water-Source Heat Pumps Water-Source Units:

Water II 3Ø 460V 60 Hz models: ARWN096DA2, ARWN192DA2, ARWN290DA2, ARWN390DA2, ARWN480DA2, ARWN580DA2, with nominally rated cooling capacities of 95,900, 191,100, 286,600, 382,200, 477,800, and 573,400 Btu/h respectively. The maximum number of connectable indoor units is 16, 32, 49, 64, 64, and 64 respectively.

Water II 3Ø 208/230V 60 Hz models: ARWN072BA2, ARWN144BA2, ARWN216BA2, ARWN288BA2, ARWN360BA2, ARWN432BA2, with nominally rated cooling capacities of 72,000, 144,000, 216,000, 288,000, 360,000, and 432,000 Btu/h respectively. The maximum number of connectable indoor units is 16, 32, 49, 64, 64, and 64 respectively.

Water II Heat Recovery 3Ø 208/230V 60 Hz models: ARWB072BA2, ARWB144BA2, ARWB216BA2, ARWB288BA2, ARWB360BA2, and ARWB432BA2, with nominally rated cooling capacities of 72,000, 144,000, 216,000, 288,000, 360,000, and 432,000 Btu/h respectively. The maximum number of connectable indoor units is 16, 32, 49, 64, 64, and 64 respectively.

Water II Heat Recovery 3Ø 460V 60 Hz models: ARWB096DA2, ARWB192DA2, ARWB290DA2, ARWB390DA2, ARWB480DA2, and ARWB580DA2, with nominally rated cooling capacities of 95,900, 191,100, 286,600, 382,200, 477,800, and 573,400 Btu/h respectively. The maximum number of connectable indoor units is 16, 32, 49, 64, 64 and 64 respectively.

Compatible indoor units for the above-listed air-source and water-source units:

Wall Mounted: ARNU073SEL2, ARNU093SEL2, ARNU123SEL2, ARNU153SEL2, ARNU183S5L2, and ARNU243S5L2, with nominally rated cooling capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Art Cool Mirror: ARNU073SE*2, ARNU093SE*2, ARNU123SE*2, ARNU153SE*2, ARNU183S3*2, and ARNU243S3*2, with nominally rated cooling capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

4 Way Cassette: ARNU073TEC2, ARNU093TEC2, ARNU123TEC2, ARNU153TEC2, ARNU183TEC2, ARNU243TPC2, ARNU283TPC2, ARNU363TNC2, ARNU423TMC2, and ARNU483TMC2, with nominally rated cooling capacities of 7,500, 9,600, 12,300, 15,400, 19,100, 24,200, 28,000, 36,200, 42,000, and 48,100 Btu/h respectively.

2 Way Cassette: ARNU183TLC2 and ARNU243TLC2, with nominally rated capacities of 19,100 and 24,200 Btu/h respectively.

1 Way Cassette: ARNU073TJC2, ARNU093TJC2, and ARNU123TJC2, with nominally rated capacities of 7,500, 9,600, and 12,300 Btu/h respectively.

Ceiling Concealed Duct—Low Static: ARNU073B1G2, RNU093B1G2, ARNU123B1G2, ARNU153B1G2, ARNU183B2G2, and ARNU243B2G2, with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Ceiling Concealed Duct—Built-in: ARNU073B3G2, ARNU093B3G2, ARNU123B3G2, ARNU153B3G2, ARNU183B4G2, and ARNU243B4G2, with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Ceiling Concealed Duct—High Static: ARNU073BHA2, ARNU093BHA2, ARNU123BHA2, ARNU153BHA2, ARNU183BHA2, ARNU243BHA2, ARNU283BGA2, ARNU363BGA2, ARNU423BGA2, ARNU483BRA2, URNU763B8A2, and URNU963B8A2, with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, 24,200, 28,000, 36,200, 42,000, 48,100, 76,400, and 95,500 Btu/h respectively.

Ceiling & Floor: ARNU093VEA2 and ARNU123VEA2, with nominally rated capacities of 9,600 and 12,300 Btu/h respectively.

Ceiling Suspended: ARNU183VJA2 and ARNU243VJA2, with nominally rated capacities of 19,100 and 24,200 Btu/h respectively.

Floor Standing with Case: ARNU073CEA2, ARNU093CEA2, ARNU123CEA2, ARNU153CEA2, ARNU183CFA2, and ARNU243CFA2, with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Floor Standing without Case: ARNU073CEU2, ARNU093CEU2, ARNU123CEU2, ARNU153CEU2, ARNU183CFU2, and ARNU243CFU2, with nominally rated capacities of 7,500, 9,600, 12,300, 15,400, 19,100, and 24,200 Btu/h respectively.

Vertical Air Handler: ARNU183NJA2, ARNU243NJA2, ARNU303NJA2, ARNU363NJA2, ARNU423NKA2, ARNU483NKA2, and ARNU543NKA2, with nominally rated capacities of 18,000, 24,000, 30,000, 36,000, 42,100, 48,000 and 54,000 Btu/h respectively.

[FR Doc. 2011–12590 Filed 5–20–11; 8:45 am]

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[2] See FTC Advisory Opinion No. 457, TRRP 1718.20 (1971 Transfer Binder); 49 FR 32213 (Aug. 13, 1984); 52 FR 49141, 49147–48 (Dec. 30, 1987).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP11–483–000; EM11–4–000]

Questar Gas Company; Notice of Application

Take notice that on May 12, 2011, Questar Gas Company (Questar Gas), 180 East 100 South, Salt Lake City, Utah 84111 filed an application for a limited

term certificate of limited jurisdiction, seeking authority to transport gas in interstate commerce during an outage on Questar Pipeline Company's Mainline 3, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Any questions regarding this application should be directed to David S. Anderson, Senior Corporate Counsel, Questar Gas Company, 180 East 100 South, Salt Lake City, Utah 84111 at (801) 324–5697 or e-mail *david.anderson@questar.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify Federal and State agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all Federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit seven copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the nonparty commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and seven copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. This filing is accessible on-line at *http://www.ferc.gov* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free) or TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on May 27, 2011.

Dated: May 17, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–12603 Filed 5–20–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2503–147]

Duke Energy Carolinas, LLC; 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.:* 2503–147.

c. *Dated Filed:* November 11, 2011.

d. *Submitted By:* Duke Energy Carolinas, LLC.

e. *Name of Project:* Keowee-Toxaway Hydroelectric Project.

f. *Location:* The Keowee-Toxaway Project is located on the Toxaway, Keowee, and Little Rivers in Oconee County and Pickens County, South Carolina and Transylvania County, North Carolina. The Keowee-Toxaway Project occupies no federal lands.

g. *Filed Pursuant to:* 18 CFR part 5 of the Commission's Regulations.

h. *Potential Applicant Contact:* Ms. Jennifer Huff, Keowee-Toxaway Relicensing Project Manager, Duke Energy Carolinas, LLC, EC12Y, P.O. Box 1006, Charlotte, North Carolina 28201–1006.

i. *FERC Contact:* Stephen Bowler at (202) 502–6861, or e-mail at *stephen.bowler@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 National Marine Fisheries Service 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. On October 24, 2008, we designated Duke Energy Carolinas, LLC 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. Duke Energy Carolinas, LLC 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's staff Scoping Document 1 (SD1), as well as study requests. All comments on the PAD and SD1, as well as 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 (Keowee-Toxaway Hydroelectric Project) and number (P–2503–147), 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 July 15, 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. 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: Wednesday, June 15, 2011.

Time: 1 p.m.

Location: Seneca High School Auditorium, 100 Bobcat Ridge, Seneca, SC 29678.

Phone: (864) 886–4460.

Evening Scoping Meeting

Date: Wednesday, June 15, 2011.

Time: 6 p.m.

Location: Seneca High School Auditorium, 100 Bobcat Ridge, Seneca, SC 29678,

Phone: (864) 886–4460.

The 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 and (in the case of SD1 only) to those on the potential applicant's mailing list who did not appear 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

The potential applicant and Commission staff will conduct an environmental site review of the Keowee-Toxaway Project on June 14 and 15, 2011. We will tour the Toxaway Development on Tuesday, June 14, 2011, starting at 1 p.m and the Keowee Development on Wednesday, June 15, 2011 starting at 8 a.m. To register for the environmental site review, e-mail *ktrelicensing@duke-energy.com* by May 20, 2011. For more details, please visit Duke's Web site at *http://www.duke-energy.com/keowee-toxaway-relicensing/jocassee-keowee-tours.asp.* On Tuesday we will meet at the Jocassee Pumped Storage Station located at 799 Jocassee Lake Road, Salem, SC 29676. On Wednesday we will meet at the Oconee Nuclear Station located at 155 E Pickens Hwy., Seneca, SC 29672. (Participants on the Keowee Hydro Station tour must provide appropriate photo identification and complete a Nuclear Regulatory Commission registration process prior to admittance. No photography will be allowed inside Keowee Hydro Station.)

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 record for the project.

Dated: May 17, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–12604 Filed 5–20–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC11–77–000.
Applicants: Paulding Wind Farm II LLC.
Description: Application For Authorization For Disposition of Jurisdictional Facilities and Request for Expedited Action of Paulding Wind Farm II LLC.
Filed Date: 05/16/2011.
Accession Number: 20110516–5143.
Comment Date: 5 p.m. Eastern Time on Monday, June 6, 2011.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER96–496–019; ER99–3658–005.
Applicants: Northeast Utilities Service Company, Select Energy, Inc.
Description: Amendment to Application of Northeast Utilities Service Company, *et. al.*
Filed Date: 05/17/2011.
Accession Number: 20110517–5013.
Comment Date: 5 p.m. Eastern Time on Tuesday, June 7, 2011.

Docket Numbers: ER11–3180–001.
Applicants: Westerly Hospital Energy Company, LLC.
Description: Westerly Hospital Energy Company, LLC submits tariff filing per 35: Westerly Hospital Amended FERC Electric Tariff to be effective 3/23/2011.
Filed Date: 05/16/2011.
Accession Number: 20110516–5085.
Comment Date: 5 p.m. Eastern Time on Monday, June 6, 2011.

Docket Numbers: ER11–3202–001.
Applicants: WFM Intermediary New England, LLC.
Description: WFM Intermediary New England, LLC submits tariff filing per 35: WFM Intermediary NE Amended FERC Electric Tariff to be effective 3/28/2011.
Filed Date: 05/16/2011.
Accession Number: 20110516–5089.
Comment Date: 5 p.m. Eastern Time on Monday, June 6, 2011.

Docket Numbers: ER11–3455–001.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits tariff filing per 35.17(b): Amendment to Docket ER11–3455 to be effective 4/1/2011.
Filed Date: 05/16/2011.
Accession Number: 20110516–5116.
Comment Date: 5 p.m. Eastern Time on Monday, June 6, 2011.

Docket Numbers: ER11–3573–000.
Applicants: The United Illuminating Company.
Description: The United Illuminating Company submits tariff filing per 35.13(a)(1): Revised Localized Costs Sharing Agreements to be effective 6/1/2011.
Filed Date: 05/16/2011.
Accession Number: 20110516–5021.
Comment Date: 5 p.m. Eastern Time on Monday, June 6, 2011.

Docket Numbers: ER11–3574–000.
Applicants: ISO New England Inc.
Description: ISO New England Inc. submits tariff filing per 35.13(a)(2)(iii: Collation Value Correction Filing to be effective 1/15/2011.
Filed Date: 05/16/2011.
Accession Number: 20110516–5030.
Comment Date: 5 p.m. Eastern Time on Monday, June 6, 2011.

Docket Numbers: ER11–3575–000.
Applicants: Wisconsin Public Service Corporation.
Description: Wisconsin Public Service Corporation submits tariff filing per 35.13(a)(2)(iii: Filing to Revise Rate Schedule No. 87 to be effective 2/1/2011.
Filed Date: 05/16/2011.
Accession Number: 20110516–5038.
Comment Date: 5 p.m. Eastern Time on Monday, June 6, 2011.

Docket Numbers: ER11–3576–000.
Applicants: Golden Spread Electric Cooperative, Inc.
Description: Golden Spread Electric Cooperative, Inc. submits tariff filing per 35.1: Baseline Tariff Filing to be effective 5/16/2011.
Filed Date: 05/16/2011.
Accession Number: 20110516–5087.
Comment Date: 5 p.m. Eastern Time on Monday, June 6, 2011.

Docket Numbers: ER11–3577–000.
Applicants: PJM Interconnection, L.L.C., Commonwealth Edison Company.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: ComEd submits Ministerial Revisions to its Formula Rate Template—Attach H–13A to be effective 6/1/2011.
Filed Date: 05/16/2011.
Accession Number: 20110516–5115.
Comment Date: 5 p.m. Eastern Time on Monday, June 6, 2011.

Docket Numbers: ER11–3578–000.
Applicants: Glacial Energy of Maryland.
Description: Notice of Cancellation of Market-Based Rate Tariff and Revised Tariff Sheets for Glacial Energy of Maryland, Inc.
Filed Date: 05/16/2011.
Accession Number: 20110516–5144.
Comment Date: 5 p.m. Eastern Time on Monday, June 6, 2011.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

As it relates to any qualifying facility filings, the notices of self-certification [or self-recertification] listed above, do not institute a proceeding regarding qualifying facility status. A notice of self-certification [or self-recertification] simply provides notification that the entity making the filing has determined the facility named in the notice meets the applicable criteria to be a qualifying facility. Intervention and/or protest do not lie in dockets that are qualifying facility self-certifications or self-recertifications. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii). Intervention and protests may be filed in response to notices of qualifying facility dockets other than self-certifications and self-recertifications.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies

of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: May 17, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–12565 Filed 5–20–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1806–003; ER11–1939–001.

Applicants: AP Gas & Electric (PA), LLC, AP Holdings, LLC.

Description: Notification of Non-Material Change in Status of AP Holdings, LLC and AP Gas & Electric (PA), LLC.

Filed Date: 05/05/2011.

Accession Number: 20110505–5171.

Comment Date: 5 p.m. Eastern Time on Thursday, May 26, 2011.

Docket Numbers: ER11–2092–002.

Applicants: Duke Energy Vermillion II, LLC.

Description: Duke Energy Vermillion II, LLC submits tariff filing per 35: Compliance Filing to be effective 5/1/2011.

Filed Date: 05/05/2011.

Accession Number: 20110505–5077.

Comment Date: 5 p.m. Eastern Time on Thursday, May 26, 2011.

Docket Numbers: ER11–2848–001.

Applicants: Arizona Public Service Company.

Description: Arizona Public Service Company submits tariff filing per 35: Service Agreement No. 174 compliance filing to be effective 11/19/2010.

Filed Date: 05/05/2011.

Accession Number: 20110505–5147.

Comment Date: 5 p.m. Eastern Time on Thursday, May 26, 2011.

Docket Numbers: ER11–3579–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Queue No. W2–016; Original Service Agreement No. 2924 to be effective 4/20/2011.

Filed Date: 05/17/2011.

Accession Number: 20110517–5038.

Comment Date: 5 p.m. Eastern Time on Tuesday, June 07, 2011.

Docket Numbers: ER11–3580–000.

Applicants: Domtar Corporation.

Description: Domtar Corporation submits tariff filing per 35.15: Domtar Corporation Notice of Cancellation of MBR Tariff to be effective 7/18/2011.

Filed Date: 05/17/2011.

Accession Number: 20110517–5050.

Comment Date: 5 p.m. Eastern Time on Tuesday, June 07, 2011.

Docket Numbers: ER11–3581–000.

Applicants: PJM Interconnection, L.L.C., Monongahela Power Company, American Electric Power Service Corporation.

Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Monongahela Power, *et al.*, submits the Third Revised Service Agreement No. 1395, to be effective 5/17/2011.

Filed Date: 05/17/2011.

Accession Number: 20110517–5073.

Comment Date: 5 p.m. Eastern Time on Tuesday, June 7, 2011.

Take notice that the Commission received the following foreign utility company status filings:

Docket Numbers: FC11–6–000.

Applicants: Inversiones Eolicas, S. de R. L. de C.V.

Description: Self-Certification of Foreign Utility Company Status of Inversiones Eolicas, S. de R. L. de C.V.

Filed Date: 05/17/2011.

Accession Number: 20110517–5045.

Comment Date: 5 p.m. Eastern Time on Tuesday, June 7, 2011.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

As it relates to any qualifying facility filings, the notices of self-certification [or self-recertification] listed above, do not institute a proceeding regarding qualifying facility status. A notice of self-certification [or self-recertification] simply provides notification that the entity making the filing has determined the facility named in the notice meets the applicable criteria to be a qualifying facility. Intervention and/or protest do not lie in dockets that are qualifying facility self-certifications or self-recertifications. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii). Intervention and protests may be filed in response to notices of qualifying facility dockets other than self-certifications and self-recertifications.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: May 17, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–12566 Filed 5–20–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RC11–3–000]

Monongahela Power Company, West Penn Power Company, The Potomac Edison Company, PJM Interconnection, L.L.C.; Notice of Filing

Take notice that on May 13, 2011, Monongahela Power Company, West Penn Power Company, The Potomac Edison Company (collectively, the Designated FirstEnergy Utilities), and PJM Interconnection, L.L.C. filed a joint petition requesting that the Federal Energy Regulatory Commission (Commission) authorize the Designated FirstEnergy Utilities to intervene in a Enforcement Hearing, being conducted pursuant to the Commission-approved Compliance Monitoring and Enforcement Program, and grant any such waivers as are necessary to allow them to participate in the Enforcement Hearing as a Participant.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on May 27, 2011.

Dated: May 17, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–12601 Filed 5–20–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14114–000]

Reliable Storage 2, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On March 18, 2011, Reliable Storage 2, 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 Rockaway Pumped Storage Hydroelectric Project that would use water from the Mount Hope Mine in Rockaway Township, Morris County, New Jersey. 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 pumped storage project would be comprised of four stages of developments, each with a powerhouse and an upper and lower reservoir. Some of the reservoirs would be included in more than one development; with a lower reservoir for one development serving as an upper reservoir for another.

(a) Stage 1 of the project would consist of the following features: (1) A new upper reservoir with a surface area of 45 acres on a 60 acre upland site west of Mount Hope Lake and a total storage capacity of 3,500 to 4,000 acre-feet. The upper reservoir would be filled with water pumped out of the Mount Hope Mine Complex and have a normal maximum water surface elevation of 900 feet mean sea level (msl). The Mount Hope inactive mine would provide access to the lower reservoir located at 1,000 feet below the ground surface; (2) a reinforced concrete intake/outlet structure capable of discharging 1,500 cubic feet per second (cfs); (3) a 10-foot-diameter, 1,300-foot-long reinforced concrete vertical intake shaft; (4) an 8-foot-diameter underground penstock; (5) a powerhouse approximately 1,300 feet below ground level containing one reversible pump turbine with a total installed generating capacity of 250 megawatts (MW); (6) a transformer hall; (7) a lower reservoir; (8) a ventilation shaft and ventilation building at the northern end of the lower reservoir; and (9) various ancillary access shafts and tunnels. The proposed Stage 1 would generate over 500 gigawatt-hours per year.

(b) Stage 2 of the project would consist of the following features: (1) The lower reservoir utilized in Stage 1, located 1,000 feet below the ground surface, would serve as the upper reservoir in Stage 2 and would have a total storage capacity of 5,000 to 5,800 acre-feet. The upper reservoir would be filled with water pumped out of the Mount Hope Mine Complex and have a normal maximum water surface elevation at 900 feet below the ground surface. The Mount Hope inactive mine would provide access to the lower reservoir located at 1,700 feet below the ground surface; (2) a reinforced concrete intake/outlet structure capable of discharging 1,500 cfs; (3) a 10-foot-diameter, 1,000-foot-long reinforced concrete vertical intake shaft; (4) an 8-foot-diameter underground penstock; (5) a powerhouse approximately 2,000 feet below ground containing one reversible pump turbine with a total installed generating capacity of 250 MW; (6) a transformer hall; (7) a lower reservoir; (8) a ventilation shaft and ventilation building at the northern end of the lower reservoir; and (9) various ancillary access shafts and tunnels. The proposed Stage 2 would generate over 500 gigawatt-hours per year.

(c) Stage 3 of the project would consist of the following features: (1) The lower reservoir utilized in Stage 2, located 1,700 feet below the ground surface, would serve as the upper reservoir in Stage 3 and would have a total storage capacity of 4,000 to 5,000 acre-feet. The upper reservoir would be filled with water pumped out of the Mount Hope Mine Complex and have a normal maximum water surface elevation at 1,600 feet below the ground surface. The Mount Hope inactive mine would provide access to the lower reservoir located at 2,500 feet below the ground surface; (2) a reinforced concrete intake/outlet structure capable of discharging 1,500 cfs; (3) a 10-foot-diameter, 1,100-foot-long reinforced concrete vertical intake shaft; (4) an 8-foot-diameter underground penstock; (5) a powerhouse approximately 2,800 feet

below ground containing one reversible pump turbine with a total installed generating capacity of 250 MW; (6) a transformer hall; (7) a lower reservoir with a storage capacity of 4,200 to 5,000 acre-feet; (8) a ventilation shaft and ventilation building at the northern end of the lower reservoir; and (9) various ancillary access shafts and tunnels. The proposed Stage 3 would generate over 500 gigawatt-hours per year.

(d) Stage 4 would be a separate development with identical features as of Stage 3, including the following: (1) The lower reservoir utilized in Stage 2, located 1,700 feet below the ground surface, would serve as the upper reservoir in Stage 4 and would have a total storage capacity of 4,000 to 5,000 acre-feet. The upper reservoir would be filled with water pumped out of the Mount Hope Mine Complex and have a normal maximum water surface elevation at 1,600 feet below the ground surface. The Mount Hope inactive mine would provide access to the lower reservoir located at 2,500 feet below the ground surface; (2) a reinforced concrete intake/outlet structure capable of discharging 1,500 cfs; (3) a 10-foot-diameter, 1,100-foot-long reinforced concrete vertical intake shaft; (4) an 8-foot-diameter underground penstock; (5) a powerhouse approximately 2,800 feet below ground containing a reversible pump turbine with a total installed generating capacity of 250 MW; (6) a transformer hall; (7) a lower reservoir which consist of the lower reservoir of Stage 3; (8) a ventilation shaft and ventilation building at the northern end of the lower reservoir; and (9) various ancillary access shafts and tunnels. The proposed Stage 4 would generate over 500 gigawatt-hours per year.

The total rated capacity of the turbines and generators of the project is 1,000 MW. Upon completion, the proposed project would generate over 2,000 gigawatt-hours annually. The proposed project would also include two parallel 10.60-mile-long, 500-kilovolt transmission lines interconnecting with the proposed Jefferson Substation, located approximately 5.3 miles north-northwest of Mt. Hope Lake. The transmission line right-of-way would parallel an existing transmission line owned by Public Services Electric and Gas Company for 4.3 miles and would traverse mostly undeveloped forest lands, two lakes and five streams. The primary transmission line of the proposed project would be located in part on federal land. Specifically, the transmission line would traverse a portion of the northern and eastern edge of the U.S. Army's Picatinny Arsenal for a total of approximately 2.4 miles.

Applicant Contact: Ms. Ramya Swaminathan, Reliable Storage, LLC, 239 Causeway Street, Boston, MA 02114; phone: (978) 252–7631.

FERC Contact: Monir Chowdhury; phone: (202) 502–6736.

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 the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–14114–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: May 17, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–12605 Filed 5–20–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–473–000]

Transcontinental Gas Pipe Line Company, LLC; Notice of Request Under Blanket Authorization

Take notice that on May 5, 2011 Transcontinental Gas Pipe Line Company, LLC (Transco), Post Office Box 1396, Houston, Texas 77251, pursuant to section 7 of the Natural Gas Act, the prior notice procedures prescribed by sections 157.205 and 157.216 of the Federal Energy Regulatory Commission's Regulations, and Transco's blanket certificate issued in Docket No. CP82–426, filed a request for authorization to abandon by sale to Williams Field Services—Gulf Coast Company, L.P.[1] (WFS) an existing 10-inch natural gas pipeline located in St. Charles, St. James and St. John the Baptist Parishes, Louisiana extending eastward 18.55 miles and appurtenant facilities. Transco states that the total cost of the abandonment is estimated to be approximately $125,000, all as more fully set forth in the application, which is open to the public for inspection. The filing may also be viewed on the Web at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding this prior notice should be directed to Nan Miksovsky, Transcontinental Gas Pipe Line Company, LLC, P.O. Box 1396, Houston, Texas 77251, or by telephone no. (713) 215–3422.

Any person may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's Regulations under the NGA (18 CFR 157.205) file a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a

[1] WFS is a Delaware limited partnership having an address of One Williams Center, Tulsa, Oklahoma 74172.

protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the Internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the "e-Filing" link. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy regulatory Commission, 888 First Street, NE., Washington, DC 20426.

Comment Date: June 7, 2011.

Dated: May 17, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–12602 Filed 5–20–11; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9309–8]

Science Advisory Board Staff Office Notification of a Public Meeting of the SAB Mercury Review Panel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA or Agency) Science Advisory Board (SAB) Staff Office announces a public meeting of the SAB Mercury Review Panel.

DATES: The meeting will be held on June 15, 2011 and June 16, 2011 from 9 a.m. to 5 p.m. and on June 17, 2011 from 8:30 a.m. to 2:30 p.m. (Eastern Time).

ADDRESSES: The Panel meeting will be held at the Marriott at Research Triangle Park, 4700 Guardian Drive, Durham, NC, 27703.

FOR FURTHER INFORMATION CONTACT: Members of the public who wish to obtain further information regarding this meeting may contact Dr. Angela Nugent, Designated Federal Officer (DFO), SAB Staff Office, by telephone/voice mail at (202) 564–2188; by fax at (202) 565–2098 or via e-mail at *nugent.angela@epa.gov.* General information concerning the EPA Science Advisory Board can be found at the EPA SAB Web site at *http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION:

Background: The SAB was established pursuant to the Environmental Research, Development, and Demonstration Authorization Act (ERDAA), codified at 42 U.S.C. 4365, to provide independent scientific and technical advice to the Administrator on the technical basis for Agency positions and regulations. The SAB is a Federal Advisory Committee chartered under the Federal Advisory Committee Act (FACA), 5 U.S.C., App. 2. Pursuant to FACA and EPA policy, notice is hereby given that the SAB Mercury Review Panel will hold a public meeting to review EPA's *Technical Support Document: National-Scale Mercury Risk Assessment Supporting the Appropriate and Necessary Finding for Coal and Oil-Fired Electric Generating Units—March 2011.* The Panel will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

EPA's Office of Air and Radiation has requested peer review of the March 2011 draft risk assessment for mercury, entitled *Technical Support Document: National-Scale Mercury Risk Assessment Supporting the Appropriate and Necessary Finding for Coal and Oil-Fired Electric Generating Units—March 2011.* This technical document was developed to support a proposed rule concerning regulation of hazardous air pollutants (HAPs) released from coal-burning electric generating units in the United States (U.S. EGUs) under Section 112(n)(1)(A) of the Clean Air Act (CAA). This regulation may potentially use a Maximally Achievable Control Device (MACT) approach to set a technology-based standard for reducing HAP emissions.

The SAB announced this peer review and requests for public nomination of experts to serve on an *ad hoc* review panel on February 28, 2011 (76 FR 10896–10897) and March 30, 2011 (76 FR 17649–17650). Information about formation of the Mercury Review Panel can be found at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/A%26N%20Hg%20Risk%20Assessment%20TSD?OpenDocument.*

Availability of Meeting Materials: The agenda will be available on the SAB Web site at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/A%26N%20Hg%20Risk%20Assessment%20TSD?OpenDocument* in advance of the meeting.

EPA contact for background on the draft document to be reviewed: For questions concerning the development of EPA's mercury assessment, on the Web site at *http://www.epa.gov/ttn/atw/utility/pro/hg_risk_tsd_3–17–11.pdf,* please contact Dr. Zachary Pekar at (919) 541–3704 or *pekar.zachary@epa.gov.*

Procedures for Providing Public Input: Public comment for consideration by EPA's federal advisory committees and panels has a different purpose from public comment provided to EPA program offices. Therefore, the process for submitting comments to a federal advisory committee is different from the process used to submit comments to an EPA program office.

Federal advisory committees and panels, including scientific advisory committees, provide independent advice to EPA. Members of the public can submit comments for a federal advisory committee to consider as it develops advice for EPA. Input from the public to the SAB will have the most impact if it provides specific scientific or technical information or analysis for SAB panels to consider or if it relates to the clarity or accuracy of the technical information. Members of the public wishing to provide comment should contact the Designated Federal Officer for the relevant advisory committee directly. *Oral Statements:* In general, individuals or groups requesting an oral presentation at this public meeting will be limited to five minutes per speaker. Interested parties should contact Dr. Angela Nugent, DFO, in writing (preferably via e-mail), at the contact information noted above, by June 10, 2011 to be placed on the list of public speakers for the meeting.

Written Statements: Written statements should be received in the SAB Staff Office by June 10, 2011 so that the information may be made available to the Panel for their consideration. Written statements should be supplied to the DFO in electronic format via e-mail (acceptable file formats: Adobe Acrobat PDF, WordPerfect, MS Word, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP format). It is the SAB Staff Office general policy to post written comments on the Web page for the advisory meeting or teleconference. Submitters are requested to provide an unsigned version of each document because the SAB Staff Office does not publish documents with signatures on its Web sites. Members of the public should be aware that their personal contact information, if included in any written comments, may be posted to the SAB Web site. Copyrighted material will not be posted without explicit permission of the copyright holder.

Accessibility: For information on access or services for individuals with disabilities, please contact Dr. Angela Nugent at the phone number or e-mail address noted above, preferably at least ten days prior to the meeting, to give

EPA as much time as possible to process your request.

Dated: May 16, 2011.

Anthony F. Maciorowski,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2011–12598 Filed 5–20–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9309–7]

State Program Requirements; Proposal To Approve Maine's Base National Pollutant Discharge Elimination System (NPDES) Permitting Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: On August 8, 2007, the U.S. Court of Appeals for the First Circuit vacated EPA's October 31, 2003 decision to withhold the permitting of two tribally owned and operated treatment works from the Agency's approval of the State of Maine's NPDES permitting program under the Clean Water Act. Today, EPA is responding to the court's order by proposing to approve Maine's NPDES program to include the permitting of all discharges within the Indian territories of the Penobscot Nation and the Passamaquoddy Tribe.

DATES: Interested persons may submit comments on the approval of Maine's Base NPDES Permitting Program in these territories as part of the administrative record to EPA–Region 1, at the address given below, no later than midnight through July 22, 2011.

ADDRESSES: *Submit comments by one of the following methods:*

- *E-mail: Hing.Jessica@epa.gov.*
- *Mail:* Jessica Hing, USEPA–Region 1, 5 Post Office Square—OEP06–04, Boston, MA 02109–3912.

No facsimiles (faxes) will be accepted.

FOR FURTHER INFORMATION CONTACT: Additional information concerning the proposed approval of Maine's program in these territories may be obtained between the hours of 9 a.m. and 5 p.m. Monday through Friday excluding holidays from: Jessica Hing, USEPA–Region 1, 5 Post Office Square—OEP06–04, Boston, MA 02109–3912, *Telephone:* 617–918–1560, *Email: hing.jessica@epa.gov.*

SUPPLEMENTARY INFORMATION: On December 17, 1999, EPA determined that the State of Maine had submitted a complete application to administer the NPDES permitting program in the state under the Clean Water Act (CWA). 33 U.S.C. 1251, *et seq.*, see 64 FR 73552 (Dec. 30, 1999). Maine's application included an assertion of authority to implement the program in the territories of the federally-recognized Indian tribes within the state, based on the jurisdictional provisions of the Maine Indian Claims Settlement Act (MICSA), which ratified the Maine Implementing Act (MIA). 25 U.S.C. 1721, *et seq.* and 30 M.R.S.A. section 6201, *et seq.*, respectively.

On January 12, 2001, EPA approved the State of Maine's application to administer the NPDES program for all areas of the state other than Indian country. At that point EPA did not take any action on Maine's application to administer the program within the territories of the federally-recognized Indian tribes in Maine. EPA published notice of its action on February 28, 2001. 66 FR 12791. As described in the **Federal Register**, EPA approved the state's application to administer both the NPDES permit program covering point source dischargers and the pretreatment program covering industrial dischargers into publicly owned treatment works (POTWs). EPA did not authorize the state to regulate cooling water intake structures under CWA section 316(b) (33 U.S.C. 1326(b)). 66 FR at 12792.

2003 Partial Approval of Program in Indian Territories

On October 31, 2003, EPA approved the State of Maine's application to administer the NPDES program in the Indian territories of the Penobscot Indian Nation and the Passamaquoddy Tribe, with the exception of any discharges that qualified as "internal tribal matters" under MICSA and MIA. 68 FR 65052 (Nov. 18, 2003). This action generally authorized the state to administer the NPDES program in the territories of the two largest Indian tribes in the state, finding that the combination of MICSA and MIA created a unique jurisdictional arrangement that granted the state authority to issue permits to dischargers. EPA did not approve the state's program to regulate two small tribally-owned and operated POTWs. EPA determined that these POTWs qualified as internal tribal matters and, therefore, fell within an enumerated exception to the grant of jurisdiction to the state in MICSA and MIA. EPA did not take action on the state's application as it applied to the territories of the two smaller federally-recognized tribes in the state, the Houlton Band of Maliseet Indians and the Aroostook Band of Micmac Indians. These two tribes are subject to jurisdictional provisions separate from those that apply to the Penobscot and Passamaquoddy tribes. EPA's 2003 action did address all the Indian territories that included existing point source dischargers covered by the NPDES program.

Appeal and Decision in Maine v. Johnson

Several parties petitioned for judicial review of EPA's 2003 decision partially approving Maine's NPDES program in the Penobscot and Passamaquoddy Indian territories. The Penobscot Nation and Passamaquoddy Tribe challenged EPA's decision to generally approve the state to administer the program in their territories. The State of Maine and a coalition of public and private NPDES permit holders challenged EPA's decision to disapprove the state's program as to the two small tribal POTWs based on the finding that permitting those discharges qualified as an internal tribal matter.

On August 8, 2007, the U.S. Court of Appeals for the First Circuit issued its opinion in *Maine* v. *Johnson.* 498 F.3d 37. The court held that EPA had correctly determined that MICSA and MIA granted the state sufficient authority to administer the NPDES permit program in the territories of these two tribes. The court disagreed with EPA's finding, however, that permitting the two small tribal POTWs qualified as an internal tribal matter. It found that

> Discharging pollutants into navigable waters is not of the same character as tribal elections, tribal membership or other exemplars [of internal tribal matters] that relate to the structure of Indian government or the distribution of tribal property.

Id. at 46. The court affirmed EPA's approval of Maine's NPDES program, but vacated EPA's decision to withhold permitting of the two tribal POTWs, and remanded the matter back to EPA to amend the program approval consistent with its opinion. *Id.* at 48–49. The court's mandate was issued on October 2, 2007.

Program Approval To Address the Court's Remand

EPA is proposing to implement the court's order by modifying its approval of Maine's NPDES program to include the permitting of all discharges within the Indian territories of the Penobscot Nation and Passamaquoddy Tribe. Additionally, EPA does not plan to undertake a case-by-case analysis of any new discharges to determine whether they qualify as internal tribal matters under MICSA and MIA. As a result, the

state would assume responsibility from EPA for issuing and administering the permits for the Penobscot Nation Indian Island treatment works (EPA NPDES Permit No. ME 0101311 and MEPDES License No. 2672) and the Passamaquoddy Tribal Council treatment works (EPA NPDES Permit No. 1011773 and MEPDES License No. 2561). Neither tribe has applied to EPA to implement the NPDES permit program, so this proposed action would not address the question of either tribe's authority to implement the program.

This proposed action would not modify the types of activities covered by Maine's base program as EPA approved it in 2001. Thus, the state's program would not include regulation of cooling water intake structures under CWA section 316(b).

Authority: This action is proposed to be taken under the authority of Section 402 of the Clean Water Act as amended, 42 U.S.C. 1342.

Dated: May 9, 2011.

Ira W. Leighton,

Acting Regional Administrator, Region 1.

[FR Doc. 2011–12599 Filed 5–20–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collections Being Submitted for Review and Approval to the Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a currently valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before June 22, 2011. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via e-mail to *Nicholas_A._Fraser@omb.eop.gov* and to the Federal Communications Commission via e-mail to *PRA@fcc.gov* and *Cathy.Williams@fcc.gov*. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the web page *http://reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called "Currently Under Review", (3) click on the downward-pointing arrow in the "Select Agency" box below the "Currently Under Review" heading, (4) select "Federal Communications Commission" from the list of agencies presented in the "Select Agency" box, (5) click the "Submit" button to the right of the "Select Agency" box, and (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB Control Number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Cathy Williams on 202–418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0463.

Title: Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Report and Order and Declaratory Ruling, CG Docket No. 03–123, FCC 07–186.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Businesses or other for-profit entities; State, Local and Tribal Government.

Number of Respondents and Responses: 5,045 respondents and 5,210 responses.

Estimated Time per Response: 10–15 hours.

Frequency of Response: Annual reporting requirement; recordkeeping requirement; third party disclosure.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority can be found at section 225 of the Communications Act, 47 U.S.C. 225. The law was enacted on July 26, 1990, as Title IV of the Americans with Disabilities Act of 1990, Public Law 101–336, 104 Stat. 327.

Total Annual Burden: 27,397 hours.

Total Annual Cost: None.

Nature and Extent of Confidentiality: An assurance of confidentiality is not offered because this information collection does not require the collection of personally identifiable information from individuals.

Privacy Impact Assessment: No impact(s).

Needs and Uses: On November 19, 2007, the Commission released the Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Report and Order and Declaratory Ruling (2007 TRS Cost Recovery Order), CG Docket No. 03–123, FCC 07–186, adopting (1) A new cost recovery methodology for interstate traditional Telecommunications Relay Services (TRS) and interstate Speech-to-Speech (STS) based on the Multi-state Average Rate Structure (MARS) plan proposed by Hamilton Relay, Inc., (2) a new cost recovery methodology for interstate captioned telephone service (CTS) and interstate and intrastate Internet-Protocol (IP) Captioned Telephone Service (IP CTS) based on the MARS plan, (3) a cost recovery methodology for IP Relay based on price caps, and (4) a cost recovery methodology for Video Relay Services (VRS) that adopts tiered rates based on call volume. The 2007 TRS Cost Recovery Order also clarifies the nature and extent that certain categories of costs are compensable from the Interstate TRS Fund (Fund), and addresses certain issues concerning the management and oversight of the Fund, including financial incentives offered to consumers to make relay calls and the role of the Interstate TRS Fund Advisory Council.

The 2007 TRS Cost Recovery Order establishes reporting requirements associated with the MARS plan cost recovery methodology for compensation from the Fund. Specifically, TRS providers must submit to the Fund administrator the following information

annually, on a per-state basis, regarding the previous calendar year: (1) The per-minute compensation rate(s) for intrastate traditional TRS, STS and CTS, (2) whether the rate applies to session minutes or conversation minutes, (3) the number of intrastate session minutes for traditional TRS, STS and CTS, and (4) the number of intrastate conversation minutes for traditional TRS, STS, and CTS. Also, STS providers must file a report annually with the Fund administrator and the Commission on their specific outreach efforts directly attributable to the additional compensation approved by the Commission for STS outreach.

In the 2007 TRS Cost Recovery Order, the Commission has assessed the effects of imposing the submission of rate data, and has found that there is no increased administrative burden on businesses with fewer than 25 employees. The Commission recognizes that the required rate data is presently available with the states and the providers of interstate traditional TRS, interstate STS, and interstate CTS, thereby no additional step is required to produce such data.

The Commission therefore believes that the submission of the rate data does not increase an administrative burden on businesses.

OMB Control Number: 3060–0750.

Title: 47 CFR 73.671, Public Information Initiatives Regarding Educational and Informational Programming for Children.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Businesses or other for-profit entities.

Number of Respondents and Responses: 2,303 respondents; 4,215 responses.

Estimated Time per Response: 1 to 5 minutes.

Frequency of Response: Third party disclosure requirement.

Obligation to Respond: Required to obtain benefits. The statutory authority for this collection is contained in Sections 154(i) and 303 of the Communications Act of 1934, as amended.

Total Annual Burden: 30,865 hours.

Total Annual Cost: None.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: 47 CFR 73.671(c)(5) states that a core educational television program must be identified as specifically designed to educate and inform children by the display on the television screen throughout the program of the symbol E/I.

47 CFR 73.673 states each commercial television broadcast station licensee must provide information identifying programming specifically designed to educate and inform children to publishers of program guides. Such information must include an indication of the age group for which the program is intended.

These requirements are intended to provide greater clarity about broadcasters' obligations under the Children's Television Act (CTA) of 1990 to air programming "specifically designed" to serve the educational and informational needs of children and to improve public access to information about the availability of these programs. These requirements provide better information to the public about the shows broadcasters air to satisfy their obligation to provide educational and informational programming under the Children's Television Act.

OMB Control Number: 3060–XXXX.

Title: Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, Third Report and Order, FCC 11–6.

Form Number: N/A.

Type of Review: New collection.

Respondents: Business or other for-profit and state, local or tribal government.

Number of Respondents and Responses: 100 respondents; 100 responses.

Estimated Time per Response: 5 hours.

Frequency of Response: One time reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 151, 154(i), 301, 303, 332 and 337.

Total Annual Burden: 500 hours.

Total Annual Cost: None.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: In general, there is no need for confidentiality. However, petitioners may request confidential treatment of their information pursuant to 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission adopted a Third Report and Order, PS Docket No. 06–229, FCC 11–6, that requires OMB approval for a new information collection that requires public safety broadband networks to employ the Long Term Evolution (LTE) broadband standard, specifically at least 3GPP Standard E–UTRA Release 8 and associated Evolved Packet Core (EPC). The Third Report and Order further requires that these networks support certain LTE interfaces. These requirements were designed to ensure that networks operated in this spectrum band are interoperable with one another.

The Third Report and Order also requires each operator of a 700 MHz public safety broadband network to submit a certification to the Commission's Public Safety and Homeland Security Bureau (Bureau), prior to network deployment, that its network will support the required LTE interfaces. This requirement will enable the Bureau to monitor network deployment and ensure that networks are supporting the interfaces necessary to achieve interoperability.

The Commission is seeking OMB approval for this new information collection which requires operators of public safety broadband networks to submit a certification to the Commission.

Accurate maintenance of this data is vital in developing a regulatory framework for this network. Since such a network is vital for public safety and homeland security, its proper operation must be assured.

Federal Communications Commission.

Gloria J. Miles,

Federal Register Liaison, Office of the Secretary, Office of Managing Director.

[FR Doc. 2011–12529 Filed 5–20–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collections Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: The Federal Communications Commission (FCC), as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act (PRA) of 1995. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d)

ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before July 22, 2011. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via e-mail *PRA@fcc.gov mailto:PRA@fcc.gov* and to *Cathy.Williams@fcc.gov mailto:Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0854.

Title: Section 64.2401, Truth-in-Billing Format, CC Docket No. 98–170 and CG Docket No. 04–208.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Businesses or other for-profit entities.

Number of Respondents and Responses: 4,484 respondents; 34,130 responses.

Estimated Time per Response: 2 to 243 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is found at section 201(b) of the Communications Act of 1934, as amended, 47 U.S.C. 201(b), and section 258, 47 U.S.C. 258, Public Law 104–104, 110 Stat. 56. The Commission's implementing rules are codified at 47 CFR 64.2400–01.

Total Annual Burden: 3,268,988 hours.

Total Annual Cost: None.

Nature and Extent of Confidentiality: An assurance of confidentiality is not offered because this information collection does not require the collection of personally identifiable information from individuals.

Privacy Impact Assessment: No impact(s).

Needs and Uses: On March 18, 2005, the Commission released *Truth-in-Billing and Billing Format; National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing,* Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, CC Docket No. 98–170, CG Docket No. 04–208, 20 FCC Rcd 6448 (2005) (*2005 Second Report and Order and Second Further Notice*); published at 70 FR 29979 and 70 FR 30044, May 25, 2005, which determined, *inter alia,* that Commercial Mobile Radio Service providers no longer should be exempted from 47 CFR 64.2401(b), which requires billing descriptions to be brief, clear, non-misleading and in plain language. The *2005 Second Further Notice* proposed and sought comment on measures to enhance the ability of consumers to make informed choices among competitive telecommunications service providers.

OMB Control Number: 3060–0126.

Title: Section 73.1820, Station Log.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Businesses or other for-profit entities; not-for-profit institutions.

Number of Respondents and Responses: 15,200 respondents; 15,200 responses.

Estimated Time per Response: 0.017–0.5 hour.

Frequency of Response: Recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in Section 154(i) of the Communications Act of 1934, as amended.

Total Annual Burden: 15,095 hours.

Total Annual Cost: None.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: 47 CFR 73.1820 requires that each licensee of an AM, FM or TV broadcast station maintain a station log. Each entry must accurately reflect the station's operation. This log should reflect adjustments to operating parameters for AM stations with directional antennas without an approved sampling system; for all stations the actual time of any observation of extinguishment or improper operation of tower lights; and entry of each test of the Emergency Broadcast System (EBS) for commercial stations.

OMB Control Number: 3060–0390.

Title: Broadcast Station Annual Employment Report, FCC Form 395–B.

Form Number: FCC Form 395–B.

Type of Review: Extension of a currently approved collection.

Respondents: Businesses and other for-profit entities; Not-for-profit institutions.

Number of Respondents and Responses: 14,000 respondents: 14,000 responses.

Estimated Time per Response: 1 hour.

Frequency of Response: Annual reporting requirement.

Total Annual Burden: 14,000 hours.

Total Annual Costs: None.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in Sections 154(i) and 334 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: FCC Form 395–B, the "Broadcast Station Annual Employment Report," is a data collection device used by the Commission to assess industry employment trends and provide reports to Congress. By the form, broadcast licensees and permittees identify employees by gender and race/ethnicity in ten specified major job categories in the form last approved by the Office of Management and Budget ("OMB") in 2008.

Federal Communications Commission.

Gloria J. Miles,

Federal Register Liaison, Office of the Secretary, Office of Managing Director.

[FR Doc. 2011–12530 Filed 5–20–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL ELECTION COMMISSION

[Notice 2011–05]

Filing Dates for the Nevada Special Election in the 2nd Congressional District

AGENCY: Federal Election Commission.

ACTION: Notice of filing dates for special election.

SUMMARY: Nevada has scheduled a Special General Election on September 13, 2011, to fill the U.S. House seat in

the 2nd Congressional District formerly held by Senator Dean Heller.

Committees required to file reports in connection with the Special General Election on September 13, 2011, shall file a 12-day Pre-General Report, and a 30-day Post-General Report.

FOR FURTHER INFORMATION CONTACT: Mr. Kevin R. Salley, Information Division, 999 E Street, NW., Washington, DC 20463; Telephone: (202) 694–1100; Toll Free (800) 424–9530.

SUPPLEMENTARY INFORMATION:

Principal Campaign Committees

All principal campaign committees of candidates who participate in the Nevada Special General Election shall file a 12-day Pre-General Report on September 1, 2011, and a 30-day Post-General Report on October 13, 2011. (See chart below for the closing date for each report).

Note that these reports are in addition to the campaign committee's year-end filing in January 2012. (See chart below for the closing date for each report).

Unauthorized Committees (PACs and Party Committees)

Political committees filing on a semi-annual basis in 2011 are subject to special election reporting if they make previously undisclosed contributions or expenditures in connection with the Nevada Special General Election by the close of books for the applicable report(s). (See chart below for the closing date for each report).

Committees filing monthly that make contributions or expenditures in connection with the Nevada Special General Election will continue to file according to the monthly reporting schedule.

Additional disclosure information in connection with the Nevada Special Election may be found on the FEC Web site at *http://www.fec.gov/info/report_dates_2011.shtml.*

Disclosure of Lobbyist Bundling Activity

Campaign committees, party committees and Leadership PACs that are otherwise required to file reports in connection with the special elections must simultaneously file FEC Form 3L if they receive two or more bundled contributions from lobbyists/registrants or lobbyist/registrant PACs that aggregate in excess of $16,200 during the special election reporting periods (see charts below for closing date of each period). 11 CFR 104.22(a)(5)(v).

CALENDAR OF REPORTING DATES FOR NEVADA SPECIAL ELECTION

REPORT	CLOSE OF BOOKS [1]	REG./CERT. & OVERNIGHT MAILING DEADLINE	FILING DEADLINE
QUARTERLY FILING POLITICAL COMMITTEES INVOLVED IN THE SPECIAL GENERAL (09/13/11) MUST FILE			
Pre-General	08/24/11	08/29/11	09/01/11
Post-General	10/03/11	10/13/11	10/13/11
October Quarterly	——WAIVED——		
Year-End	12/31/11	01/31/12	01/31/12
SEMI–ANNUAL FILING POLITICAL COMMITTEES INVOLVED IN THE SPECIAL GENERAL (09/13/11) MUST FILE			
Pre-General	08/24/11	08/29/11	09/01/11
Post-General	10/03/11	10/13/11	10/13/11
Year-End	12/31/11	01/31/12	01/31/12

[1] These dates indicate the beginning and the end of the reporting period. A reporting period always begins the day after the closing date of the last report filed. If the committee is new and has not previously filed a report, the first report must cover all activity that occurred before the committee registered as a political committee with the Commission up through the close of books for the first report due.

Dated: May 17, 2011.

On behalf of the Commission.

Cynthia L. Bauerly,

Chair, Federal Election Commission.

[FR Doc. 2011–12523 Filed 5–20–11; 8:45 am]

BILLING CODE 6715–01–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 June 6, 2011.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Richard F. Levy,* Riverwoods, Illinois; as Trustee of the Eugene P. Heytow Trust, dated March 23, 1988, as amended, to acquire voting shares of Amalgamated Investments Company, and thereby indirectly acquire voting shares of Amalgamated Bank of Chicago, both in Chicago, Illinois.

Board of Governors of the Federal Reserve System, May 17, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–12492 Filed 5–20–11; 8:45 am]

BILLING CODE 6210–01–P

GENERAL SERVICES ADMINISTRATION

[Notice MC–2011–2; Docket No. 2011–0006; Sequence 5]

The President's Management Advisory Board (PMAB); Notification of Upcoming Public Advisory Meeting

AGENCY: Office of Executive Councils, U.S. General Services Administration (GSA).

ACTION: Meeting Notice.

SUMMARY: The President's Management Advisory Board, a Federal Advisory Committee established in accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C., App., and Executive Order 13538, will hold a public meeting on June 17, 2011.

DATES: *Effective date:* May 23, 2011.

Meeting date: The meeting will be held on Friday, June 17, 2011, beginning at 9:30 a.m. eastern time, ending no later than 1 p.m.

Addresses and Meeting Access: The PMAB will convene its meeting in the Eisenhower Executive Office Building, 1650 Pennsylvania Avenue, NW., Washington, DC. Due to security, there will be no public admittance to the Eisenhower Building to attend the meeting. However, public access to the meeting will be available via live webcast at *http://www.whitehouse.gov/live.*

FOR FURTHER INFORMATION CONTACT: Mr. Stephen Brockelman, Designated Federal Officer, President's Management Advisory Board, Office of Executive Councils, General Services Administration, 1776 G Street NW., Washington, DC 20006, at *stephen.brockelman@cxo.gov.*

SUPPLEMENTARY INFORMATION:

Agenda: The main purpose of this meeting is for the two PMAB subcommittees to discuss their work to date and receive feedback from the full PMAB. The subcommittees are examining Information Technology Management in the Federal Government, and Senior Executive Service (SES) Development and Management, for the purpose of identifying leading business practices that have the potential to improve government performance in these areas. On the PMAB Web site, a detailed meeting agenda will be available by June 16; in addition, the meeting transcript will be available after the meeting at: *http://www.whitehouse.gov/administration/advisory-boards/pmab* Information regarding changes to the agenda can be obtained from this Web site or by contacting the identified DFO. In view of the possibility that the starting time scheduled for the PMAB meeting may be adjusted, persons planning to view via webcast should check with the above Web site for time changes if such rescheduling would result in an inconvenience.

Background: The PMAB was established to provide independent advice and recommendations to the President and the President's Management Council on a wide range of issues related to the development of effective strategies for the implementation of best business practices to improve Federal Government management and operation, with a particular focus on productivity and the application of technology.

Availability of Materials for the Meeting: Please see the PMAB Web site for any available materials at *http://www.whitehouse.gov/administration/advisory-boards/pmab.*

Procedures for Providing Public Comments: In general, public statements will be posted on the White House Web site (*http://www.whitehouse.gov/administration/advisory-boards/pmab*), Non-electronic documents will be made available for public inspection and copying in PMAB offices at GSA, 1776 G Street NW., Washington, DC 20006, on official business days between the hours of 10 a.m. and 5 p.m. eastern time. You can make an appointment to inspect statements by telephoning (202) 501–1398. All statements, including attachments and other supporting materials, received are part of the public record and subject to public disclosure. Any statements submitted in connection with the PMAB meeting will be made available to the public under the provisions of the Federal Advisory Committee Act.

The public is invited to submit written statements for this meeting to the Advisory Committee prior to the meeting until June 16, 2011, by either of the following methods:

Electronic Statements: Submit written statements to Stephen Brockelman, Designated Federal Officer at *stephen.brockelman@cxo.gov;* or

Paper Statements: Send paper statements in triplicate to Stephen Brockelman at President's Management Advisory Board, Office of Executive Councils, General Services Administration, 1776 G Street, NW., Washington, DC 20006.

Dated: May 16, 2011.

Robert Flaak,

Director, Office of Committee and Regulatory Management, General Services Administration.

[FR Doc. 2011–12647 Filed 5–20–11; 8:45 am]

BILLING CODE 6820–BR–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Nomination of In Vitro Test Methods for Detection and Quantification of Botulinum Neurotoxins and Detection of Non-Endotoxin Pyrogens; Data Request for Substances Evaluated by These Test Methods

AGENCY: Division of National Toxicology Program (NTP), National Institute of Environmental Health Sciences (NIEHS), National Institutes of Health (NIH).

ACTION: Request for comments and/or data.

SUMMARY: On behalf of the Interagency Coordinating Committee on the Validation of Alternative Methods (ICCVAM), the NTP Interagency Center for the Evaluation of Alternative Toxicological Methods (NICEATM) requests public comment on nominations received for (1) Three *in vitro* test methods proposed for detecting and quantifying botulinum neurotoxin (BoNT), and (2) an *in vitro* test method proposed for detecting non-endotoxin pyrogens. NICEATM seeks data generated using alternative test methods for detecting and quantifying BoNT, including but not limited to three test methods nominated by BioSentinel Pharmaceuticals, Inc. (BioSentinel). Data from the standardized mouse LD_{50} assay currently used for these endpoints are requested for comparison. In addition, NICEATM seeks data generated using alternative test methods for identifying non-endotoxin pyrogens, including but not limited to the monocyte activation test (MAT), which was nominated by Biotest AG. Data on non-endotoxin pyrogens tested in the rabbit pyrogen test (RPT) are requested for comparison. NICEATM received nominations for validation studies on each of the above test methods, which have the potential to reduce or replace animal use for regulatory testing. At this time, ICCVAM requests public comments on the appropriateness and relative priority of these activities.

DATES: For consideration by the Scientific Advisory Committee on Alternative Toxicological Methods (SACATM) at its annual meeting (67 FR 23323), comments and data are

requested by June 2, 2011. NICEATM and ICCVAM will accept comments and data for these nominations until July 7, 2011.

FOR FURTHER INFORMATION CONTACT: Dr. Warren Casey, Deputy Director, NICEATM, NIEHS, P.O. Box 12233, *Mail Stop:* K2–16, Research Triangle Park, NC, 27709, (telephone) 919–541–2384, (fax) 919–541–0947, (e-mail) *niceatm@niehs.nih.gov. Courier address:* NICEATM, NIEHS, Room 2034, 530 Davis Drive, Morrisville, NC 27560.

SUPPLEMENTARY INFORMATION:

Nomination for the Detection and Quantification of BoNTs

In 2006, NICEATM and ICCVAM convened a workshop, *Alternative Methods to Refine, Reduce, or Replace the Mouse LD_{50} Assay for Botulinum Toxin Testing,* in response to a nomination from the Humane Society of the United States requesting that ICCVAM assess the availability of alternative methods to replace the mouse LD_{50} assay for BoNT potency testing. Workshop participants concluded that some of the methods considered could be used, in specific circumstances or in a tiered-testing strategy, to reduce or refine the use of mice in current *in vivo* BoNT testing protocols (ICCVAM, 2008a). However, none of the reviewed methods was considered suitable to serve as a complete replacement for the mouse LD_{50} assay, either for detection of BoNT or for potency determination. The workshop participants noted that some of the methods considered might be useful as replacements for the mouse LD_{50} assay in the future given additional development and validation efforts.

BioSentinel has developed tests for the detection and quantification of BoNTs. These tests include the *in vitro* BoTest™ and BoTest™ Matrix assays and the cell-based assay BoCeIl™. Following appropriate validation and demonstration of adequate performance, these methods may have the potential to meet regulatory requirements for detection and quantification of BoNTs in a range of applications.

BioSentinel has forwarded a nomination for these methods to (1) Facilitate collaboration to develop a validation strategy which could lead to the regulatory acceptance of the test methods for the detection and quantification of BoNT contained in suspect substances, the determination of drug product potency, and/or the clinical diagnosis of botulism and (2) coordinate and conduct necessary validation studies.

Nomination for the Detection of Non-Endotoxin Pyrogens

ICCVAM previously evaluated the validation status of five *in vitro* test methods proposed for assessing the potential pyrogenicity (*i.e.,* ability to induce fever) of pharmaceuticals and other products, as potential replacements for the RPT. Subsequent to this evaluation, ICCVAM recommended that, although none of the test methods should be considered as a complete replacement for the RPT for the detection of Gram-negative endotoxin, they can be considered for use to detect Gram-negative endotoxin in human parenteral drugs on a case-by-case basis, subject to product-specific validation to demonstrate equivalence to the RPT, in accordance with applicable U.S. Federal regulations (ICCVAM, 2008b). ICCVAM recognized that these test methods could be applicable for detection of a wider range of pyrogens, including non-endotoxin pyrogens, and made recommendations for future studies that could expand their applicability. In response to these recommendations, Biotest AG recently nominated a commercialized version of one of these tests (*i.e.,* MAT), which uses cryopreserved human blood and quantitates the induction of interleukin (IL)-1β, for additional validation studies to evaluate its usefulness for identifying non-endotoxin pyrogens.

Draft ICCVAM Conclusions and Recommendations

Based on the information provided by the test method sponsors, ICCVAM concludes that the nominated activities are of sufficient interest and applicability to warrant further evaluation. ICCVAM's preliminary recommendation is that both nominations should have a high priority for further discussion to assess what information is needed to adequately characterize the usefulness and limitations of the proposed test methods, and any other similar *in vitro* test methods, for these endpoints. These assessments will identify what data are needed and what studies are required to fill any data gaps that are identified. Studies identified as necessary to adequately characterize the validation status for regulatory testing purposes are proposed to have a high priority.

As part of the nomination review process, NICEATM invites public comments on these nominations and the appropriateness and relative priority assigned by ICCVAM to the nominated activities. ICCVAM will finalize its recommendations on the priority of these nominations after considering comments received from the public and SACATM, which will comment on the ICCVAM draft recommendations at its meeting on June 16–17, 2011.

Background Information on ICCVAM, NICEATM, and SACATM

ICCVAM is an interagency committee composed of representatives from 15 Federal regulatory and research agencies that require, use, generate, or disseminate toxicological and safety testing information. ICCVAM conducts technical evaluations of new, revised, and alternative safety testing methods with regulatory applicability and promotes the scientific validation and regulatory acceptance of toxicological and safety testing methods that more accurately assess the safety and hazards of chemicals and products and that reduce, refine (decrease or eliminate pain and distress), or replace animal use. The ICCVAM Authorization Act of 2000 (42 U.S.C. 285l-3) established ICCVAM as a permanent interagency committee of the NIEHS under NICEATM. NICEATM administers ICCVAM, provides scientific and operational support for ICCVAM-related activities, and conducts independent validation studies to assess the usefulness and limitations of new, revised, and alternative test methods and strategies. NICEATM and ICCVAM work collaboratively to evaluate new and improved test methods and strategies applicable to the needs of U.S. Federal agencies. NICEATM and ICCVAM welcome the public nomination of new, revised, and alternative test methods and strategies for validation studies and technical evaluations. Additional information about ICCVAM and NICEATM can be found on the NICEATM–ICCVAM Web site (*http://iccvam.niehs.vnih.gov).*

SACATM was established in response to the ICCVAM Authorization Act (Section 285l–3(d)) and is composed of scientists from the public and private sectors. SACATM advises ICCVAM, NICEATM, and the Director of the NIEHS and NTP regarding statutorily mandated duties of ICCVAM and activities of NICEATM. SACATM provides advice on priorities and activities related to the development, validation, scientific review, regulatory acceptance, implementation, and national and international harmonization of new, revised, and alternative toxicological test methods. Additional information about SACATM, including the charter, roster, and records of past meetings, can be found at *http://ntp.niehs.nih.gov/go/167.*

References

ICCVAM. 2008a. ICCVAM–NICEATM/ECVAM Scientific Workshop on Alternative Methods to Refine, Reduce, or Replace the Mouse LD_{50} Assay for Botulinum Toxin Testing. NIH Publication No. 08–6416. Research Triangle Park, NC: NIEHS. *Available: http://iccvam.niehs.nih.gov/docs/biologics-docs/BoNTwkshprept.pdf.*

ICCVAM. 2008b. ICCVAM Test Method Evaluation Report: Validation Status of Five *In Vitro* Test Methods Proposed for Assessing Pyrogenicity of Pharmaceuticals and Other Products. NIH Publication No. 08– 6392. Research Triangle Park, NC: NIEHS. *Available: http://iccvam.niehs.nih.gov/methods/pyrogen/pyr_tmer.htm.*

Dated: May 16, 2011.

John R. Bucher,

Associate Director, National Toxicology Program.

[FR Doc. 2011–12627 Filed 5–20–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60-Day–11–0576]

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 and send comments to Daniel Holcomb, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Possession, Use, and Transfer of Select Agents and Toxins (OMB Control No. 0920–0576)—Revision—Office of Public Health Preparedness and Response (OPHPR), Division of Select Agents and Toxins, Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The *Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Subtitle A of Public Law 107–188 (42 U.S.C. 262a*), requires the United States Department of Health and Human Services (HHS) to regulate the possession, use, and transfer of biological agents or toxins (i.e., select agents and toxins) that could pose a severe threat to public health and safety. The *Agricultural Bioterrorism Protection Act of 2002, Subtitle B of Public Law 107–188 (7 U.S.C. 8401),* requires the United States Department of Agriculture (USDA) to regulate the possession, use, and transfer of biological agents or toxins (*i.e.,* select agents and toxins) that could pose a severe threat to animal or plant health, or animal or plant products. In accordance with these Acts, HHS and USDA promulgated regulations requiring entities to register with the CDC or the Animal and Plant Health Inspection Service (APHIS) if they possess, use, or transfer a select agent or toxin (42 CFR part 73, 7 CFR part 331, and 9 CFR part 121).

CDC is requesting continued OMB approval to collect this information through the use of five forms: (1) Application for Registration, (2) Request to Transfer Select Agent or Toxin, (3) Report of Theft, Loss, or Release of Select Agent and Toxin, (4) Report of Identification of Select Agent or Toxin, and (5) Request for Exemption. There have been no new select agent program forms added to this information collection request. The current versions of the standard forms have been revised to: (1) Reduce the burden expended by the regulated entities and CDC by removing similar questions, (2) enhance clarification of the transfer process, (3) determine the level of potential exposure, and (4) improve surveillance methods for monitoring the reports of select agents and toxins identified by registered entities. In addition to the standardized forms listed above, requests for expedited reviews, administrative reviews and inspections are also submitted to CDC. There is not a standardized form for the request for expedited review, administrative review and inspections. Therefore, an entity must submit a written request to the Secretary of Health and Human Services, by way of the Attorney General for expedited reviews (42 CFR 73.10(e)) and exclusions of an attenuated strain of a select agent or toxin that does not pose a severe threat to public health and safety (42 CFR 73.3(e)(1) and 73.4(e)(1)). Inspections take place prior to issuance of a certificate of registration to ensure compliance with regulation 42 CFR 73.18. Following the inspection an entity may be asked to respond to written requests and submits the documentation to CDC.

Entities may also amend their registration (42 CFR, 73.7(h)(1)) if any changes occur to the information previously submitted. When applying for an amendment to a certificate of registration, an entity must obtain and complete the relevant portion of the application package.

The total estimated annualized burden for all data collection is 8,878 hours. Information will be collected via fax, email and mail from respondents of the 320 entities registered with the Select Agent Program. There is no cost to the respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

CFR	Form name	Number of respondents	Number of responses per respondent	Average burden per response	Total burden hours
73.3(d)	Application for Registration	5	1	4.5	23
73.7(h)(1)	Amendment to Registration Application.	320	8	1	2,560
73.16	Request to Transfer Select Agents or Toxins.	320	1	1.5	480

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

CFR	Form name	Number of respondents	Number of responses per respondent	Average burden per response	Total burden hours
73.19(a)(b)	Notification of Theft, Loss or Release.	180	1	1	180
73.5 & 73.6(a)(b)	Report of Identification of Select Agent.	320	9	1	2,880
73.5 & 73.6(d–e)	Request of Exemption	3	1	1	3
73.3 & 73.4(e)(1)	Request for Exclusions/Restricted	71	1	1	71
73.10(e)	Request for Expedited Review	1	1	1	1
73.20	Administrative Review	30	1	4	120
73.18	Inspections	320	1	8	2,560
Total					8,878

Dated: May 17, 2011.

Daniel Holcomb,

Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2011–12571 Filed 5–20–11; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Advisory Committee on Immunization Practices (ACIP)

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 for the aforementioned committee:

Time and Date

8 a.m.–6 p.m., June 22, 2011.
8 a.m.–4 p.m., June 23, 2011.

Place: CDC, Tom Harkin Global Communications Center, 1600 Clifton Road, NE., Building 19, Kent "Oz" Nelson Auditorium, Atlanta, Georgia 30333.

Status: Open to the public, limited only by the space available.

Purpose: The committee is charged with advising the Director, CDC, on the appropriate uses of immunizing agents. In addition, under 42 U.S.C. 1396s, the committee is mandated to establish and periodically review and, as appropriate, revise the list of vaccines for administration to vaccine-eligible children through the Vaccines for Children (VFC) program, along with schedules regarding the appropriate periodicity, dosage, and contraindications applicable to the vaccines.

Matters To Be Discussed: The agenda will include discussions on: human papillomavirus vaccines, pertussis, meningococcal vaccine, influenza, febrile seizures related to vaccine administration, herpes zoster vaccine, 13-valent pneumococcal conjugate vaccine (PCV13), new MMR Vaccine Work Group, two dose varicella vaccination and hepatitis B vaccine.

Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Stephanie B. Thomas, National Center for Immunization and Respiratory Diseases, CDC, 1600 Clifton Road, NE., (E–05), Atlanta, Georgia 30333, Telephone: (404)639–8836, Fax: (404)639–8905, E-mail: *acip@cdc.gov.*

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention, and the Agency for Toxic Substances and Disease Registry.

Dated: May 16, 2011.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2011–12563 Filed 5–20–11; 8:45 am]

BILLING CODE 4160–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Advisory Committee to the Director (ACD), Centers for Disease Control and Prevention (CDC)—Ethics Subcommittee (ES)

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 subcommittee:

TIMES AND DATES:

1 p.m.–5 p.m., June 16, 2011
8:30 a.m.–12:30 p.m., June 17, 2011

PLACE: CDC, Thomas R. Harkin Global Communications Center, Distance Learning Auditorium, 1600 Clifton Road, NE., Atlanta, Georgia 30333. This meeting is also available by teleconference. Please dial (877) 928–1204 and enter code 4305992.

STATUS: Open to the public, limited only by the space available. The meeting room accommodates approximately 60 people. To accommodate public participation in the meeting, a conference telephone line will be available. The public is welcome to participate during the public comment. The public comment periods are tentatively scheduled from 4 p.m.–4:15 p.m. on June 16, 2011 and from 12 p.m.–12:15 p.m. on June 17, 2011.

PURPOSE: The ES will provide counsel to the ACD, CDC, regarding a broad range of public health ethics questions and issues arising from programs, scientists and practitioners.

MATTER TO BE DISCUSSED: Agenda items will include the following: An update on ES presentation during the April 28, 2011, ACD, CDC meeting; discussion of next steps on addressing potential public health ethical issues associated with implementation of effective preventive interventions for noncommunicable disease; and review of workgroup progress on developing practical tools to assist state, tribal, local, and territorial health departments in their efforts to address public health ethics challenges. The agenda is subject to change as priorities dictate.

CONTACT PERSON FOR MORE INFORMATION: For security reasons, members of the public interested in attending the meeting should contact Drue Barrett, PhD, Designated Federal Officer, ACD, CDC–ES, 1600 Clifton Road, NE., M/S D–50, Atlanta, Georgia 30333. Telephone (404) 639–4690. E-mail: *dbarrett@cdc.gov.* The deadline for

notification of attendance is June 10, 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: May 16, 2011.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2011–12562 Filed 5–20–11; 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 Centers for Agricultural Disease and Injury Research, Education, and Prevention, Program Announcement (PA) Number PAR–11–022, 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.–6:30 p.m., June 6, 2011 (Closed)

8 a.m.–6:30 p.m., June 7, 2011 (Closed)

8 a.m.–6:30 p.m., June 8, 2011 (Closed)

8 a.m.–6:30 p.m., June 9, 2011 (Closed)

8 a.m.–6:30 p.m., June 10, 2011 (Closed)

Place: Doubletree by Hilton Philadelphia Center City, 237 S. Broad Street, Philadelphia, Pennsylvania 19107.

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 "Centers for Agricultural Disease and Injury Research, Education, and Prevention, PAR–11–022, initial review."

Contact Person for More Information: M. Chris Langub, PhD, Scientific Review Officer, Office of Extramural Programs, 1600 Clifton Road, NE., Mailstop E74, Atlanta, Georgia 30333, Telephone: (404) 498–2543.

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: May 16, 2011.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2011–12561 Filed 5–20–11; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Healthcare Infection Control Practices Advisory Committee (HICPAC)

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 for the aforementioned committee:

TIMES AND DATES:

9 a.m.–5 p.m., June 16, 2011.

9 a.m.–12 p.m., June 17, 2011.

PLACE: CDC, Global Communications Center, Building 19, Auditorium B3, 1600 Clifton Road, NE., Atlanta, Georgia, 30333.

STATUS: Open to the public, limited only by the space available. Please register for the meeting at *http://www.cdc.gov/hicpac.*

PURPOSE: The Committee is charged with providing advice and guidance to the Secretary, the Assistant Secretary for Health, the Director, CDC, the Director, National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), and the Director, Division of Healthcare Quality Promotion regarding (1) The practice of healthcare infection control; (2) strategies for surveillance, prevention, and control of infections (e.g., nosocomial infections), antimicrobial resistance, and related events in settings where healthcare is provided; and (3) periodic updating of guidelines and other policy statements regarding prevention of healthcare-associated infections and healthcare-related conditions.

MATTERS TO BE DISCUSSED: The agenda will include updates on CDC's activities for healthcare associated infections; draft guidelines for prevention of infections among patients in neonatal intensive care units (NICU); draft guidelines for infection control in healthcare personnel; draft guidelines for the prevention of surgical site infections; update from the HICPAC surveillance working group; and discussion of a draft infection control worksheet for acute-care hospitals. Agenda items are subject to change as priorities dictate.

CONTACT PERSON FOR MORE INFORMATION: Heidi Williams, HICPAC, Division of Healthcare Quality Promotion, NCEZID, CDC, l600 Clifton Road, NE., Mailstop A–07, Atlanta, Georgia 30333, Telephone (404) 639–4227. Email: *hicpac@cdc.gov.*

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: May 16, 2011.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2011–12560 Filed 5–20–11; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Office of Planning, Research and Evaluation; Advisory Committee on Head Start Research and Evaluation

AGENCY: Administration for Children and Families, Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: This notice announces a forthcoming meeting of a public advisory committee of the Administration for Children and Families (ACF). The meeting will be open to the public.

Name of Committee: Advisory Committee for Head Start Research and Evaluation.

General Function of Committee: The Advisory Committee for Head Start Research and Evaluation will provide feedback op the published final report for the Head Start Impact Study, offering interpretations of the findings, discussing implications for practice and policy, and providing recommendations on follow-up research, including additional analysis of the Head Start Impact Study data. The Committee will also be asked to provide recommendations to the Secretary regarding how to improve Head Start and other early childhood programs by enhancing the use of research-informed practices in early childhood. Finally, the Committee will be asked to provide recommendations on the overall Head Start research agenda, including—but not limited to—how the Head Start Impact Study fits within this agenda. The Committee will provide advice regarding future research efforts to inform HHS about how to guide the development and implementation of best practices in Head Start and other early childhood programs around the country.

DATES: The meeting will be held from 8:30 a.m. to 5 p.m. on June 7–8, 2011.

ADDRESSES: The Madison Hotel, 1177 15th Street, NW., Washington, DC 20005. Phone: (202) 862–1600.

FOR FURTHER INFORMATION CONTACT: Jennifer Brooks, Office of Planning, Research, and Evaluation, e-mail *jennifer.brooks@acf.hhs.gov* or call (202) 205–8212.

Agenda: The Committee will review information on the Federal and Early Head Start programs and the children and families they serve, and learn about the latest research in the area of patent, family, and community engagement and other topic areas related to early childhood education and development.

Procedure: Interested persons may present data, information or views, in writing, on issues pending before the Committee. Written submissions may be made to the contact person on or before May 24, 2011. All written materials provided to the contact person will be shared with the Committee members.

ACF welcomes the attendance of the public at this advisory committee meeting and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Jennifer Brooks at least seven days in advance of the meeting. Information about the Committee and this meeting can be found at the Committee Web site, *http://www.acfhhs.gov/prosrams/opre/hs/advisory_com/.*

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: May 4, 2011.

David A. Hansell,

Acting Assistant Secretary for Children and Families.

[FR Doc. 2011–12370 Filed 5–20–11; 8:45 am]

BILLING CODE M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0001]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Health and Diet Survey

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by June 22, 2011.

ADDRESSES: 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: FDA 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 0910–0545. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Jr., Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3793.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Health and Diet Survey—(OMB Control Number 0910–0545)—Extension

FDA is seeking extension of OMB approval for the Health and Diet Survey, which is a voluntary consumer survey intended to gauge and track consumer attitudes, awareness, knowledge, and behavior regarding various topics related to health, nutrition, and physical activity. The authority for FDA to collect the information derives from FDA's Commissioner of Food and Drugs authority provided in section 903(d)(2) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 393(d)(2)).

The survey consists of two independent data collection activities. One collection, entitled "Health and Diet Survey—General Topics," tracks a broad range of consumer attitudes, awareness, knowledge, and self-reported behaviors related to key diet and health issues. The other collection, entitled "Health and Diet Survey—*Dietary Guidelines* Supplement," will provide FDA with updated information about consumer attitudes, awareness, knowledge, and behavior regarding various elements of nutrition and physical activity based on the key recommendations of the *Dietary Guidelines for Americans,* which are jointly issued by the Department of Health and Human Services and the U.S. Department of Agriculture every 5 years.

The information to be collected with the Health and Diet Survey—General Topics will include: (1) Awareness of diet-disease relationships, (2) food and dietary supplement label use, (3) dietary practices including strategies to lose or maintain weight, and (4) awareness and knowledge of dietary fats. This survey has been repeated approximately every 3 years over the course of the past several years for the purpose of tracking changes and trends in public opinions and consumer behavior, with some new questions added or omitted or partially modified each iteration in response to current events. In the next 3 years, FDA plans to field the Health and Diet Survey—General Topics in 2012 and anticipates that it might have the need for additional iterations in 2014. The information to be collected with the Health and Diet Survey—*Dietary Guidelines* Supplement will include: (1) Awareness and sources of information, (2) attitudes toward diet and physical activity, and (3) practice and knowledge related to recommended behaviors. The survey will also ask about perceptions and use of Federal nutrition information, special diet, weight status, health status, and demographics. In the next 3 years, FDA anticipates to field the Health and Diet Survey—*Dietary Guidelines* Supplement in 2011–2012.

FDA and other Federal Agencies will use the information from the Health and Diet Survey to evaluate and develop strategies and programs to encourage

and help consumers adopt healthy lifestyles. The information will also help FDA and other Federal Agencies evaluate and track consumer awareness and behavior as outcome measures of their achievement in improving public health.

Description of Respondents: The respondents are adults, age 18 and older, drawn from the 50 States and the District of Columbia. Participation will be voluntary.

FDA bases its estimate of the number of respondents and the hours per response on its experience with previous Health and Diet Surveys. Prior to the administration of the Health and Diet Survey—General Topics, the Agency plans to conduct a pretest to identify and resolve potential problems. The pretest will be conducted with 27 participants; we estimate that it will take a respondent 15 minutes (0.25 hours) to complete the pretest, for a total of 6.75 hours, rounded to 7. The Agency will use a screener to select an eligible adult respondent in each household to participate in the survey. For the Health and Diet Survey—General Topics data collection activity, a total of 10,000 individuals in the 50 States and the District of Columbia will be screened by telephone. We estimate that it will take a respondent 1 minute (0.02 hours) to complete the screening, for a total of 200 hours. We estimate that 3,000 eligible adults will participate in the survey, each taking 15 minutes (0.25 hours), for a total of 750 hours. For the Health and Diet Survey—*Dietary Guidelines* Supplement data collection activity, 4,000 individuals in the 50 States and the District of Columbia will be screened by telephone. We estimate that it will take a respondent 1 minute (0.02 hours) to complete the screening questions, for a total of 80 hours. Of these respondents, 1,200 will complete the survey. We estimate that it will take a respondent 13 minutes (0.22 hours) to complete the entire survey, for a total of 264 hours. Thus, the total estimated burden is 1,301 hours.

In the **Federal Register** of January 7, 2011 (76 FR 1168), FDA published a 60-day notice requesting public comment on the proposed collection of information. FDA received two comments in response to the 30-day notice. The letters contained comments outside the scope of the four collection of information topics on which the notice solicits comments and, thus, will not be addressed here.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response (in hours) [2]	Total hours
General Topics: Pretest	27	1	27	15/60	7
General Topics: Screener	10,000	1	10,000	1/60	200
General Topics: Survey	3,000	1	3,000	15/60	750
Dietary Guidelines Supplement: Screener	4,000	1	4,000	1/60	80
Dietary Guidelines Supplement: Survey	1,200	1	1,200	13/60	264
Total					1,301

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Burden estimates of less than 1 hour are expressed as a fraction of an hour in the form "[number of minutes per response]/60".

Dated: May 12, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–12554 Filed 5–20–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0345]

Agency Information Collection Activities; Proposed Collection; Comment Request; Experimental Study on Consumer Responses to Nutrition Facts Labels With Various Footnote Formats and Disclosure of Amounts of Vitamins and Minerals

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information and to allow 60 days for public comment in response to the notice. This notice solicits comments on a study entitled "Experimental Study on Consumer Responses to Nutrition Facts Labels With Various Footnote Formats and Disclosure of Amounts of Vitamins and Minerals."

DATES: Submit either electronic or written comments on the collection of information by July 22, 2011.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov.* Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Jr., Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3793.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether

the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA'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 respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

I. Experimental Study on Consumer Responses to Nutrition Facts Labels With Various Footnote Formats and Disclosure of Amounts of Vitamins and Minerals—(OMB Control Number 0910-New)

Under the Nutrition Labeling and Education Act of 1990 (Pub. L. 101–535), the Nutrition Facts label is required on most packaged foods, and this information must be provided in a specific format in accordance with the provisions of § 101.9 (21 CFR 101.9). When FDA was determining which Nutrition Facts label format to require, the Agency undertook consumer research to evaluate alternatives (Refs. 1 through 3). More recently, FDA conducted qualitative consumer research on the format of the Nutrition Facts label on behalf of the Agency's Obesity Working Group (Ref. 4), which was formed in 2003 and tasked with outlining a plan to help confront the problem of obesity in the United States (Ref. 5). In addition to conducting consumer research, in the **Federal Register** of November 2, 2007 (72 FR 62149) FDA issued an advance notice of proposed rulemaking (ANPRM) entitled, "Food Labeling: Revision of Reference Values and Mandatory Nutrients" (the 2007 ANPRM), which requested comments on a variety of topics related to a future proposed rule to update the presentation of nutrients and content of nutrient values on food labels. In the 2007 ANPRM, the Agency included a request for comments on how consumers use the percent Daily Value in the Nutrition Facts label when evaluating the nutritional content of food items and making purchases.

Research has suggested that consumers use the Nutrition Facts label in various ways, including, but not limited to, using the Nutrition Facts label to determine if products are high or low in a specific nutrient and to compare products (Ref. 6). One component of the Nutrition Facts label that serves as an aid in these uses is the percent Daily Value. Early consumer research indicated that the percent Daily Value format improved consumers' abilities to make correct dietary judgments about a food in the context of a total daily diet (Ref. 3), which led FDA to require both quantitative and percentage declarations of nutrient daily values in the Nutrition Facts label in the 1993 Nutrition Labeling final rule (58 FR 2079, January 6, 1993).

Research in subsequent years, however, suggested that consumers' understanding and use of percent Daily Value may be somewhat inconsistent (Refs. 7 and 8). Additionally, FDA has received several public comments suggesting that further research on percent Daily Values may be warranted, along with research on other modifications to the Nutrition Facts label. Suggested research on potential modifications includes research on: (1) The removal of the statements, "Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs"; (2) the removal of the table in the footnote that lists the Daily Values for total fat, saturated fat, cholesterol, sodium, total carbohydrate, and dietary fiber based on 2,000 and 2,500 calorie diets as described in § 101.9(d)(9); and (3) changes to the presentation of and amount of information provided in the Nutrition Facts label. Therefore, FDA, as part of its effort to promote public health, proposes to use this study to explore consumer responses to various food label formats for the footnote area of the Nutrition Facts label, including those that exhibit information such as various definitions for percent Daily Value and general guidelines for high and low nutrient levels. In addition, the Agency will use this study to explore consumer responses to inclusion of weight amount information in the declaration of vitamins and minerals described in § 101.9(c)(8)(ii) (i.e., vitamin A, vitamin C, calcium, and iron), which may have potential health value to consumers (Ref. 9).

The proposed collection of information is a controlled, randomized, experimental study. The study will use a Web-based survey, which will take about 15 minutes to complete, to collect information from 10,000 English-speaking adult members of an online consumer panel maintained by a contractor. The study will aim to recruit a sample that reflects the U.S. Census on gender, education, age, and ethnicity/race.

The study will randomly assign each of its participants to view a total of three label images from a set of food labels that will be created for the study and systematically varied in the presence or absence of the following items: (1) A definition for percent Daily Value, (2) a general guideline for "high" and "low" nutrient levels, and (3) weight amounts for vitamins and minerals. Various definitions for percent Daily Value may include, for example, "The percent Daily Value is the amount of a nutrient listed above that one serving of this product contributes to the daily diet"; "The percent Daily Value is the amount of a nutrient listed above that one serving of this product contributes to what you eat in a day"; and "The percent Daily Value is the amount of a nutrient listed above that one serving of this product contributes to a 2,000 calorie diet." A sample guideline for high and low nutrient levels may include, for example, "A percent Daily Value that is 5 percent or less is low, and 20 percent or more is high." To correspond with FDA's other experimental study of Nutrition Facts label formats described in the November 17, 2010, **Federal Register** (75 FR 70266), this study will evaluate performance of the footnote statements in combination with single and dual column labeling. Finally, the study will also examine effects of including reference to FDA within the Nutrition Facts footnote. All label images will be mock-ups resembling food labels that may be found in the marketplace. Images will show product identity (e.g., potato chips), but not any real or fictitious brand name.

The survey will ask its participants to view label images and answer questions about their understanding, perceptions, and reactions related to the viewed label. The study will focus on the following types of consumer reactions: (1) Judgments about a food product in terms of its nutritional attributes and overall healthiness; (2) ability to use the Nutrition Facts label to, for example, compare products and calculate the number of servings of a product needed to meet nutritional objectives; and (3) label perceptions (*e.g.,* helpfulness and credibility). To help understand consumer reactions, the study will also collect information on participants' background, including but not limited to use of the Nutrition Facts label and health status.

The study is part of the Agency's continuing effort to enable consumers to make informed dietary choices and construct healthful diets. Results of the study will be used primarily to enhance the Agency's understanding of how various potential modifications to the Nutrition Facts label may affect how consumers perceive a product or a label,

which may in turn affect their dietary choices. Results of the study will not be used to develop population estimates.

To help design and refine the questionnaire, FDA plans to conduct cognitive interviews by screening 72 panelists in order to obtain 9 participants in the interviews. Each screening is expected to take 5 minutes (0.083 hour) and each cognitive interview is expected to take 1 hour. The total for cognitive interview activities is 15 hours (6 hours + 9 hours). Subsequently, we plan to conduct pretests of the questionnaire before it is administered in the study. We expect that 1,600 invitations, each taking 2 minutes (0.033 hour), will need to be sent to panelists to have 200 of them complete a 15-minute (0.25 hour) pretest. The total for the pretest activities is 103 hours (53 hours + 50 hours). For the survey, we estimate that 80,000 invitations, each taking 2 minutes (0.033 hour) to complete, will need to be sent to the consumer panel to have 10,000 of its members complete a 15-minute (0.25 hour) questionnaire. The total for the survey activities is 5,140 hours (2,640 hours + 2,500 hours). Thus, the total estimated burden is 5,258 hours. FDA's burden estimate is based on prior experience with research that is similar to this proposed study.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response (in hours) [2]	Total hours
Cognitive interview screener	72	1	72	5/60	6
Cognitive interview	9	1	9	1	9
Pretest invitation	1,600	1	1,600	2/60	53
Pretest	200	1	200	15/60	50
Survey invitation	80,000	1	80,000	2/60	2,640
Survey	10,000	1	10,000	15/60	2,500
Total					5,258

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Burden estimates of less than 1 hour are expressed as a fraction of an hour in the format "[number of minutes per response]/60".

II. References

The following references are on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Levy, A.S., Fein, S.B., and Schucker, R.E. "Nutrition Labeling Formats: Performance and Preference," *Food Technology*, 45: 116–121, 1991.
2. Levy, A.S., Fein, S.B., and Schucker, R.E. "More Effective Nutrition Label Formats Are Not Necessarily Preferred," *Journal of the American Dietetic Association*, 92: 1230–1234, 1992.
3. Levy, A.S., Fein, S.B., and Schucker, R.E. "Performance Characteristics of Seven Nutrition Label Formats," *Journal of Public Policy and Marketing*, 15: 1–15, 1996.
4. Lando, A.M. and Labiner-Wolfe, J. "Helping Consumers to Make More Healthful Food Choices: Consumer Views on Modifying Food Labels and Providing Point-of-Purchase Nutrition Information at Quick-Service Restaurants," *Journal of Nutrition Education and Behavior*, 39: 157–163, 2007.
5. U.S. Food and Drug Administration. *Calories Count: Report of the Working Group on Obesity*, 2004, available at *http://www.fda.gov/Food/LabelingNutrition/ReportsResearch/ucm081696.htm.*
6. U.S. Food and Drug Administration. "2008 Health and Diet Survey—Preliminary Topline Frequencies (Weighted)," 2010, available at *http://www.fda.gov/Food/ScienceResearch/ResearchAreas/ConsumerResearch/ucm193895.htm.*
7. Li, F., Miniard, P.W., and Barone, M.J. "The Facilitating Influence of Consumer Knowledge on the Effectiveness of Daily Value Reference Information," *Journal of the Academy of Marketing Science*, 28: 425–436, 2000.
8. Levy, L., Patterson, R.E., Kristal, A.R., and Li, S.S. "How Well Do Consumers Understand Percentage Daily Value on Food Labels?" *American Journal of Health Promotion*, 14: 157–160, 2000.
9. Institute of Medicine. *Dietary Reference Intakes: Guiding Principles for Nutrition Labeling and Fortification.* Washington, DC: National Academies Press, 2003.

Dated: May 16, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–12556 Filed 5–20–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0640]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Data To Support Food and Nutrition Product Communications, as Used by the Food and Drug Administration

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by June 22, 2011.

ADDRESSES: 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: FDA 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 0910–NEW and title "Data to Support Food and Nutrition Product Communications, as Used by the Food and Drug Administration." Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Jr., Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3793.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Data To Support Food and Nutrition Product Communications, as Used by the Food and Drug Administration—(OMB Control Number 0910–NEW)

FDA plans to use the data collected under this generic clearance to inform its nutrition and foods communications campaigns. FDA expects the data to guide the formulation of its food and nutrition communication objectives. FDA also plans to use the data to help tailor print, broadcast, and use electronic media communications in order for them to have powerful and desired impacts on target audiences. The data will not be used for the purposes of making policy or regulatory decisions.

The information collected will serve two major purposes. First, as formative research, it will provide the critical knowledge needed about target audiences. FDA must explore audiences' beliefs, perceptions, and decisionmaking processes about nutrition and food consumption in order to formulate the basic objectives of its risk communication campaigns. Such knowledge will provide the needed target audience understanding to design effective communication strategies, messages, and product labels. These communications will aim to improve public understanding of the risks and benefits of consuming certain foods or nutritional products by providing users with a better context in which to place risk information more completely.

Second, as initial testing, it will give FDA some information about the potential effectiveness of messages and materials in reaching and successfully communicating with their intended audiences. Testing messages with a sample of the target audience will allow FDA to refine messages while still in the developmental stage. Respondents may be asked to give their reaction to the messages in individual or group settings.

FDA's Center of Food Safety and Applied Nutrition, Office of the Commissioner, and other Centers or Offices will use this mechanism to test messages about regulated food and nutrition products on a variety of subjects related to consumer, patient, or health care professional perceptions and use of foods and related materials, including but not limited to, food advertising, food and nutrition labeling, emerging risk communications, online sales of food products, and consumer and professional education. The data will not be used for the purposes of making policy or regulatory decisions.

In the **Federal Register** of December 29, 2010 (75 FR 82030), FDA published a 60-day notice requesting public comment on the proposed collection of information. FDA received one comment. It complimented the data collection tools that FDA proposed to use within this clearance and suggested use of newer technologies to improve data collection. It also noted that automated survey data collection (audio computer-assisted self interview, for example) does not reduce respondent burden, which FDA acknowledges. The other parts of the comment were beyond the scope of the questions asked in the 60-day **Federal Register** notice.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response (in hours) [2]	Total hours
Individual indepth interviews	360	1	360	45/60	270
General public focus group interviews	144	1	144	1 30/60	216
Intercept interviews:					
Central location	600	1	600	15/60	150
Intercept interviews:					
Telephone	10,000 [3]	1	10,000	5/60	800
Self-Administered surveys	2,400	1	2,400	15/60	600
Gatekeeper reviews	400	1	400	30/60	200
Omnibus surveys	2,400	1	2,400	10/60	408
Total (General public)	16,304		16,304		2,644
Total Physician focus group interviews	144	1	144	1 30/60	216
Total (Overall)					2,860

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Burden estimates of less than 1 hour are expressed as a fraction of an hour in the format "[number of minutes per response]/60".
[3] Brief interviews with callers to test messages, concepts, and strategies following their call-in request to an FDA Center 1–800 number.

Annually, FDA projects about 30 communication studies using the variety of test methods listed in table 1. FDA is requesting this burden so as not to restrict the Agency's ability to gather information on public sentiment for its proposals in its regulatory and communications programs.

Dated: May 17, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–12557 Filed 5–20–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0307]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Antiparasitic Resistance and Combination New Animal Drugs Survey

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (the PRA).

DATES: Fax written comments on the collection of information by June 22, 2011.

ADDRESSES: 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: FDA 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 0910–NEW and title "Antiparasitic Resistance and Combination New Animal Drugs Survey." Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Juanmanuel Vilela, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–7651, *juanmanuel.vilela@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Antiparasitic Resistance and Combination New Animal Drugs Survey—(OMB Control Number 0910–NEW)

Resistance of parasites to one or more of the major classes of FDA approved antiparasitic drugs is a documented problem in cattle, horses, sheep, and goats in the United States. Further, FDA is aware that there are differing scientific opinions on the impact of the use of multiple antiparasitic drugs at the same time on the development of resistance to these drugs. The results from this survey will assist FDA in regulating antiparasitic drugs. FDA will also share their results with the veterinary parasitology community.

FDA plans to survey scientists and veterinarians with expertise in veterinary parasitology using a Web-based tool. The questions in the survey are designed to elicit expert opinions and clarify areas of agreement and disagreement within the veterinary parasitology community. The survey will query subjects on topics such as: (1) Concurrent use of multiple antiparasitic drug products, (2) recommended tests to detect and monitor for antiparasitic resistance, (3) characteristics of combination antiparasitic drug products that may either slow or enhance the selection for multidrug resistant parasites, and (4) regulatory considerations regarding combination antiparasitic drugs.

In the **Federal Register** of July 13, 2010 (75 FR 39948), FDA published a 60-day notice requesting public comment on the proposed collection of information. FDA received five comments (all from the same source).

(Comment 1) The first comment stated that any conclusions drawn from a survey that includes a diversity of opinion and conjecture would not be appropriate or adequate to develop the Agency's position with respect to the regulation of antiparasitic drugs. The Agency should instead consult with appropriate experts in the field to develop an appropriate science-based strategy.

(Center for Veterinary Medicine's (CVM's) Response) The proposed information collection is only one part of a strategy to compile scientific data on the subject of antiparasitic resistance and combinations. It is not the sole method by which the Agency will make any regulatory decisions. The other parts of the strategy include gathering information from scientific meetings, consultation with outside experts, and a comprehensive literature search and evaluation. The information collection allows the Agency to gauge the awareness of the issues and affords a broader audience with an opportunity to provide scientific information to the Agency about the current state of antiparasitic resistance, the use patterns of combinations of antiparasitic drugs, and measures being employed in the field to detect and curtail antiparasitic resistance.

(Comment 2) The second comment requested that FDA publish the survey questions in the **Federal Register** for comment prior to finalizing them for the pretest and the actual survey.

(CVM's Response) In accordance with the PRA and the requirements of OMB, FDA will publish the survey questions as part of a 30-day notice in the **Federal Register**, and the public will have the opportunity to comment.

(Comment 3) The third comment requested that FDA comment on how FDA will decide who to survey.

(CVM's Response) FDA will offer the Web-based survey to scientists and veterinarians with parasitology experience. Professional organizations that FDA will notify of the availability of the survey include the American Veterinary Medical Association, American Academy of Veterinary Pharmacology and Therapeutics, American College of Veterinary Internal Medicine, American Association of Veterinary Parasitologists, World Association for the Advancement of Veterinary Parasitology, American Association of Bovine Practitioners, American Association of Equine Practitioners, American Association of Small Ruminant Practitioners, and the Veterinary Information Network. Additional organizations may be invited as appropriate.

(Comment 4) The fourth comment requested that FDA comment on who will review and compile the survey results.

(CVM's Response) Veterinarians and other scientists from CVM will review and compile the survey results.

(Comment 5) The fifth comment requested that FDA comment on how FDA plans to publish the results and how they will be made public.

(CVM's Response) FDA plans to present a summary of the information collection at a scientific forum widely available to the veterinary parasitology community.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Portion of study	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response (in hours) [2]	Total hours
Pretest	5	1	5	20/60	1.65
Survey	100	1	100	20/60	33
Total					34.65

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Burden estimates of less than 1 hour are expressed as a fraction of an hour in the format "[number of minutes per response]/60".

FDA calculated the total annual responses by multiplying the number of respondents by the annual frequency. FDA calculated the total hours by multiplying the estimated hours per response (20 minutes = 0.33 hours) by the number of respondents.

Dated: May 12, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–12555 Filed 5–20–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0327]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by June 22, 2011.

ADDRESSES: 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: FDA 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 0910–New and title "Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery." Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3794, *Jonnalynn.Capezzuto@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery—(OMB Control Number 0910—NEW)

The proposed information collection activity provides a means to garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery.

By qualitative feedback, we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences, and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training, or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative, and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

The solicitation of feedback will target areas such as: Timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on the Agency's services will be unavailable.

The Agency will only submit a collection for approval under this generic clearance if it meets the following conditions:

- The collections are voluntary;
- The collections are low burden for respondents (based on considerations of total burden hours, total number of respondents, or burden hours per respondent) and are low cost for both the respondents and the Federal Government;
- The collections are noncontroversial and do not raise issues of concern to other Federal Agencies;
- Any collection is targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future;
- Personally identifiable information (PII) is collected only to the extent necessary and is not retained;
- Information gathered is intended to be used only internally for general service improvement and program management purposes and is not intended for release outside of the Agency (if released, the Agency must indicate the qualitative nature of the information);
- Information gathered will not be used for the purpose of substantially informing influential policy decisions; and
- Information gathered will yield qualitative information; the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study.

Feedback collected under this generic clearance provides useful information, but it does not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably

actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: The target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential nonresponse bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

As a general matter, information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

Current Actions: New collection of information.

Type of Review: New collection.

Affected Public: Individuals and households, businesses and organizations, State, local, or Tribal Government.

Estimated Number of Respondents: Following is a preliminary estimate of the aggregate burden hours for this generic clearance. This estimate based on a review of past behavior of the participating Agencies and by several individual Agencies' estimates for this information collection request. In recognition that individual Agencies will differ in how often they use this generic clearance, this burden estimate assumes that 10 Agencies would be the heaviest users and account for approximately 10 times as great a burden as the other Agencies combined. Agencies will provide more refined individual estimates of burden in their subsequent notices.

Average Expected Annual Number of Activities: 25,000.

Average Number of Respondents per Activity: 200.

Annual Responses: 5,000,000.

Frequency of Response: Once per request.

Average Minutes per Response: 30.

Burden Hours: 2,500,000.

Request for Comments: Comments submitted in response to this document will be summarized and/or included in the request for OMB approval. Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (2) the accuracy of the Agency's estimate of the burden of the collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (5) estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal Agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

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

In the **Federal Register** of December 22, 2010 (75 FR 80542), OMB published a 60-day notice requesting public comment on the proposed collection of information. All written comments will be available for public inspection at *http://www.regulations.gov.*

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

44 U.S.C. 3501	Number of respondents	Annual frequency per response	Total annual responses	Hours per response	Total expected annual number of activities	Average minutes per response
	200	1	5,000,000	2,500,000	25,000	30

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: May 12, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–12553 Filed 5–20–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0322]

Agency Information Collection Activities; Proposed Collection; Comment Request; Manufacturer's Notification of the Intent To Use an Accredited Person Under the Accredited Persons Inspection Program Authorized by Section 228 of the Food and Drug Administration Amendments Act of 2007

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the eligibility criteria and the process to be followed by establishments when notifying FDA of a manufacturer's intent

to have an accredited third party conduct a quality systems regulation inspection of their establishment instead of FDA, under the inspections by the Accredited Persons (AP) Program.

DATES: Submit either electronic or written comments on the collection of information by July 22, 2011.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, *Daniel.Gittleson@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA'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 respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Requests for Inspection Under the Inspection by Accredited Persons Program—21 U.S.C. 374(g) (OMB Control Number 0910–0569)—Extension

Section 201 of the Medical Device User Fee and Modernization Act of 2002 (Public Law 107–250) amended section 704 of the Federal Food, Drug, and Cosmetic Act by adding subsection (g) (21 U.S.C. 374 (g)). This amendment authorized FDA to establish a voluntary third-party inspection program applicable to manufacturers of class II or class III medical devices who meet certain eligibility criteria. In 2007, the program was modified by the Food and Drug Administration Amendments Act of 2007 by revising eligibility criteria and by no longer requiring prior approval by FDA. To reflect the revisions, FDA modified the title of the collection of information and on March 2, 2009, issued a guidance entitled "Manufacturer's Notification of the Intent to Use an Accredited Person Under the Accredited Persons Inspection Program Authorized by Section 228 of the Food and Drug Administration Amendments Act of 2007." This guidance supersedes the Agency's previous guidance regarding requests for third-party inspection and may be found on the Internet at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/ucm085187.htm*. This guidance is intended to assist device establishments in determining whether they are eligible to participate in the AP Program and, if so, how to submit notification of their intent to use the program. The AP Program applies to manufacturers who currently market their medical devices in the United States and who also market or plan to market their devices in foreign countries. Such manufacturers may need current inspections of their establishments to operate in global commerce.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 U.S.C. Section	Number of respondents	Number of responses per respondent	Total annual respondents	Average burden per response (in hours)	Total hours
374(g)	100	1	100	15	1,500

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

There are approximately 8,000 foreign and 10,000 domestic manufacturers of medical devices. Approximately 5,000 of these firms only manufacture class I devices and are, therefore, not eligible for the AP Program. In addition, 40 percent of the domestic firms do not export devices and therefore are not eligible to participate in the AP Program. Further, 10 to 15 percent of the firms are not eligible due to the results of their previous inspection. FDA estimates there are 4,000 domestic manufacturers and 4,000 foreign manufacturers that are eligible for inclusion under the AP Program. Based on communications with industry, FDA estimates that on an annual basis approximately 100 of these manufacturers may use an AP in any given year.

Dated: May 12, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–12552 Filed 5–20–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0633]

Determination of System Attributes for the Tracking and Tracing of Prescription Drugs; Reopening of the Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; reopening of the comment period.

SUMMARY: The Food and Drug Administration (FDA) is reopening the comment period for the notice of public workshop published in the **Federal Register** of January 7, 2011 (76 FR 1182). In that notice, FDA announced a public workshop that took place on February 15 and 16, 2011, and requested public comment regarding the topics discussed at the workshop on determining system attributes for tracking and tracing prescription drugs. The workshop provided a forum for discussing possible approaches to developing a track-and-trace system and for obtaining input from supply chain partners on potential attributes and standards for the identification, authentication, and tracking and tracing of prescription drug packages. FDA is reopening the comment period to allow additional time for interested persons both to consider all the information provided by the Agency related to the workshop and to submit additional comments.

DATES: Submit either electronic or written comments by June 22, 2011.

ADDRESSES: 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.

FOR FURTHER INFORMATION CONTACT: Connie Jung, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 301–796–3100, *connie.jung@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of January 7, 2011 (76 FR 1182), FDA published a notice announcing a public workshop entitled "Determination of System Attributes for the Tracking and Tracing of Prescription Drugs; Public Workshop." In that notice, FDA requested the following: (1) Input and comments from interested stakeholders regarding possible approaches to developing a track-and-trace system and (2) input from supply chain partners on potential attributes and standards for the identification, authentication, and tracking and tracing of prescription drug packages.

Interested persons were originally given until April 16, 2011, to submit comments.

II. Request for Comments

On April 4, 2011, FDA posted on the FDA Web site a summary of the main comments shared by the public workshop participants. To allow adequate time for interested persons both to consider all the information provided by the Agency related to the workshop and to submit additional comments, FDA is reopening the comment period.

III. How to Submit Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. 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.

Dated: May 13, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–12617 Filed 5–20–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0002]

Pulmonary-Allergy Drugs Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Pulmonary-Allergy Drugs Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the Agency on FDA's regulatory issues.

Date and Time: The meeting will be held on June 23, 2011, from 8:30 a.m. to 5 p.m.

Location: Hilton Washington DC/Silver Spring, The Ballrooms, 8727 Colesville Rd., Silver Spring, MD 20910. The hotel's telephone number is 301–589–5200.

Contact Person: Kristine T. Khuc, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, rm. 2417, Silver Spring, MD 20993–0002, 301–796–9001, FAX: 301–847–8533, e-mail: *PADAC@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), and follow the prompts to the desired center or product area. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: On June 23, 2011, the committee will discuss the new drug application (NDA) 22150, icatibant solution for injection (proposed trade name Firazyr), Shire Human Genetic Therapies, for the proposed indication of treatment of acute attacks of hereditary angioedema.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before June 16, 2011. Oral presentations from the public will be scheduled between approximately 1 p.m. to 2 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before June 8, 2011. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will

notify interested persons regarding their request to speak by June 9, 2011.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Kristine T. Khuc at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: May 16, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–12543 Filed 5–20–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0002]

Arthritis Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Arthritis Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the Agency on FDA's regulatory issues.

Date and Time: The meeting will be held on June 21, 2011, from 8:30 a.m. to 4 p.m.

Location: The Marriott Inn and Conference Center, University of Maryland University College (UMUC), 3501 University Blvd. East, Hyattsville, MD 20783. The hotel's phone number is 301–985–7300.

Contact Person: Philip A. Bautista, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, rm. 2417, Silver Spring, MD 20993–0002, 301–796–9001, FAX: 301–847–8533, e-mail: *AAC@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), and follow the prompts to the desired center or product area. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: On June 21, 2011, the committee will discuss the supplemental biologics license application 125319, ILARIS (canakinumab), Novartis Pharmaceuticals Corp., for the following proposed indication: "ILARIS is indicated for the treatment of gouty arthritis attacks. ILARIS has also been shown to extend the time to the next attack and reduce the frequency of subsequent attacks."

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before June 7, 2011. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before May 27, 2011. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by May 31, 2011.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Philip Bautista at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: May 16, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–12544 Filed 5–20–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0238]

Preventive Controls for Registered Human Food and Animal Food/Feed Facilities; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; request for comments.

SUMMARY: The Food and Drug Administration (FDA) is announcing the opening of a docket to obtain information about preventive controls and other practices used by facilities to identify and address hazards associated with specific types of food and specific processes. FDA is establishing this docket to provide an opportunity for interested parties to provide information and share views that will inform the development of guidance on preventive controls for food facilities that

manufacture, process, pack, or hold human food or animal food/feed (including pet food).

DATES: Submit either electronic or written comments by August 22, 2011.

ADDRESSES: 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.

FOR FURTHER INFORMATION CONTACT: Jenny Scott, Center for Food Safety and Applied Nutrition (HFS–300), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740–3835, 301–436–2166; or Kim Young, Center for Veterinary Medicine (HFV–230), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–276–9207.

SUPPLEMENTARY INFORMATION:

I. Background

On March 19, 2009, President Barack Obama established a new Food Safety Working Group (FSWG), chaired by the Secretaries of the Department of Health and Human Services and the Department of Agriculture. In announcing the creation of the FSWG, the President said the group would advise him on how to upgrade U.S. food safety laws for the 21st century, foster coordination of food safety efforts throughout the Government, and ensure laws are being adequately enforced to keep the American people safe from foodborne illness (Ref. 1).

On July 1, 2009, the FSWG recommended a new public health-focused approach to food safety based on three core principles: (1) Prioritizing prevention; (2) strengthening surveillance and enforcement; and (3) improving response and recovery (Ref. 1). The FSWG emphasized the importance of setting rigorous standards for food safety and providing regulatory agencies the tools necessary to ensure that the food industry meets these standards. The FSWG also recommended that food regulators move aggressively to implement sensible measures designed to prevent food safety problems before they occur.

On January 4, 2011, President Barack Obama signed into law the FDA Food Safety Modernization Act (Pub. L. 111–353), which requires the owner, operator, or agent in charge of a facility required to register under section 415 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 350d) to take certain actions, including to evaluate the hazards that could affect food manufactured, processed, packed, or held by the facility and to identify and implement preventive controls to significantly minimize or prevent the occurrence of such hazards. A written plan must be prepared to describe the procedures used by the facility to comply.

FDA is required to issue guidance with respect to hazard analysis and preventive controls. Given the diversity of registered facilities and regulated foods, FDA will use guidance to assist the food and feed industries in complying with the preventive controls regulations, when finalized. We plan to leverage, where appropriate, the best practices for hazards and controls identified by the food and feed industries for specific types of food and specific methods to manufacture, process, pack, and hold food.

Representatives of the food and feed industries have told FDA the food safety information they have developed is not proprietary and have committed to sharing with us the best practices relating to hazards and control measures they have identified. FDA is interested in making appropriate best practices relating to identified hazards and control measures for specific industry segments publicly available.

FDA is establishing a docket to provide an opportunity for interested parties to provide information and share views that will inform the development of guidance on the following: (1) Hazard identification and (2) control measures associated with specific types of food or specific methods of manufacturing, processing, packing, or holding food. FDA is particularly interested in preventive controls practices that are practical for small and very small businesses to implement.

II. Request for Comments and Information

We are requesting comments that will inform the development of guidance on the following: (1) Hazard identification (biological, chemical, radiological, and physical) and (2) control measures associated with specific types of food or specific methods of manufacturing, processing, packing, or holding food. In particular, we welcome input on any of the following general categories with respect to human food or animal food/feed (including pet food):

- Conducting a hazard analysis to determine the hazards associated with specific human food or animal food/feed and processes (*e.g.,* the procedures used to determine potential hazards and to assess whether they are reasonably likely to occur).
- Implementing process controls (*e.g.,* processes employed to prevent, eliminate, or reduce to acceptable levels the occurrence of any hazards that are reasonably likely to occur).
- Validating food/feed safety controls (*e.g.,* information on procedures used to determine that control measures are capable of controlling the identified hazards).
- Implementing sanitation controls (*e.g.,* procedures and practices utilized to minimize the risk of contamination) for human food and animal food/feed.
- Implementing supplier controls (*e.g.,* procedures and practices used to ensure raw materials and ingredients are safe for their intended use).
- Allergen control (human food), including procedures to ensure that ingredients are accurately declared on the label, procedures to ensure the proper label is applied to the food, and procedures and practices to prevent the unintentional incorporation of a major food allergen into a food by cross contact during manufacturing, processing, and holding food.
- Environmental monitoring for *Salmonella* and for *Listeria monocytogenes* for specific types of food facilities (*e.g.,* ready-to-eat food facilities, pet food facilities).
- Microbiological and other testing used to help ensure the safety of specific human food and animal food/feed.
- Specific biological, chemical, radiological, and physical hazards and controls for food types such as (but not limited to) spices, nuts, ready-to-eat food, bakery products, fresh-cut produce, milk products, and medical food.
- Specific biological, chemical, radiological, and physical hazards and controls for animal food/feed including feed ingredients.
- Preventive control approaches and practices (*e.g.,* for validation, supplier controls) that are practical for small and very small businesses to implement.

III. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. 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.

IV. References

FDA has placed the following reference on display in FDA's Division of Dockets Management (see **ADDRESSES**)

and it may be seen between 9 a.m. and 4 p.m., Monday through Friday. (FDA has verified the Web site address, but FDA is not responsible for any subsequent changes to the Web site after this document publishes in the **Federal Register**).

1. Food Safety Working Group, "Food Safety Working Group: Key Findings" (July 1, 2009), Available at *http://www.foodsafetyworkinggroup.gov/ContentKeyFindings/HomeKeyFindings.htm.* Accessed and printed on April 1, 2011.

Dated: May 16, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–12616 Filed 5–20–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Healthy Tomorrows Partnership for Children Program

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Notice of a Noncompetitive Replacement Award to the University of Nevada School of Medicine, Department of Pediatrics.

SUMMARY: The Health Resources and Services Administration (HRSA) will transfer remaining Special Projects of Regional and National Significance (SPRANS) discretionary grant funds in H17MC08971 from the Southern Nevada Area Health Education Center, the current grantee of record, to the University of Nevada School of Medicine, Department of Pediatrics, in order to continue Healthy Tomorrows supported prevention and intervention services to low-income, underserved women, children and adolescents in Clark County and Southern Nevada.

SUPPLEMENTARY INFORMATION:

Former Grantee of Record: Southern Nevada Area Health Education Center.

Original Period of Grant Support: Healthy Tomorrows Partnership for Children Program—March 1, 2008 to February 28, 2013.

Replacement Awardee: The University of Nevada School of Medicine, Department of Pediatrics.

Amount of Replacement Award: $100,000 (remaining two years of grant, Year 4 and Year 5).

Period of Replacement Award: The period of support for this award is March 1, 2011 to February 28, 2013.

Authority: Social Security Act as amended, Title V, Section 501(a)(2), (42 U.S.C. 701(a)(2)).

CFDA Number: 93.110.

Justification for the Exception to Competition: The former grantee, Southern Nevada Area Health Education Center, relinquished all grants due to financial difficulties and closure of facilities and programs. The Maternal and Child Health Bureau (MCHB) has identified the University of Nevada School of Medicine, Department of Pediatrics as the best qualified grantee for this replacement award because: the University of Nevada School of Medicine, Department of Pediatrics maintains an on-going partnership with the original grantee, the Southern Nevada Area Health Education Center; the original Project Director has a clinical appointment with the Department of Pediatrics; the Department of Pediatrics is maintaining the project despite not having access to grant funds; and obstetrical care for pregnant women occurs at a clinic jointly run by the Department of Pediatrics and the Department of Family and Community Medicine. Transferring funds to the Department of Pediatrics will not change the project as originally proposed and funded, as it still serves the intended target population, maintains partnerships with many of the community organizations discussed in the original application and proposes to enhance services with the addition of the Project Outreach Coordinator. In sum, the Department of Pediatrics has the capacity to provide an array of Healthy Tomorrows supported prevention and intervention services to the target population and to fulfill the expectations of the originally funded grant application.

This grant transfer will ensure that prevention and intervention services remain available for approximately 100 African American, Hispanic, and/or American Indian pregnant women in Clark County and Southern Nevada and their children; launch a community-wide, bi-lingual program of culturally competent public education and awareness services to recruit and enroll at least 100 women into the Nevada Care Program; and maintain the Nevada Care Program Screening Clinic to monitor the health and development of infants born to pregnant women enrolled in the program. Not ensuring continued funding to provide these services would have a substantially negative impact on the healthcare needs of this population, while continued funding to the Department of Pediatrics will ensure that these critical services remain available to address the demonstrated needs of low-income, underserved women, children and adolescents in Clark County and Southern Nevada.

FOR FURTHER INFORMATION CONTACT: Madhavi Reddy via e-mail at *mreddy@hrsa.gov* or via phone at 301–443–0754.

Dated: May 17, 2011.

Mary K. Wakefield,

Administrator.

[FR Doc. 2011–12655 Filed 5–20–11; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Advisory Council on the National Health Service Corps; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of the following meeting:

Name: National Advisory Council on the National Health Service Corps (NHSC).

Dates and Times: June 22, 2011–8:30 a.m.–4:30 p.m.

June 23, 2011—8 a.m.—12 p.m.

Place: Saddlebrook Tampa, 5700 Saddlebrook Way, Wesley Chapel, FL 33543, *Phone:* 813–973–1111.

Status: The meeting will be open to the public.

Agenda: The Council is convening in Tampa, Florida, to hear NHSC program updates and to discuss evidence-based strategies for clinician retention, and a new communications tool for clinicians. A portion of the meeting will be open for public comment and questions.

For Further Information Contact: Njeri Jones, Bureau of Clinician Recruitment and Service, Health Resources and Services Administration, Parklawn Building, Room 8A–46, 5600 Fishers Lane, Rockville, MD 20857; e-mail: *NJones@hrsa.gov;* Telephone: 301–443–2541.

Dated: May 17, 2011.

Reva Harris,

Acting Director, Division of Policy and Information Coordination.

[FR Doc. 2011–12656 Filed 5–20–11; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Cancer Institute Board of Scientific Advisors, June 20, 2011, 9 a.m. to June 21, 2011,

12 p.m., National Institutes of Health, Building 31, 31 Center Drive, 6th Floor, Conference Rm. 10, Bethesda, MD, 20892 which was published in the **Federal Register** on May 6, 2011, 76 FR 26310.

This meeting is amended to change it to a one-day meeting to be held on June 20, 2011, from 9 a.m. to 5 p.m. The meeting is open to the public.

Dated: May 17, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–12638 Filed 5–20–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel, R13 Conference Grant Review,

Date: June 27, 2011,

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington DC/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Bratin K. Saha, PhD, Scientific Review Officer, Program Coordination and Referral Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Boulevard, Room 8041, Bethesda, MD 20892, (301) 402–0371, *sahab@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Small Grants for Behavioral Research In Cancer Control (R03).

Date: July 7, 2011.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda, (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Donald L. Coppock, PhD, Scientific Review Officer, Scientific Review and Logistic Branch, Division of Extramural Activities, NCI, National Institutes of Health, 6116 Executive Blvd., Rm 7151, Bethesda, MD 20892, 301–451–9385, *donald.coppock@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: May 17, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–12637 Filed 5–20–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: AIDS/HIV.

Date: June 7–8, 2011.

Time: 8 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting)

Contact Person: Kenneth A Roebuck, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5106, MSC 7852, Bethesda, MD 20892, (301) 435–1166, *roebuckk@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Eukaryotic Pathogens.

Date: June 7–8, 2011.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting)

Contact Person: Richard G Kostriken, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3192, MSC 7808, Bethesda, MD 20892, 301–402–4454, *kostrikr@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Synthetic and Biological Chemistry A Study Section.

Date: June 15–16, 2011.

Time: 8 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Mayflower Park Hotel, 405 Olive Way, Seattle, WA 98101.

Contact Person: Mike Radtke, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4176, MSC 7806, Bethesda, MD 20892, 301–435–1728, *radtkem@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Synthetic and Biological Chemistry A.

Date: June 15, 2011.

Time: 10 a.m. to 11 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: John L. Bowers, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4170, MSC 7806, Bethesda, MD 20892, (301) 435–1725, *bowersj@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Skeletal Cell/Development, Arthritis.

Date: June 16–17, 2011.

Time: 9 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting)

Contact Person: Baljit S Moonga, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4214, MSC 7806, Bethesda, MD 20892, 301–435–1777, *moongabs@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Program Project: Regulation of Mammalian Meiosis.

Date: June 17, 2011.

Time: 10 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Richard A Currie, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1108, MSC 7890, Bethesda, MD 20892, (301) 435–1219, *currieri@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA: DE 11–003 NIH OppNet Short-term Mentored Career Development Award in the Basic Behavioral and Social Sciences.

Date: June 17, 2011.

Time: 12 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Washington, DC Hotel, 999 Ninth Street, NW., Washington, DC 20001.

Contact Person: Biao Tian, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3089B, MSC 7848, Bethesda, MD 20892, (301) 402–4411, *tianbi@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Pilot Clinical Applications in Urology and Nephrology.

Date: June 20–21, 2011.

Time: 8 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Contact Person: Ryan G. Morris, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4205, MSC 7814, Bethesda, MD 20892, 301–435–1501, *morrisr@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Vascular and Hematology.

Date: June 20–21, 2011.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Rajiv Kumar, PhD, Chief, MOSS IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4216, MSC 7802, Bethesda, MD 20892, 301–435–1212, *kumarra@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Cancer Drug Development and Therapeutics.

Date: June 23–24, 2011.

Time: 10 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: Lilia Topol, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6192, MSC 7804, Bethesda, MD 20892, 301–451–0131, *ltopol@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR10–266: Program Project: NFKB Cell Signal Theory and Experimentation.

Date: June 27–28, 2011.

Time: 8 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: David R. Jollie, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4150, MSC 7806, Bethesda, MD 20892, (301)-435–1722, *jollieda@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Orthopedic and Skeletal Biology.

Date: June 27, 2011.

Time: 8 a.m. to 5:30 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: Baljit S Moonga, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4214, MSC 7806, Bethesda, MD 20892, 301–435–1777, *moongabs@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Genetic Disease Therapy.

Date: June 27, 2011.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Diane L Stassi, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2200, MSC 7890, Bethesda, MD 20892, 301–435–2514, *stassid@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Chronic Diseases.

Date: June 28–29, 2011.

Time: 8 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Aaron Mendelsohn, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3138, MSC 7770, Bethesda, MD 20892, 301–435–1721, *mendelsohnab@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Psychiatric Disorders and Dementia.

Date: June 29–30, 2011.

Time: 10 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: James P Harwood, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5168, MSC 7840, Bethesda, MD 20892, 301–435–1256, *harwoodj@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–11–081: Shared Instrumentation: Miscellaneous.

Date: June 30, 2011.

Time: 10 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westin Georgetown, 2350 M Street, NW., Washington, DC 20037.

Contact Person: Allen Richon, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6184, MSC 7892, Bethesda, MD 20892, 301–435–1024, *allen.richon@nih.hhs.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: May 17, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–12636 Filed 5–20–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, NIDDK Interconnectivity Network.

Date: July 13, 2011.

Time: 2 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Michael W. Edwards, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 750, 6707 Democracy Boulevard, Bethesda, Md 20892–5452, (301) 594–8886, *edwardsm@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Digestive Diseases Program Projects.

Date: July 18, 2011.

Time: 8 a.m. to 4:40 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

Contact Person: Maria E. Davila-Bloom, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 758, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7637, *davila-bloomm@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: May 17, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–12635 Filed 5–20–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Human Genome Research Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Human Genome Research Institute Special Emphasis Panel; ELSI–SEP.

Date: June 21, 2011.

Time: 8 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: Rudy O. Pozzatti, PhD, Scientific Review Officer, Office of Scientific Review, National Human Genome Research Institute, National Institutes of Health, Bethesda, MD 20892, 301–402–0838.

Name of Committee: National Human Genome Research Institute Special Emphasis Panel; Data Analysis-SEP.

Date: June 27, 2011.

Time: 8 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard Arlington Crystal City/Reagan National Airport, 2899 Jefferson Davis Highway, Arlington, VA 22202.

Contact Person: Keith McKenney, PhD, Scientific Review Officer, NHGRI,5635 Fishers Lane, Suite 4076, Bethesda, MD 20814, 301–594–4280, *mckenneyk@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research,National Institutes of Health, HHS)

Dated: May 17, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–12634 Filed 5–20–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel, Review of Conferences and Scientific Meetings with an Environmental Health Focus.

Date: June 15, 2011.

Time: 1:30 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: NIEHS/National Institutes of Health, Building 4401, East Campus, 79 T.W. Alexander Drive, Research Triangle Park, NC 27709 (Telephone Conference Call).

Contact Person: Linda K Bass, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research and Training, Nat. Institute Environmental Health Sciences, P. O. Box 12233, MD EC–30, Research Triangle Park, NC 27709, (919) 541–1307, *bass@niehs.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: May 16, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–12633 Filed 5–20–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Mentored Career Transition Scientist Award.

Date: June 16–17, 2011.

Time: 8 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: Bolger Center, 9600 Newbridge Drive, Potomac, MD 20854.

Contact Person: Giuseppe Pintucci, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7192, Bethesda, MD 20892, 301–435–0287, *Pintuccig@nhlbi.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, NHLBI—Mentored Clinical Investigator Award: Scientist Research.

Date: June 16–17, 2011.

Time: 8 a.m. to 1 p.m.
Agenda: To review and evaluate grant applications.
Place Crystal Gateway Marriott, 1700 Jefferson Davis Highway, Arlington, VA 22202.
Contact Person: Keith A. Mintzer, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7186, Bethesda, MD 20892–7924, 301–435–0280, *mintzerk@nhlbi.nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Center for Gene Transfer.
Date:
Date: June 20, 2011.
Time: 12 p.m. to 3 p.m.
Agenca: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).
Contact Person: William J Johnson, PhD, Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7178, Bethesda, MD 20892–7924, 301–435–0725, *johnsonwj@nhlbi.nih.gov*.q2
(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: May 17, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–12630 Filed 5–20–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Complementary & Alternative Medicine; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Complementary and Alternative Medicine Special Emphasis Panel; NCCAM Education Panel.
Date: June 23–24, 2011.
Time: 8 a.m. to 12 p.m.
Agenda: To review and evaluate grant applications.
Place: Marriott Courtyard Gaithersburg Washingtonian Ctr, 204 Boardwalk Place, Gaithersburg, MD 20878.
Contact Person: Peter Kozel, PhD, Scientific Review Officer, NCCAM, 6707 Democracy Boulevard, SUITE 401, Bethesda, MD 20892–5475, 301–496–8004, *kozelp@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.213, Research and Training in Complementary and Alternative Medicine, National Institutes of Health, HHS)

Dated: May 17, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–12640 Filed 5–20–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Initial Review Group, Biomedical Research and Research Training Review Subcommittee B.
Date: June 17, 2011.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hilton Washington DC–Silver Spring, 8727 Colesville Road, Silver Spring, MD 20910.
Contact Person: Arthur L. Zachary, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN–18, Bethesda, MD 20892, 301–594–2886, *zacharya@nigms.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: May 17, 2011.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–12639 Filed 5–20–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Call for Participation in Pillbox Patient-Safety Initiative

ACTION: Notice.

SUMMARY: The National Library of Medicine (NLM) invites the participation of manufacturers, including repackagers, and private label distributors of solid oral dosage form medications in the development of Pillbox, a publicly accessible online repository of digital images and descriptive information for solid oral dosage form medications. This project seeks to promote utilization of the SPLIMAGE element of the Food and Drug Administration (FDA) Structured Product Label (SPL) through development and use of imaging standards and methodologies. Through this Call for Participation, NLM seeks to evaluate the photography methodology and procedures it has developed for creating standardized high-resolution images of solid oral dosage form medications that are appropriate for inclusion in the SPL. Participating organizations will be invited to submit samples of their solid oral dosage form medications to NLM for imaging. Resulting image files will be provided to participants, who may choose to voluntarily include them in their subsequent SPL submissions to FDA. Image files that are voluntarily submitted to FDA as part of an SPL listing submission will be included in the publicly accessible, production version of Pillbox. This initiative is an important element of ongoing efforts to enhance patient safety, reduce adverse drug events, and improve the quality and availability of drug information.

SUPPLEMENTARY INFORMATION: NLM has established Pillbox, an initiative to enhance patient safety, by making available via a publicly accessible resource (*http://pillbox.nlm.nih.gov*) digital images and descriptive data of

solid oral dosage form medications (*e.g.,* capsules and tablets, also referred to as "pills"). NLM intends to create a search system allowing patients, healthcare providers, and the public to identify and reference medications using the submitted images and related descriptive information. Such a resource is intended to have application in poison control, emergency response, disaster response, anti-counterfeiting, manufacturer compliance with Federal regulations, improved prescription filling accuracy, and reduction of medication errors and adverse drug events.

Images of tablets and capsules that are currently available to the public from various online resources are of varying quality. There exists no single, authoritative resource of high-quality images representative of prescription and non-prescription medications available in the United States from which a trustworthy resource such as Pillbox can be constructed. To remedy this situation, NLM, working with FDA, has developed a standardized methodology for creating digital images of solid oral dosage form medications. Presently, NLM is testing a demonstration/beta version of Pillbox that contains SPL information for listed solid oral dosage form medications and NLM-produced images for approximately 1,000 solid oral dosage form medications. Because these images are not part of the SPL and have not been verified by the manufacturer; the demonstration/beta version of Pillbox contains a disclaimer indicating that it is a demonstration system that is not intended for clinical use.

In order to test the imaging methodology in an operational setting and to begin developing a production version of Pillbox, NLM is offering, on a time-limited basis, to provide manufacturers, including repackagers, and private label distributors who send product samples to NLM, image files suitable for inclusion with their SPL files that are being submitted to FDA. Manufacturers, including repackagers, and private label distributors may voluntarily include this standardized image in the SPL file they submit to FDA as part of the drug listing process. If a firm includes the image with an SPL submission, that image will be included in the production version of Pillbox. The production version of Pillbox will only contain images that have been verified by manufactures, including repackagers, and private label distributers. When the production version of Pillbox is launched, the current demonstration/beta version will be taken offline from public access and will only be used for agency research and development. NLM may also use the images it produces to populate the offline version of Pillbox to further agency research and development.

Photography Facility

NLM, in collaboration with FDA, has set up a photography laboratory at an FDA facility in Rockville, Maryland for the purpose of generating standardized images of representative solid oral dosage form medications for the duration of this project. This facility is registered with the Drug Enforcement Administration.

NLM will provide to manufacturers, including repackagers, and private label distributors, at no cost, an image suitable for submission to FDA as part of drug listing for any actively marketed solid oral dosage form medication that is sent to them. The image will encompass visible spectrum only. Ultra-violet and infrared images will not be captured.

No physical or chemical tests or assays of any nature will be performed on the submitted products. Once imaging is completed, the representative solid oral dosage form medications will be destroyed.

Photographs will be provided for the duration of the testing period, which is anticipated to continue through FY2012. The agency will provide information about further development of Pillbox, the production of SPL image files, and the standardized methodology for SPL images after completion of the testing period.

Participation

We invite manufacturers, including repackagers, and private label distributors of solid oral dosage form medications to voluntarily participate in this program.

Procedure for Submitting Applicable Packaged Products for Imaging

Manufacturers, including repackagers, and private label distributors of prescription and over-the-counter solid oral dosage form medications may submit products for imaging. The expiration date on the submitted products' packaging should be the longest available expiration date. Participants should:

1. Indicate to the agency their intent to participate in this program via e-mail to *pillbox@mail.nih.gov.* It is not necessary to provide any information related to products which will be submitted in this announcement of intent. This initial communication is strictly to express intent and to allow for resource allocation planning.

2. Select and ship the smallest volume stock package(s) totaling at least 8–10 representative solid oral dosage form medications (*e.g.,* tablets, capsules) of the same drug product. In order to ensure the safety of facility staff and compliance with appropriate federal regulations please include the accompanying prescribing information.

a. Consolidated shipments of multiple packages are permitted.

b. If there is an undue financial burden associated with providing the smallest volume stock package, please contact NLM via e-mail to *pillbox@mail.nih.gov.*

3. Provide contact information for the person(s) submitting the solid oral dosage form medications and receiving the final images. Contact information should include:

a. Firm's name and address.

b. Name, e-mail address, and telephone number of the person submitting the representative solid oral dosage form medications.

c. Name, e-mail address, and telephone number of the person who is responsible for receiving the final images of the representative solid oral dosage form medications.

4. Send the representative solid oral dosage form medications to:

a. NLM PILLBOX IMAGING PROJECT, Attn: Staff Pharmacist, 2094 Gaither Rd., Suite 240, Room 245, Rockville, MD 20850.

The final image file will be sent to the specified e-mail address of the person who is responsible for receiving the final image. The manufacturer, repackager, or private label distributor may voluntarily include the provided image in an SPL drug listing submission to FDA, in the SPLIMAGE data element. Images submitted as part of the SPL will be included in the production version of Pillbox.

Partnership Acknowledgment

Manufacturers, including repackagers, and private label distributors who participate in this process will be acknowledged on the Pillbox Web site and in other communications about the project.

FOR FURTHER INFORMATION CONTACT: Any question regarding this process or the Pillbox initiative, including alternative methods for receiving the images, should be sent to *pillbox@mail.nih.gov.* Any questions regarding submission of the file to FDA should be sent to *spl@fda.hhs.gov.*

Dated: May 16, 2011.

Todd Danielson,

Executive Officer, National Library of Medicine, National Institutes of Health.

[FR Doc. 2011–12629 Filed 5–20–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2011–0038]

The Critical Infrastructure Partnership Advisory Council (CIPAC)

AGENCY: National Protection and Programs Directorate, DHS.

ACTION: Quarterly CIPAC membership update.

SUMMARY: The Department of Homeland Security (DHS) announced the establishment of the Critical Infrastructure Partnership Advisory Council (CIPAC) by notice published in the **Federal Register** Notice (71 FR 14930–14933) dated March 24, 2006. That notice identified the purpose of CIPAC as well as its membership. This notice provides: (i) The quarterly CIPAC membership update; (ii) instructions on how the public can obtain the CIPAC membership roster and other information on the Council; and, (iii) information on recently completed CIPAC meetings.

FOR FURTHER INFORMATION CONTACT: Nancy J. Wong, Director, Partnership Programs and Information Sharing Office, Partnership and Outreach Division, Office of Infrastructure Protection, National Protection and Programs Directorate, U.S. Department of Homeland Security, 245 Murray Lane, Mail Stop 0607, Arlington, VA 20598–0607, by telephone (703) 235–3999 or via e-mail at *CIPAC@dhs.gov.*

Responsible DHS Official: Nancy J. Wong, Director Partnership Programs and Information Sharing Office, Partnership and Outreach Division, Office of Infrastructure Protection, National Protection and Programs Directorate, U.S. Department of Homeland Security, 245 Murray Lane, Mail Stop 0607, Arlington, VA 20598–0607, by telephone (703) 235–3999 or via e-mail at *CIPAC@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Purpose and Activity: The CIPAC facilitates interaction between government officials and representatives of the community of owners and/or operators for each of the critical infrastructure sectors defined by Homeland Security Presidential Directive 7 (HSPD–7) and identified in the National Infrastructure Protection Plan (NIPP). The scope of activities covered by the CIPAC includes planning; coordinating among government and critical infrastructure owner/operator security partners; implementing security program initiatives; conducting operational activities related to critical infrastructure protection security measures, incident response, recovery, infrastructure resilience, reconstituting critical infrastructure assets and systems for both man-made as well as naturally occurring events; and sharing threat, vulnerability, risk mitigation, and infrastructure continuity information.

Organizational Structure: CIPAC members are organized into eighteen (18) critical infrastructure sectors. Within all of the sectors containing critical infrastructure owners/operators, there generally exists a Sector Coordinating Council (SCC) that includes critical infrastructure owners and/or operators or their representative trade associations. Each of the sectors also has a Government Coordinating Council (GCC) whose membership includes a lead Federal agency that is defined as the Sector Specific Agency (SSA), and all relevant Federal, state, local, tribal, and/or territorial government agencies (or their representative bodies) whose mission interests also involve the scope of the CIPAC activities for that particular sector.

CIPAC Membership: CIPAC Membership may include:

(i) Critical infrastructure owner and/or operator members of an SCC;

(ii) Trade association members who are members of an SCC representing the interests of critical infrastructure owners and/or operators;

(iii) Each sector's Government Coordinating Council (GCC) members; and,

(iv) State, local, tribal, and territorial governmental officials comprising the DHS State, Local, Tribal, and Territorial GCC.

CIPAC Membership Roster and Council Information: The current roster of CIPAC membership is published on the CIPAC Web site (*http://www.dhs.gov/cipac*) and is updated as the CIPAC membership changes. Members of the public may visit the CIPAC Web site at any time to obtain current CIPAC membership as well as the current and historic list of CIPAC meetings and agendas.

Dated: May 13, 2011.

Nancy Wong,

Designated Federal Officer for the CIPAC.

[FR Doc. 2011–12615 Filed 5–20–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1976–DR; Docket ID FEMA–2011–0001]

Kentucky; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Kentucky (FEMA–1976–DR), dated May 4, 2011, and related determinations.

DATES: *Effective Date:* May 10, 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: The notice of a major disaster declaration for the Commonwealth of Kentucky is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of May 4, 2011.

Bath, Green, Lewis, Mason, Pendleton, and Spencer Counties for Public Assistance.

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. 2011–12597 Filed 5–20–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1976–DR; Docket ID FEMA–2011–0001]

Kentucky; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Kentucky (FEMA–1976–DR), dated May 4, 2011, and related determinations.

DATES: *Effective Date:* May 12, 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: The notice of a major disaster declaration for the Commonwealth of Kentucky is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of May 4, 2011.

Clay, Franklin, Harlan, Lee, and Owsley Counties for Public Assistance, including direct Federal Assistance.

(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. 2011–12610 Filed 5–20–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1971–DR; Docket ID FEMA–2011–0001]

Alabama; Amendment No. 11 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Alabama (FEMA–1971–DR), dated April 28, 2011, and related determinations.

DATES: *Effective Date:* May 10, 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: The notice of a major disaster declaration for the State of Alabama is hereby amended to include the following area among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of April 28, 2011.

Bibb, Blount, Calhoun, Cullman, DeKalb, Elmore, Franklin, Jackson, Limestone, Madison, Marion, Marshall, Walker and Winston Counties for Public Assistance [Categories C–G], (already designated for Individual Assistance and assistance for debris removal and emergency protective measures [Categories A and B], including direct Federal assistance, under the Public Assistance 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. 2011–12649 Filed 5–20–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1975–DR; Docket ID FEMA–2011–0001]

Arkansas; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Arkansas (FEMA–1975–DR), dated May 2, 2011, and related determinations.

DATES: *Effective Date:* May 9, 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: The notice of a major disaster declaration for the State of Arkansas is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of May 2, 2011.

Boone, Jefferson, and White Counties for Individual Assistance.

Carroll, Conway, Crawford, Hot Spring, Montgomery, Stone, and Washington Counties for Public Assistance (Categories A–G), including direct Federal Assistance.

Benton, Faulkner, and Garland Counties for Public Assistance [Categories A–G], including direct Federal Assistance, (already designated for Individual Assistance and assistance for debris removal and emergency protective measures [Category B], limited to direct Federal assistance).

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. 2011–12652 Filed 5–20–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1972–DR; Docket ID FEMA–2011–0001]

Mississippi; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Mississippi (FEMA–1972–DR), dated April 29, 2011, and related determinations.

DATES: *Effective Date:* May 9, 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: The notice of a major disaster declaration for the State of Mississippi is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of April 29, 2011.

Alcorn, Attala, Clay, Coahoma, DeSoto, Grenada, Holmes, Leflore, Marshall, Montgomery, Newton, Panola, Quitman, Smith, Sunflower, Tishomingo, Tunica, and Winston Counties for Individual Assistance.

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. 2011–12651 Filed 5–20–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2504–11; DHS Docket No. USCIS 2011–0006]

RIN 1615–ZB02

Re-registration Procedures for Temporary Protected Status (TPS) Beneficiaries Under the Extended TPS Designation of Haiti and Automatic Extension of Employment Authorization Documentation for Haitian TPS Beneficiaries

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Notice.

SUMMARY: This notice announces the opening of the 90-day re-registration period (May 23, 2011 through August 22, 2011) for individuals who were granted Temporary Protected Status (TPS) under the original designation of Haiti for TPS and whose initial TPS applications were approved on or before May 19, 2011. These TPS beneficiaries may now re-register under the 18-month extension of TPS for Haiti that was announced in the **Federal Register** notice published on May 19, 2011.

New employment authorization documents (EADs) with a January 22, 2013 expiration date will be issued to eligible TPS beneficiaries who timely re-register and apply for EADs. Given the timeframes involved with processing TPS re-registration applications, the Department of Homeland Security recognizes that all re-registrants may not receive new EADs until after their current EADs expire on July 22, 2011. Accordingly, this notice automatically extends the validity of EADs issued under the TPS designation of Haiti for six months, through January 22, 2012. This notice also explains to TPS beneficiaries and their employers which EADs are automatically extended.

DATES: The extension of the TPS designation of Haiti is effective July 23, 2011, and will remain in effect through January 22, 2013. The 90-day re-registration period begins on May 23, 2011, and will be open through August 22, 2011.

FOR FURTHER INFORMATION CONTACT:

- For further information on TPS, including guidance on the application process and additional information on eligibility, please visit the USCIS TPS Web page at *http://www.uscis.gov/tps.* You can find specific information about this extension of the Haiti TPS designation by selecting "TPS Designated Country: Haiti" from the menu on the left of the TPS Web page. From the Haiti page, you can find additional information by selecting "Temporary Protected Status—Haiti Questions & Answers" from the menu on the right.
- You can contact the TPS Operations Program Manager by sending mail to Family and Status Branch, Service Center Operations Directorate, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529–2060, or by phone at (202) 272–1533 (this is not a toll-free number). **Note:** The phone number provided here is solely for questions regarding this TPS notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online available at the USCIS Web site at *http://www.uscis.gov,* or call the USCIS National Customer Service Center at 1–800–375–5283 (TTY 1–800–767–1833).
- Further information will also be available at local USCIS offices upon publication of this notice.

SUPPLEMENTARY INFORMATION:

Abbreviations and Terms Used in This Document

INA—Immigration and Nationality Act
DHS—Department of Homeland Security
DOJ—Department of Justice
DOS—Department of State
EAD—Employment Authorization Document
OSC—Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices
Secretary—Secretary of Homeland Security
TPS—Temporary Protected Status

Background

On January 21, 2010, the Secretary of Homeland Security (Secretary), Janet Napolitano, designated Haiti for Temporary Protected Status (TPS) following the devastating earthquake in Haiti on January 12, 2010. *See* 75 FR 3476. On May 19, 2011, the Secretary extended TPS for Haiti for an additional 18 months through January 23, 2013, and also re-designated Haiti for TPS through the same date. The extension allows existing, eligible Haitian TPS beneficiaries to retain their TPS, whereas the redesignation allows certain eligible individuals who arrived after the January 12, 2010 earthquake and before January 13, 2011 to obtain TPS. *Id.* The **Federal Register** notice published on May 19, 2011, provided registration procedures for individuals applying for TPS under the redesignation of Haiti.

This notice provides re-registration application procedures and other

relevant information for individuals who were granted TPS under the original designation. TPS beneficiaries who were granted TPS by May 19, 2011, must now apply for re-registration between May 23, 2011 and August 22, 2011. USCIS will withdraw TPS from any beneficiary who fails to file a timely re-registration application without good cause. INA section 244(c)(3)(C), 8 U.S.C. 1254a(c)(3)(C).

How do I know whether I should apply for re-registration under the extension of TPS or whether I should file an initial TPS application under the redesignation of Haiti?

Table 1 below will help you decide if you should file a re-registration application under the extension of TPS for Haiti or if you should file an initial application under the redesignation of Haiti for TPS. Table 1 will also help you decide if you need to file an Application for Temporary Protected Status, Form I–821, and/or an Application for Employment Authorization, Form I–765.

TABLE 1—RE-REGISTRATION FILING VERSUS INITIAL FILING

If . . .	And . . .	Then . . .
You filed a TPS application under the initial designation of Haiti during the registration period January 21, 2010 through January 18, 2011, or filed after January 18, 2011 under the fee waiver cure*.	Your application was approved by May 19, 2011.	You need to re-register under the extension by filing Form I–821 and Form I–765 during the re-registration period of May 23, 2011 through August 22, 2011.
	Your application is still pending as of May 19, 2011.	You do not yet have TPS. Your pending Form I–821 will be treated as an initial application under the redesignation, so you do not need to file a new Form I–821. Please see Table 2 to determine if you need to file a new Form I–765.
*The "fee waiver cure" refers to USCIS' policy of permitting certain applicants whose request for a TPS fee waiver was denied to re-file their applications, with the correct fees, during a limited period after January 18, 2011. *See* 75 FR 39957 (July 13, 2010). USCIS sent the affected applicants an individual notice with the procedures for re-filing.	Your application was denied before May 19, 2011, and you believe you may be eligible for TPS under the redesignation.	You may be covered under the redesignation. You must file an initial Form I–821 and Form I–765 during the registration period ending November 15, 2011.
You never filed a TPS application under the initial designation of Haiti.	You believe you may be eligible for TPS under the redesignation.	You may be covered under the redesignation. You must file an initial Form I–821 and Form I–765 during the registration period ending November 15, 2011.

I have a pending TPS application filed during the original Haiti TPS registration period that ran from January 21, 2010 through January 18, 2011. What should I do?

If your TPS application remained pending on May 19, 2011, you do not need to file a new Form I–821. Pending TPS applications are being treated as initial applications under the redesignation. Therefore, if your TPS application is approved, you will be granted TPS through January 22, 2013. If your TPS application was pending on May 19, 2011 and it has not been denied, please refer to Table 2 below to determine whether you should file a new Form I–765, starting May 23, 2011. If your TPS application was denied after May 19, 2011, do not file a new Form I–765; if you do file, the new Form I–765 will be denied because your Form I–821 was denied under the redesignation.

TABLE 2—EAD INFORMATION FOR TPS APPLICATIONS PENDING ON MAY 19, 2011

If . . .	And . . .	Then . . .	But if . . .
You requested an EAD during the original registration period for Haiti TPS.	You received an EAD with Category C19 (temporary TPS-related EAD) or A12 (regular TPS-related EAD).	You must file a new Form I–765 with fee (or fee waiver request) during the re-registration period that opens on May 23, 2011 if you wish to have a new EAD valid through January 22, 2013.	Your Form I–821 is denied before the re-registration period opens on May 23, 2011, DO NOT file a new Form I–765. If you file a new Form I–765 it will be denied because your Form I–821 was denied under the redesignation.
	You did not receive an EAD with Category C19 or A12.	You do not need to file a new Form I–765. If your TPS application is approved, your Form I–765 will be approved through January 22, 2013..	

TABLE 2—EAD INFORMATION FOR TPS APPLICATIONS PENDING ON MAY 19, 2011—Continued

If . . .	And . . .	Then . . .	But if . . .
You did not request an EAD during the original registration period for Haiti TPS.	You want an EAD valid through January 22, 2013.	You must file a new Form I–765 with fee (or fee waiver request) during the re-registration period that opens on May 23, 2011.	Your Form I–821 is denied before the re-registration period opens on May 23, 2011, then DO NOT file a new Form I–765. If you file a new Form I–765 it will be denied because your Form I–821 was denied under the re-designation.
	You do not want an EAD valid through January 22, 2013.	You do not need to file a Form I–765.	

I am a TPS beneficiary. What are the procedures for re-registration for TPS under the extension?

The remainder of this **Federal Register** notice will provide you with the procedures for re-registration under the extension. The following procedures *do not* apply to individuals who are filing an initial application under the redesignation. Registration procedures for individuals applying for TPS under the redesignation can be found in the Haitian TPS **Federal Register** notice that was published on May 19, 2011, and on the "TPS Designated Country: Haiti" Web page that can be accessed from the USCIS TPS Web site at *http://www.uscis.gov/tps.*

Required Application Forms and Application Fees to Re-Register for TPS

To re-register for TPS, an applicant must submit:

1. Application for Temporary Protected Status, Form I–821

• You do not need to pay the application fee for a re-registration; and

2. Application for Employment Authorization, Form I–765

• For re-registration, you must pay the application fee if you want an EAD.

• You do not pay the Form I–765 fee if you are not requesting an EAD.

You must submit both completed application forms together. If you are unable to pay, you may apply for application and/or biometrics fee waivers by submitting a written request for a fee waiver or by completing Request for Fee Waiver, Form I–912, and providing satisfactory supporting documentation. For more information on the application forms and application fees for TPS, please visit the USCIS TPS Web page at *http://www.uscis.gov/tps* and on left hand column click on Temporary Protected Status for Haiti. Fees for the Form I–821, Form I–765, and biometric services fee are also described in 8 CFR 103.7(b).

Biometric Services Fee

Biometrics (such as fingerprints) are required for all applicants 14 years of age or older. Those applicants must submit a biometric services fee. As previously stated, if you are unable to pay, you may apply for a biometrics fee waiver by completing Form I–912 or submitting your own written request for a fee waiver, and providing satisfactory supporting documentation. For more information on the biometric services fee, please visit the USCIS Web site at *http://www.uscis.gov.*

Mailing Information

Mail your re-registration application for TPS to the proper address in Table 3:

TABLE 3—MAILING ADDRESSES

If you live in . . .	For regular mail, send to . . .	For express mail and courier deliveries, send to . . .
The state of Florida	USCIS, P.O. Box 4464, Chicago, IL 60680–4464.	USCIS, Attn: Haiti TPS, 131 South Dearborn, 3rd Floor, Chicago, IL 60603–5517.
The state of New York	USCIS, P.O. Box 660167, Dallas, TX 75266–0167.	USCIS, Attn: Haiti TPS, 2501 S. State Hwy. 121, Business, Suite 400, Lewisville, TX 75067.
All other states	USCIS, P.O. Box 24047, Phoenix, AZ 85074–4047.	USCIS, Attn: Haiti TPS, 1820 E. Skyharbor Circle S, Suite 100, Phoenix, AZ 85034.

E-Filing

E-filing is not available for Haiti TPS, so you cannot e-file your re-registration application. Please mail your application to the mailing address listed in Table 3 above.

Employment Authorization Documents (EADs)

DHS recognizes the possibility that all re-registrants may not receive new EADs until after their current EADs expire on July 22, 2011. Accordingly, DHS is automatically extending the validity of EADs issued under the 2010 TPS designation of Haiti for six months, through January 22, 2012.

May I request an interim EAD at my local USCIS office?

No. USCIS will not issue interim EADs to TPS applicants and re-registrants at local offices.

Am I eligible to receive an automatic six-month EAD extension from July 23, 2011, through January 22, 2012?

You will receive an automatic six-month extension of your EAD if you:

• Are a national of Haiti (or an alien having no nationality who last habitually resided in Haiti) who received an EAD under the designation of Haiti for TPS, and

• Have not had TPS withdrawn or denied.

This automatic extension is limited to EADs Form I–766 with an expiration date of July 22, 2011. These EADs must also bear the notation "A–12" or "C–19" on the face of the card under "Category."

Upon hire, what documentation may I show to my employer as proof of employment authorization and identity when completing Employment Eligibility Verification, Form I–9?

You can find a list of acceptable document choices on page 5 of the Employment Eligibility Verification form, Form I–9. Employers are required to verify the identity and employment authorization of all new employees by using Form I–9. Within three days of hire, an employee must present his or her employer with proof of identity and employment authorization.

You may present any document from List A (reflecting both your identity and employment authorization), or one document from list B (reflecting identify) together with one document from list C (reflecting employment authorization). An EAD is an acceptable document under "List A."

If you received a six-month automatic extension of your EAD by virtue of this **Federal Register** notice, you may choose to present your automatically extended EAD, as described above, to your employer as proof of identity and employment authorization for Form I–9 through January 22, 2012 (see the subsection below titled "*How do I and my employer complete Form I–9 using an automatically extended EAD for a new job (i.e., verification)*" for further information). To minimize confusion over this extension at the time of hire, you may choose to present a copy of this **Federal Register** notice regarding the automatic extension of employment authorization through January 22, 2012, to your employer. As an alternative to presenting your automatically extended EAD, you may choose to present any other acceptable document from list A, or list B plus list C.

What documentation may I show my employer if I am already employed but my current TPS-related EAD is set to expire?

You must present any document from list A or any document from list C on Form I–9 to reverify employment authorization. Employers are required to reverify on Form I–9 the employment authorization of current employees upon the expiration of a TPS-related EAD.

If you received a six-month automatic extension of your EAD by virtue of this **Federal Register** notice, your employer does not need to reverify until after January 22, 2012. You and your employer *do* need to make corrections to the employment authorization expiration dates in section 1 and section 2 of the Form I–9 (see the subsection below titled "*How do I and my employer fill out Form I–9 using an automatically extended EAD for my current job?*" for further information). In addition, you may also show this **Federal Register** notice to your employer to avoid confusion about whether or not your expired TPS-related document is acceptable. After January 22, 2012, when the automatic extension expires, your employer must reverify your employment authorization. You may show any document from list A or list C on Form I–9 to satisfy this reverification requirement (including a new TPS EAD that expires January 22, 2013).

What happens after January 22, 2012 for purposes of employment authorization?

After January 22, 2012, employers may not accept the EADs that were automatically extended by this **Federal Register** notice. However, USCIS will issue new EADs to TPS re-registrants. These EADs will have an expiration date of January 22, 2013, and can be presented to your employer as proof of employment authorization and identity. The EAD will bear the notation "A–12" or "C–19" on the face of the card under "Category." Alternatively, you may choose to present any other legally acceptable document or combination of documents listed on the Form I–9 to prove identity and employment authorization.

How do I and my employer complete Form I–9 using an automatically extended EAD for a new job (i.e., verification)?

When using an automatically extended EAD to fill out Form I–9 for a new job prior to January 22, 2012, you and your employer should do the following:

(1) For Section 1, you should:

a. Check "An alien authorized to work;"

b. Write your alien number (A-number) in the first space (your EAD will have your A-number printed on it); and

c. Write the automatic extension date in the second space.

(2) For Section 2, employers should:

a. Record the document title;

b. Record the document number; and

c. Record the automatically extended EAD expiration date.

After January 22, 2012, employers must reverify the employee's employment authorization in section 3 of Form I–9.

How do I and my employer make corrections to Form I–9 using an automatically extended EAD for my current job?

If you are an existing employee and you presented an EAD that was valid when you first started your job, but that EAD has now been automatically extended, you and your employer should correct your previously completed Form I–9 as follows:

(1) For section 1, you should:

a. Draw a line through the expiration date in the second space;

b. Write January 22, 2012, above the previous date;

c. Write "TPS Ext." in the margin of section 1; and

a. Initial and date the correction in the margin of section 1.

(2) For section 2, employers should:

a. Draw a line through the expiration date written in section 2;

b. Write January 22, 2012, above the previous date;

c. Write "TPS Ext." in the margin of section 2; and

d. Initial and date the correction in the margin of section 2.

After January 22, 2012, when the automatic extension of EADs expires, employers must reverify the employee's employment authorization in section 3.

If I am an employer enrolled in E-Verify, what do I do when I receive a "Work Authorization Documents Expiring" alert for an automatically extended EAD?

If you are an employer who participates in E-Verify, you will receive a "Work Authorization Documents Expiring" case alert when a TPS beneficiary's EAD is about to expire. Usually, this message is an alert to complete section 3 of Form I–9 to reverify an employee's employment authorization. For existing employees with TPS EADs that have been automatically extended, employers should disregard the E-Verify case alert and follow the instructions above explaining how to correct Form I–9. After January 22, 2012, employment authorization needs to be reverified in section 3. You should never use E-Verify for reverification.

Can my employer require that I produce any other documentation to prove my status, such as proof of my Haitian citizenship?

No. When completing the Form I–9, employers must accept any documentation that appears on the lists of acceptable documentation, and that reasonably appears to be genuine and that relates to you. Employers may not

request documentation that does not appear on the Form I–9. Therefore, employers may not request proof of Haitian citizenship when completing Form I–9. If presented with EADs that have been automatically extended pursuant to this **Federal Register** notice or EADs that are unexpired on their face, employers should accept such EADs as valid "List A" documents so long as the EADs reasonably appear on their face to be genuine and to relate to the employee. See below for important information about your rights if your employer rejects lawful documentation, requires additional documentation, or otherwise discriminates against you because of your citizenship or immigration status, or national origin.

Note to All Employers: Employers are reminded that the laws requiring employment eligibility verification and prohibiting unfair immigration-related employment practices remain in full force. This notice does not supersede or in any way limit applicable employment verification rules and policy guidance, including those rules setting forth reverification requirements. For questions, employers may call the USCIS Customer Assistance Office at 1–800–357–2099. The USCIS Customer Assistance Office accepts calls in English and Spanish only. Employers may also call the Department of Justice (DOJ) Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) Employer Hotline at 1–800–255–8155.

Note to Employees: Employees or applicants may call the DOJ OSC Worker Information Hotline at 1–800–255–7688 for information regarding employment discrimination based upon citizenship or immigration status, and national origin, unfair documentary practices related to the Form I–9, and discriminatory practices related to E-Verify. Employers must accept any document or combination of documents acceptable for Form I–9 completion if the documentation reasonably appears to be genuine and relates to the employee. Employers may not require extra or additional documentation beyond what is required for Form I–9 completion. Further, employees who receive an initial mismatch via E-Verify must be given an opportunity to challenge the mismatch, and employers are prohibited from taking adverse action against such employees based on the initial mismatch unless and until E-Verify returns a final nonconfirmation. The Hotline accepts calls in multiple languages. Additional information is available on the OSC Web site at *http://www.justice.gov/crt/osc/.*

Note Regarding State and Local Government Agencies (Such as Departments of Motor Vehicles): State and local government agencies are permitted to create their own guidelines when granting certain benefits, such as a driver's license or an identification card. Each state may have different laws, requirements, and determinations about what documents you need to provide to prove eligibility for certain benefits. If you are applying for a state or local government benefit, you should provide the state or local government agency with all documents that show you are a TPS beneficiary and/or show you are authorized to work based on TPS. Examples are:

(1) Your expired EAD that has been automatically extended, or your EAD that has a valid expiration date,

(2) A copy of this **Federal Register** notice if your EAD is automatically extended,

(3) A copy of your I–821 Receipt Notice (I–797) for this re-registration,

(4) A copy of your I–821 Approval Notice (I–797), if you receive one from USCIS,

(5) Any other document from USCIS (such as a mailer) showing that you have a pending or approved I–821 or I–765 re-registration or approved I–821 or I–765 initial registration.

Some benefit-granting agencies use the USCIS Systematic Alien Verification for Entitlements Program (SAVE) to verify the current immigration status of applicants for public benefits. If such an agency has denied your application based solely or in part on a SAVE response following completion of all required SAVE verification steps, the agency must offer you the opportunity to appeal the decision in accordance with the agency's procedures. If the agency has completed all SAVE verification and you do not believe the response is correct, you may make an Info Pass appointment for an in-person interview at a local USCIS office. Detailed information on how to make corrections and how to make an appointment or a written request can be found at the SAVE Web site at *http://www.uscis.gov/save,* then by choosing "How to Correct Your Records" from the menu on the right.

Janet Napolitano,

Secretary.

[FR Doc. 2011–12576 Filed 5–20–11; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5480–N–45]

Notice of Submission of Proposed Information Collection to OMB; Emergency Comment Request Capacity Building for Sustainable Communities

AGENCY: Office of Sustainable Housing and Communities, HUD.

ACTION: Notice of proposed information collection.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for emergency review and approval, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* May 31, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments must be received within seven (7) days from the date of this Notice. Comments should refer to the proposal by name/or OMB approval number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; e-mail: *OIRA_Submission @omb.eop.gov;* fax: (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail: *Colette.Pollard@hud.gov*; telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Mr. McKinney.

SUPPLEMENTARY INFORMATION: 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 of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Capacity Building for Sustainable Communities Program.

Description of Information Collection: On December 16, 2009, the President signed the Consolidated Appropriations Act. 2010 (Pub. L. 111–117), which provided a total of $150 million in fiscal year 2010 to HUD for a Sustainable Communities Initiative to improve regional planning efforts that integrate housing and transportation decisions, and increase the capacity to improve land use and and zoning. Of that total $2 million was reserved in FY 2010, and up to $3 million will be reserved in FY 2011, if available, to build the capacity

of metropolitan and multijurisdictional planning efforts that support community involvement and integrate housing, land use, land cleanup and preparation for reuse, economic and workforce development, transportation, and infrastructure investment. Up to $700,000 may be available from the EPA as authorized in the Clean Air Act Section 103(b)(2), Clean Water Act Section 104(b)(2), and CERCLA Section 104(k)(6), subject to Congress appropriating FY 2011 Funding.

OMB Control Number: 2501–Pending.

Agency Form Numbers:

(a) Form SF–424—Application for Federal Assistance.

(b) SF–424—Supplement Survey on Equal Opportunity for Applicants ("Faith Based EEO Survey (SF–424–SUPP)" on Grants.gov) (optional submission).

(c) HUD–424—CBW, HUD Detailed Budget Worksheet, (Included Total Budget Federal Share and Matching) and Budget Justification Narrative.

(d) Form HUD–2880—Applicant/Recipient Disclosure/Update Report ("HUD Applicant Recipient Disclosure Report" on Grants.gov).

(e) Form SF–LLL—Disclosure of Lobbying Activities (if applicable).

(f) Form HUD–96011—Third Party Documentation Facsimile Transmittal ("Facsimile Transmittal Form" on Grants.gov) (Used as the cover page to transmit third party documents and other information designed for each specific application for tracking purposes. HUD will not read faxes that do not use the HUD–96011 as the cover page to the fax.)

Members of Affected Public: State, Local Government and Non-profit organization.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of responses, and hours of responses: The estimated number of respondents during the pre-application process is 600 and the number of responses is 100. The estimated number of respondents during the application process is 0.166 and the number of responses is 6. The total reporting burden is 100 hours.

Status of the proposed information collection: New Emergency collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: May 17, 2011.

Colette Pollard,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2011–12646 Filed 5–20–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–R–2010–N273; 1265–0000–10137–S3]

Hakalau Forest National Wildlife Refuge, Hawai'i County, HI; Final Comprehensive Conservation Plan and Finding of No Significant Impact for Environmental Assessment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the availability of our final Comprehensive Conservation Plan (CCP) and Finding of No Significant Impact (FONSI) for the Environmental Assessment (EA) for the Hakalau Forest National Wildlife Refuge (Refuge). In this final CCP, we describe how we will manage this refuge for the next 15 years.

ADDRESSES: You may view or obtain copies of the final CCP and FONSI by any of the following methods. You may request a hard copy or CD–ROM.

Agency Web site: Download the CCP/FONSI at *http://www.fws.gov/pacific/planning.*

E-mail: *FW1PlanningComments@fws.gov.* Include "Hakalau Forest National Wildlife Refuge Final CCP" in the subject line of the message.

Mail: Hakalau Forest National Wildlife Refuge, 60 Nowelo Street, Suite 100, Hilo, HI 96720.

In-Person Viewing or Pickup: Hakalau Forest National Wildlife Refuge, 60 Nowelo Street, Suite 100, Hilo, HI 96720.

FOR FURTHER INFORMATION CONTACT: Jim Kraus, Refuge Manager, (808) 443–2300.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we finalize the CCP process for the Hakalau Forest National Wildlife Refuge. We started this process through a notice of intent in the **Federal Register** (74 FR 8564; February 25, 2009). We released the draft CCP/EA to the public, announcing and requesting comments in a notice of availability in the **Federal Register** (75 FR 52546; August 26, 2010).

The Refuge is located on the Island of Hawai'i. It encompasses two units: the Hakalau Forest Unit and the Kona Forest Unit. The Hakalau Forest Unit was established in 1985 to protect endangered forest birds and their rainforest habitat. The Hakalau Forest Unit encompasses 32,733 acres of land, located on the windward (eastern) slope of Mauna Kea, which supports a diversity of native birds and plants. The Kona Forest Unit, at 5,300 acres, was established in 1997 on the leeward (southwestern) slope of Mauna Loa to protect native forest birds and the 'alalā, the endangered Hawaiian crow. The Kona Forest Unit supports diverse native bird and plant species, as well as rare habitats found in lava tubes and lava tube skylights.

We announce our decision and the availability of the FONSI for the final CCP for Hakalau Refuge in accordance with National Environmental Policy Act (NEPA) (40 CFR 1506.6(b)) requirements. We completed a thorough analysis of impacts on the human environment, which we included in the draft CCP/EA.

The CCP will guide us in managing and administering the Refuge for the next 15 years. Alternative B, as we described in the final CCP, is the foundation for the CCP.

Background

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee) (Refuge Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. We will review and update the CCP at least every 15 years in accordance with the Refuge Administration Act.

CCP Alternatives, Including Selected Alternative

During our CCP planning process we identified several issues. To address the issues, we developed and evaluated the following alternatives in our draft CCP/EA.

Alternative A (No Action)

Under Alternative A, we would continue existing Refuge management activities, including fencing projects currently under way at the Kona Forest Unit. Staff would conduct limited additional restoration of various koa forest habitats and predator control. Volunteer opportunities to assist Refuge staff with planting native plants would continue, along with public pig hunting. Refuge staff would provide limited outreach regarding management activities.

Alternative B (Preferred Alternative)

Under Alternative B, we would increase reforestation, restoration, and threat (*e.g.,* predators, nonnative species, *etc.*) removal efforts. Additional areas in both units would be protected through fencing and increased management. Refuge staff, with the assistance of volunteers, would increase efforts to restore understory species in reforested areas. Staff would provide additional opportunities for outreach and environmental education and interpretation, while closing public hunting. We would work with partners and neighboring landowners to explore habitat protection and restoration opportunities, including the potential for Refuge boundary expansion. Opportunities for additional land acquisition would focus on protection of forest birds and their habitats in response to climate change concerns.

Alternative C

Under Alternative C, we would focus on maintaining existing koa forest and allowing natural regeneration of the understory on the Kona Forest Unit. We would place less emphasis on ungulate and predator removal. Additional grassland areas would be maintained for nēnē foraging. We would open additional areas of the Hakalau Forest Unit to the public. Fewer volunteer opportunities would be provided. As in Alternative B, we would explore habitat protection opportunities through acquisition.

Comments

We solicited comments on the draft CCP/EA from August 26, 2010, to September 15, 2010. We received 19 comments via letters, e-mails, or at the public open house on the draft CCP/EA, all of which were thoroughly evaluated. To address public comments, minor changes and clarifications were made to the final CCP where appropriate.

Selected Alternative

After considering the comments we received, we have selected Alternative B for implementation. Alternative B was the most supported alternative identified by the comments received. By implementing Alternative B, we will increase habitat supporting threatened and endangered species including the ʻalalā, ʻakiapōlāʻau, *Clermontia lindseyana, Cyanea stictophylla,* and others. Major management actions will center on habitat protection through fencing, restoration and reforestation via an enhanced outplanting program, and threat mitigation by removal of predators, ungulates, and invasive weed species. Through partnering, opportunities for additional land acquisitions will focus on protection of forest birds and their habitats in response to concerns regarding climate change. Prioritizing data collection and research supporting adaptive management will occur. Additional outreach and environmental education opportunities will increase along with public use through a new interpretive trail and expanded volunteer program.

Public Availability of Documents

In addition to the methods in **ADDRESSES**, you can view or obtain documents at the following locations:

- Our Web site: *http://www.fws.gov/hakalauforest/.*
- During regular library hours at:
  - ○ Hawaiʻi State Library (478 S. King Street, Honolulu, HI 96813)
  - ○ Hilo Public Library (300 Waianuenue Avenue, Hilo, HI 96720)
  - ○ Kailua-Kona Public Library (75–138 Hualālai Road, Kailua-Kona, HI 96740)
  - ○ National Conservation Training Center Library (698 Conservation Way, Shepherdstown, WV 25443)

Dated: May 17, 2011.

Richard R. Hannan,

Acting Regional Director, Region 1, Portland, Oregon.

[FR Doc. 2011–12564 Filed 5–20–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[USGS–8327–CMG61]

Agency Information Collection: Comment Request; The State of Ecosystem Services Implementation Survey

AGENCY: United States Geological Survey (USGS), Interior.

ACTION: Notice of a new collection.

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), we are notifying the public that we have submitted to the Office of Management and Budget (OMB) an information collection request (ICR) for a new collection of information: The State of Ecosystem Services Implementation Survey. This notice provides the public and other Federal agencies an opportunity to comment on the paperwork burden of this information collection request.

DATES: You must submit comments on or before June 22, 2011.

ADDRESSES: Please submit written comments on this information collection directly to the Office of Management and Budget (OMB) Office of Information and Regulatory Affairs, Attention: Desk Officer for the Department of the Interior via e-mail to *OIRA_DOCKET@omb.eop.gov* or fax at 202–395–5806; and identify your submission as 1028—NEW. Please also submit a copy of your written comments to Phadrea Ponds, USGS Information Collection Clearance Officer, U.S. Geological Survey, 2150–C, Centre Avenue, Fort Collins, CO 80526–8118 (mail); 970–226–9230 (fax); or *pondsp@usgs.gov* (e-mail). Please reference Information Collection 1028—NEW, ECOSERV in the subject line.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Rudy Schuster by mail at U.S. Geological Survey, 2150–C Center Avenue, Fort Collins, CO 80526, or by telephone at (970) 226–9165. To see a copy of the entire ICR submitted to OMB, go to *http://www.reginfo.gov* (Information Collection Review, Currently under Review).

SUPPLEMENTARY INFORMATION:

I. Abstract

Ecosystem goods and services are defined by ecologists as the biophysical processes that give rise to social benefits. For example, in ecology, processes such as nutrient cycling, atmospheric regulation, pollination, and seed dispersal are considered ecosystem services. Indirect benefits are also considered; for example, recreation, avoided flood damage, and aesthetic benefits are also ecosystem services. In short, the benefits associated with an ecosystem service are the value that humans derive from that service. The objectives of this survey are to illustrate the various approaches that are being used to formulate ecosystem services projects and the state-of-the-art processes through which projects are implemented. The survey will gather information concerning: Methods used in ecosystem services projects, motivations for conducting projects, degree of project implementation, management actions resulting from project results (for completed projects), and characteristics of projects that have successfully implemented ecosystem services concepts.

II. Data

OMB Control Number: 1028—NEW.

Title: The State of Ecosystem Services Implementation Survey.

Type of Request: This is a new collection.

Affected Public: Individuals who are (currently or recently have been)

engaged in conducting an ecosystem services research project; potential respondents will include: Federal employees, non-governmental organization employees, and academic researchers. The population will include people from the United States as well as other nations.

Respondent's Obligation: Voluntary.

Frequency of Collection: On occasion.

Estimated Annual Number of Non-Federal Respondents: 392.

Estimated Total Annual Non-Federal Responses: 392.

Estimated Time per Response: 25 minutes for complete response and 5 minutes for non-respondents.

Estimated Total Annual Burden Hours: 140 hours.

Estimated Annual Reporting and Recordkeeping Non-Hour Cost Burden: We have not identified any non-hour cost burdens associated with this collection of information.

III. Request for Comments

On September 13, 2010, we published a **Federal Register** notice (75 FR 55598) announcing that we would submit this ICR to OMB for approval and soliciting comments. The comment period closed on November 12, 2011. We did not receive any comments in response to that notice.

We again invite comments concerning this ICR on: (a) Whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, usefulness, and clarity of the information to be collected; and (d) ways to minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

Please note that the comments submitted in response to this notice are a matter of public record. 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: May 3, 2011.

Anne Kinsinger,

Associate Director for Ecosystems.

[FR Doc. 2011–12517 Filed 5–20–11; 8:45 am]

BILLING CODE 4311–AM–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNVS00560.L58530000.FR0000.241A; N–57230; 11–08807; MO#450020986; TAS:14X5232]

Notice of Correction for Conveyance of Public Lands for Airport Purposes in Clark County, NV

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of correction.

SUMMARY: This notice corrects the legal land description published in the **Federal Register** on March 1, 2011 (76 FR 11262) for the Department of the Interior, Bureau of Land Management, City of Henderson, Clark County, Nevada.

FOR FURTHER INFORMATION CONTACT: Philip Rhinehart, (702) 515–5182, or *prhineha@blm.gov.* 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 lands for conveyance to the Clark County Department of Aviation for the Henderson Executive Airport are correctly and legally described as:

Mount Diablo Meridian

T. 23 S. R. 61 E.
Sec. 10, S½SE¼NE¼NE¼, S½NE¼SE¼NE¼, SE¼SE¼NE¼, SW¼SE¼NE¼, N½NE¼NE¼SE¼, NW¹⁴NE¹⁴SE¼, N½SE¼NE¼SE¼;
Sec. 11, W½NW¼, NW¼NW¼SW¼, NE¼NW¼SW¼, N½SW¼NW¼SW¼, N½SE¼NW¼SW¼.

The area described contains 160 acres, more or less, in Clark County.

Authority: 43 CFR 2911.0–1.

Vanessa L. Hice,

Acting Assistant Field Manager, Division of Lands.

[FR Doc. 2011–12626 Filed 5–20–11; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLIDT03000–L14300000.EU0000; IDI–35577]

Notice of Realty Action; Direct Sale of Public Lands in Jerome County, ID

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: The Bureau of Land Management (BLM) proposes to sell a parcel of public land totaling 7.45 acres in Jerome County, Idaho, to the owners of the adjacent private land, Todd and Bridget Buschhorn, for the appraised fair market value of $5,600.

DATES: Comments regarding the proposed sale must be received by the BLM by July 7, 2011.

ADDRESSES: Written comments concerning the proposed sale should be sent to Ruth A. Miller, Manager, BLM Shoshone Field Office, 400 West F Street, Shoshone, Idaho 83352.

FOR FURTHER INFORMATION CONTACT: Lisa Claxton, Realty Specialist, at the above address or (208) 732–7272. 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 following-described public land in Jerome County, Idaho, is being proposed for direct sale to Todd and Bridget Buschhorn in accordance with Sections 203 and 209 of the Federal Land Policy and Management Act of 1976, as amended (43 U.S.C. 1713 and 1719), at not less than the appraised fair market value:

Boise Meridian

T. 10 S., R. 19 E.,
sec. 25, lot 10.

The area described contains 7.45 acres in Jerome County.

The appraised fair market value is $5,600. The public land is identified as suitable for disposal in the 1985 BLM Monument Resource Management Plan, as amended, and is not needed for any other Federal purposes. The direct sale will allow for the subject parcel to be formally consolidated with adjacent private property, the owner of which currently holds a land use authorization (Land Use Permit) for agricultural and residential purposes. The subject parcel is somewhat isolated and uneconomical to manage due to its location and authorized use for agricultural and residential purposes. Disposal would alleviate the processing and administration of this land use authorization. Regulations contained in 43 CFR 2711.3–3 make allowances for direct sales when a competitive sale is inappropriate and when the public

interest would best be served by a direct sale. This could include the need to recognize an authorized use, such as an existing business which could suffer a substantial economic loss if the tract were purchased by someone other than the authorized user. In accordance with 43 CFR 2710, the BLM authorized officer finds that the public interest would best be served by authorizing the direct sale to Todd and Bridget Buschhorn, which would allow the identified lands to be consolidated with Todd and Bridget Buschhorn's adjacent private property to continue to be used for agricultural and residential purposes.

It has been determined that the subject parcel contains no known mineral values; therefore, the BLM proposes that the conveyance of the Federal mineral interests occur simultaneously with the sale of the land. On April 29, 2010, the above described land was segregated from appropriation under the public land laws, including the mining laws. The segregation will terminate (1) Upon issuance of a patent, (2) publication in the **Federal Register** of a termination of the segregation, or (3) 2 years from the date of segregation, whichever occurs first. The lands will not be sold until at least July 22, 2011. Todd and Bridget Buschhorn will be required to pay a $50 nonrefundable filing fee for the conveyance of the mineral interests. Any patent issued will contain the following terms, conditions, and reservations:

a. A reservation of right-of-way to the United States for ditches and canals constructed by the authority of the United States under the Act of August 30, 1890, 43 U.S.C. 945;

b. A condition that the conveyance be subject to all valid existing rights of record;

c. A notice and indemnification statement under the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9620(W)), indemnifying and holding the United States harmless from any release of hazardous materials that may have occurred; and

d. Additional terms and conditions that the authorized officer deems appropriate.

Detailed information concerning the proposed land sale including the appraisal, planning and environmental documents, and a mineral report are available for review at the BLM Shoshone Field Office at the location identified in the **ADDRESSES** section above. Normal business hours are 7:45 a.m. to 4:30 p.m., Monday through Friday, except for Federal holidays.

Public Comments

Public comments regarding the proposed sale may be submitted in writing to the BLM Shoshone Field Manager (see **ADDRESSES** above) on or before July 7, 2011. Comments received in electronic form, such as e-mail or facsimile, will not be considered. Any adverse comments regarding the proposed sale will be reviewed by the BLM Idaho State Director or other authorized official of the Department of the Interior, who may sustain, vacate, or modify this realty action in whole or in part. In the absence of timely filed objections, this realty action will become the final determination of the Department of the Interior.

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.

Authority: 43 CFR 2711.1–2(a) and (c).

Ruth A. Miller,

Shoshone Field Manager.

[FR Doc. 2011–12539 Filed 5–20–11; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLIDB00100 LF10000PP.HT0000 LXSS020D0000 241A.0; 4500020463; IDI–34392]

Notice of Realty Action: Recreation and Public Purposes Act Classification; Lease of Public Land in Canyon County, ID

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: The Treasure Valley Aero Modelers filed an application to lease 40 acres of public land under the Recreation and Public Purposes (R&PP) Act, as amended, to be used for a runway and related improvements for flying radio-controlled model airplanes. The Bureau of Land Management (BLM) has examined the land and found it suitable to be classified for lease under the provisions of the R&PP Act, as amended.

DATES: Interested parties may submit written comments regarding the proposed classification and lease of this public land until July 7, 2011.

ADDRESSES: Mail written comments to Terry A. Humphrey, Four Rivers Field Manager, Bureau of Land Management, Boise District Office, 3948 Development Avenue, Boise, Idaho 83705.

FOR FURTHER INFORMATION CONTACT: Effie Schultsmeier, BLM Four Rivers Realty Specialist, at the above address or via phone at (208) 384–3300. 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 BLM has examined and found the following tract to be suitable for lease under the provisions of the R&PP Act, as amended (43 U.S.C. 869 *et seq.*):

Boise Meridian

T. 6 N., R. 5 W.,
Sec. 27, SW¼ NE¼.

The area described contains approximately 40 acres in Canyon County.

In accordance with the R&PP Act, the Treasure Valley Aero Modelers, a non-profit association, filed an application to lease the above-described property for a runway and related improvements for flying radio-controlled model airplanes. Rental has been determined using the BLM R&PP Pricing Guidelines. Additional detailed information pertaining to this application, plan of development, and site plans are in case file IDI–34392, located in the BLM Four Rivers Field Office at the address above.

Lease of this land is consistent with the BLM Cascade Resource Management Plan, dated July 1, 1988, as amended, and would be in the public interest. The Treasure Valley Aero Modelers have not applied for more than 640 acres in a year for recreational purposes, the limit set in 43 CFR 2741.7(a)(5), and have submitted a statement in compliance with the regulations at 43 CFR 2741.4(b). Any lease will be subject to the provisions of the R&PP Act and applicable regulations of the Secretary of the Interior. Any lease of this land will be subject to valid existing rights; will contain any terms or conditions required by law or regulation, including a provision for termination upon a finding that the land has not been utilized for the purpose specified for a time period to be specified in the lease or that the land is being devoted to another use; will contain a provision

prohibiting the disposal, placement, or release of any hazardous substance; and will contain an appropriate indemnification clause protecting the United States from claims arising out of the lessee's use, occupancy or operations on the leased lands. It will also contain any other terms or conditions deemed necessary or appropriate by the authorized officer. As of May 23, 2011, the above-described land is segregated from all forms of appropriation under the public land laws, including the United States mining laws, except for lease under the R&PP Act.

Public Comments: Interested parties may submit written comments involving the suitability of the land for a runway and related improvements for flying radio-controlled model airplanes. Comments transmitted via e-mail, facsimile, or other electronic means will not be accepted. Comments on the classification are restricted to whether the land is physically suited for the proposal, whether the use will maximize future uses of the land, whether the use is consistent with local planning and zoning, or if the use is consistent with State and Federal programs.

Interested parties may also submit written comments regarding the specific use proposed in the application and plan of development, whether the BLM followed proper administrative procedures in reaching its decision or any other factor not directly related to the suitability of the land for R&PP Act use.

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.

Any adverse written comments on the proposed classification and lease will be reviewed by the BLM Idaho State Director, who may sustain, vacate or modify this realty action and classification, and issue a final determination. In the absence of any objections, the classification of the land described in this notice will become effective on July 22, 2011. The land will not be available for lease until after the classification becomes effective.

Authority: 43 CFR 2741.5.

Terry A. Humphrey,

Four Rivers Field Manager.

[FR Doc. 2011–12528 Filed 5–20–11; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

National Park Service

[2031–A046–409]

Environmental Impact Statement for the Big Cypress National Preserve Addition, Florida

AGENCY: National Park Service.

ACTION: Notice of Availability of the Record of Decision and Floodplain Statement of Findings for the General Management Plan/Wilderness Study/Off-Road Vehicle Management Plan/Environmental Impact Statement for the Big Cypress National Preserve Addition.

SUMMARY: Pursuant to the National Environmental Policy Act of 1969, the National Park Service (NPS) announces the availability of the Record of Decision (ROD) and Floodplain Statement of Findings for the General Management Plan/Wilderness Study/Off-Road Vehicle Management Plan/Environmental Impact Statement (EIS) for the Big Cypress National Preserve Addition, Florida. On February 4, 2011, the Regional Director, Southeast Region, approved the ROD for the project.

SUPPLEMENTARY INFORMATION: Four alternatives were evaluated in the Environmental Impact Statement. These include: Alternative A, No Action—continues current management; Alternative B—enables visitor participation in a wide variety of outdoor recreational experiences; Alternative F—emphasizes resource preservation, restoration, and research while providing recreational opportunities with limited facilities and support; and the Preferred Alternative—provides diverse frontcountry and backcountry recreational opportunities, enhances day use and interpretive opportunities along road corridors, and enhances recreational opportunities with new facilities and services. The Environmental Impact Statement also evaluated the impacts of a wilderness study and an off-road vehicle management plan.

The Preferred Alternative is NPS' selected alternative. The ROD includes a statement of the decision made, a description of mitigation measures and monitoring, synopses of other alternatives considered, the basis for the decision, a description of the environmentally preferable alternative, an overview of public involvement in the decision-making process, the U.S. Fish and Wildlife Service's Biological Opinion for the project, a finding of no impairment of Preserve resources and values, and a Floodplain Statement of Findings.

ADDRESSES: The ROD is available online at *http://parkplanning.nps.gov/bicy*. You may request a hard copy by contacting Pedro Ramos, Superintendent, Big Cypress National Preserve, 33100 Tamiami Trail East, Ochopee, FL 34141–1000.

FOR FURTHER INFORMATION CONTACT: Pedro Ramos, Superintendent, Big Cypress National Preserve, 33100 Tamiami Trail East, Ochopee, FL 34141–1000; telephone 239–695–1103. *pedro_ramos@nps.gov.*

Authority: The authority for publishing this notice is 40 CFR 1506.6.

The responsible official for this Record of Decision is the Regional Director, Southeast Region, National Park Service, 100 Alabama Street, SW., 1924 Building, Atlanta, Georgia 30303.

Dated: May 13, 2011.

Gordon Wissinger,

Deputy Regional Director, Southeast Region, National Park Service.

[FR Doc. 2011–11969 Filed 5–20–11; 8:45 am]

BILLING CODE 4310–V6–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Agency Information Collection; Activities Under OMB Review; Comment Request

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of renewal of a currently approved collection (OMB No. 1006–0005).

SUMMARY: The Bureau of Reclamation (we, our, or us) has forwarded the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval: Individual Landholder's Certification and Reporting Forms for Acreage Limitation. The ICR describes the nature of the information collection and its expected cost and burden.

DATES: OMB has up to 60 days to approve or disapprove this information collection, but may respond after 30 days; therefore, public comments must be received on or before June 22, 2011 to assure maximum consideration.

ADDRESSES: Send written comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to the Desk Officer for the Department of the Interior at the Office of Management and Budget, Office of Information and Regulatory Affairs, via facsimile to (202) 395–5806, or e-mail to *OIRA_DOCKET@omb.eop.gov.* A copy of your comments should also be directed to the Bureau of Reclamation, Attention: 84–53000, P.O. Box 25007, Denver, CO 80225–0007.

FOR FURTHER INFORMATION CONTACT: Stephanie McPhee at (303) 445–2897. The entire Information Collection Request may be found at *http://www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Title: Individual Landholder's Certification and Reporting Forms for Acreage Limitation, 43 CFR part 426 and 43 CFR part 428.

Abstract: This information collection requires certain landholders (direct or indirect landowners or lessees) and farm operators to complete forms demonstrating their compliance with the acreage limitation provisions of Federal reclamation law, as required under the Reclamation Reform Act of 1982 (RRA), Acreage Limitation Rules and Regulations, 43 CFR part 426, and Information Requirements for Certain Farm Operations In Excess of 960 Acres and the Eligibility of Certain Formerly Excess Land, 43 CFR part 428. Responses are required to retain or obtain a benefit. These forms are submitted to districts that use the information to establish each landholder's status with respect to landownership limitations, full-cost pricing thresholds, lease requirements, and other provisions of Federal reclamation law. In addition, forms are submitted by certain farm operators to provide information concerning the services they provide and the nature of their farm operating arrangements. All landholders whose entire westwide landholdings total 40 acres or less are exempt from the requirement to submit RRA forms. Landholders who are "qualified recipients" have RRA forms submittal thresholds of 80 acres or 240 acres depending on the district's RRA forms submittal threshold category where the land is held. Only farm operators who provide multiple services to more than 960 acres held in trusts or by legal entities are required to submit forms.

Minor editorial changes were made to the forms and instructions prior to the 60-day comment period initiated by the notice published in the **Federal Register** (75 FR 59740, Sept. 28, 2010). These changes are designed to assist the respondents by increasing their understanding of the forms, clarifying the instructions for use when completing the forms, and clarifying the information that is required to be submitted to the districts with the forms. No public comments were received in response to that notice. The proposed revisions to the RRA forms will be effective in the 2012 water year.

Frequency: Annually.

Respondents: Landholders and farm operators of certain lands in our projects, whose landholdings exceed specified RRA forms submittal thresholds.

Estimated Total Number of Respondents: 15,279

Estimated Number of Responses per Respondent: 1.02

Estimated Total Number of Annual Responses: 15,585

Estimated Total Annual Burden on Respondents: 11,522 hours

ESTIMATE OF BURDEN FOR EACH FORM

Form No.	Burden estimate per form (in minutes)	Number of respondents	Annual number of responses	Annual burden on respondents (in hours)
Form 7–2180	60	4,124	4,206	4,206
Form 7–2180EZ	45	425	434	326
Form 7–2181	78	1,205	1,229	1,598
Form 7–2184	45	32	33	25
Form 7–2190	60	1,620	1,652	1,652
Form 7–2190EZ	45	96	98	74
Form 7–2191	78	777	793	1,031
Form 7–2194	45	4	4	3
Form 7–21PE	75	146	149	186
Form 7–21PE–IND	12	4	4	1
Form 7–21TRUST	60	882	900	900
Form 7–21VERIFY	12	5,434	5,543	1,109
Form 7–21FC	30	214	218	109
Form 7–21XS	30	144	147	74
Form 7–21FARMOP	78	172	175	228
Totals		15,279	15,585	11,522

Comments

Comments are invited on:

(a) Whether the proposed collection of information is necessary for the proper performance of our functions, including whether the information will have practical use;

(b) Accuracy of our burden estimate for the proposed collection of information;

(c) Ways to enhance the quality, usefulness, and clarity of the information to be collected; and

(d) Ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Reclamation will display a valid OMB control number on the RRA forms.

Before including your address, telephone 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.

Roseann Gonzales,

Director, Policy and Administration, Denver Office.

[FR Doc. 2011–12586 Filed 5–20–11; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Agency Information Collection; Activities Under OMB Review; Comment Request

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of renewal of a currently approved collection (OMB No. 1006–0006).

SUMMARY: The Bureau of Reclamation (we, our, or us) has forwarded the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval: Certification Summary Form and Reporting Summary Form for Acreage Limitation. The ICR describes the nature of the information collection and its expected cost and burden.

DATES: OMB has up to 60 days to approve or disapprove this information collection, but may respond after 30 days; therefore, public comments must be received on or before *June 22, 2011* to assure maximum consideration.

ADDRESSES: Send written comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to the Desk Officer for the Department of the Interior at the Office of Management and Budget, Office of Information and Regulatory Affairs, via facsimile to (202) 395–5806, or e-mail to *OIRA_DOCKET@omb.eop.gov.* A copy of your comments should also be directed to the Bureau of Reclamation, Attention: 84–53000, PO Box 25007, Denver, CO 80225–0007.

FOR FURTHER INFORMATION CONTACT: Stephanie McPhee at (303) 445–2897. The entire Information Collection Request may be found at *http://www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Title: Certification Summary Form and Reporting Summary Form for Acreage Limitation, 43 CFR part 426 and 43 CFR part 428.

Abstract: The forms in this information collection are to be used by district offices to summarize individual landholder (direct or indirect landowner or lessee) and farm operator certification and reporting. This information allows us to establish water user compliance with Federal reclamation law, as required under the Reclamation Reform Act of 1982 (RRA), Acreage Limitation Rules and Regulations, 43 CFR part 426, and Information Requirements for Certain Farm Operations In Excess of 960 Acres and the Eligibility of Certain Formerly Excess Land, 43 CFR part 428.

Minor editorial changes and correction of typographical errors were the only changes made to the forms and instructions prior to the 60-day comment period initiated by the notice published in the **Federal Register** (75 FR 59739, Sept. 28, 2010). No public comments were received in response to that notice. The proposed revisions to the RRA forms will be effective in the 2012 water year.

Frequency: Annually.

Respondents: Contracting entities that are subject to the acreage limitation provisions of Federal reclamation law.

Estimated Total Number of Respondents: 210.

Estimated Number of Responses per Respondent: 1.25.

Estimated Total Number of Annual Responses: 263.

Estimated Total Annual Burden on Respondents: 10,520 hours.

ESTIMATE OF BURDEN FOR EACH FORM

Form No.	Estimated number of respondents	Frequency of response	Total annual responses	Burden hours per response	Total burden hours
7–21SUMM–C and tabulation sheets	198	1.25	248	40	9,920
7–21SUMM–R and tabulation sheets	12	1.25	15	40	600
Total	210	1.25	263		10,520

Comments

Comments are invited on:

(a) Whether the proposed collection of information is necessary for the proper performance of our functions, including whether the information will have practical use;

(b) Accuracy of our burden estimate for the proposed collection of information;

(c) Ways to enhance the quality, usefulness, and clarity of the information to be collected; and

(d) Ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Reclamation will display a valid OMB control number on the RRA forms.

Before including your address, telephone 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.

Roseann Gonzales,

Director, Policy and Administration, Denver Office.

[FR Doc. 2011–12584 Filed 5–20–11; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Agency Information Collection; Activities Under OMB Review; Comment Request

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of renewal of a currently approved collection (OMB No. 1006–0023).

SUMMARY: The Bureau of Reclamation (we, our, or us) has forwarded the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval: Forms to Determine Compliance by Certain Landholders. The ICR describes the nature of the information collection and its expected cost and burden.

DATES: OMB has up to 60 days to approve or disapprove this information collection, but may respond after 30 days; therefore, public comments must be received on or before June 22, 2011 to assure maximum consideration.

ADDRESSES: Send written comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to the Desk Officer for the Department of the Interior at the Office of Management and Budget, Office of Information and Regulatory Affairs, via facsimile to (202) 395–5806, or e-mail to *OIRA_DOCKET@omb.eop.gov.* A copy of your comments should also be directed to the Bureau of Reclamation, Attention: 84–53000, P.O. Box 25007, Denver, CO 80225–0007.

FOR FURTHER INFORMATION CONTACT: Stephanie McPhee at (303) 445–2897. The entire Information Collection Request may be found at *http://www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Title: Forms to Determine Compliance by Certain Landholders, 43 CFR part 426.

Abstract: Identification of limited recipients—Some entities that receive Reclamation irrigation water may believe that they are under the Reclamation Reform Act of 1982 (RRA) forms submittal threshold and, consequently, may not submit the appropriate RRA form(s). However, some of these entities may in fact have a different RRA forms submittal threshold due to the number of natural persons benefiting from each entity and the location of the land held by each entity. In addition, some entities that are exempt from the requirement to submit RRA forms due to the size of their landholdings (directly and indirectly owned and leased land) may in fact be receiving Reclamation irrigation water for which the full-cost rate must be paid because the start of Reclamation irrigation water deliveries occurred after October 1, 1981 [43 CFR 426.6(b)(2)]. The information obtained through completion of the Limited Recipient Identification Sheet (Form 7–2536) allows us to establish entities' compliance with Federal reclamation law. The Limited Recipient Identification Sheet is disbursed at our discretion.

Trust review—In order to administer section 214 of the RRA and 43 CFR 426.7, we are required to review all trusts. Land held in trust generally will be attributed to the beneficiaries of the trust rather than the trustee if the criteria specified in the RRA and 43 CFR 426.7 are met. When we become aware of trusts with a relatively small landholding (40 acres or less), we may extend to those trusts the option to complete and submit for our review the Trust Information Sheet (Form 7–2537) instead of actual trust documents. If we find nothing on the completed Trust Information Sheet that would warrant the further investigation of a particular trust, that trustee will not be burdened with submitting trust documents to us for in-depth review. The Trust Information Sheet is disbursed at our discretion.

Acreage limitation provisions applicable to public entities—Land farmed by a public entity can be considered exempt from the application of the acreage limitation provisions provided the public entity meets certain criteria pertaining to the revenue generated through the entity's farming activities (43 CFR 426.10 and the Act of July 7, 1970, Pub. L. 91–310). We are required to ascertain whether or not public entities that receive Reclamation irrigation water meet such revenue criteria regardless of how much land the public entities hold (directly or indirectly own or lease) [43 CFR 426.10(a)]. To minimize the burden on public entities, standard RRA forms are submitted only when the public entity holds more than 40 acres subject to the acreage limitation provisions westwide, which makes it difficult to apply the revenue criteria as required to those public entities that hold less than 40 acres. When we become aware of such public entities, we request them to complete and submit the Public Entity Information Sheet (Form 7–2565). This form allows us to establish compliance with Federal reclamation law for those public entities that hold 40 acres or less and, thus, do not submit a standard RRA form because they are below the RRA forms submittal threshold. In addition, for those public entities that do not meet the exemption criteria, we must determine the proper rate to charge for Reclamation irrigation water deliveries. The Public Entity Information Sheet is disbursed at our discretion.

Acreage limitation provisions applicable to religious or charitable organizations—Some religious or charitable organizations that receive Reclamation irrigation water may believe that they are under the RRA forms submittal threshold and, consequently, may not submit the appropriate RRA form(s). However, some of these organizations may in fact have a different RRA forms submittal threshold depending on whether these organizations meet all of the required criteria for full special application of the acreage limitation provisions to religious or charitable organizations [43 CFR 426.9(b)]. In addition, some organizations that (1) Do not meet the criteria to be treated as a religious or charitable organization under the acreage limitation provisions, and (2) are exempt from the requirement to submit RRA forms due to the size of their landholdings (directly and indirectly owned and leased land), may in fact be receiving Reclamation irrigation water for which the full-cost rate must be paid because the start of Reclamation irrigation water deliveries occurred after October 1, 1981 [43 CFR 426.6(b)(2)]. The Religious or Charitable Organization Identification Sheet (Form 7–2578) allows us to establish certain religious or charitable organizations' compliance with Federal reclamation law. The Religious or Charitable Organization Identification Sheet is disbursed at our discretion.

There are no proposed revisions to the Limited Recipient Identification Sheet, the Trust Information Sheet, or the Religious or Charitable Organization Sheet. A single change was made to the Public Entity Identification Sheet prior to the 60-day comment period initiated by the notice published in the **Federal Register** (75 FR 59738, Sept. 28, 2010). This change is designed to further delineate the identification of certain excess land as required by 43 CFR 426.12(g). The proposed revision to the Public Entity Identification Sheet will be included starting in the 2012 water year. No public comments were received in response to that notice.

Frequency: Generally, these forms will be submitted only once per identified entity, trust, public entity, or religious or charitable organization. Each year, we expect new responses in accordance with the following numbers.

Respondents: Entity landholders, trusts, public entities, and religious or charitable organizations identified by Reclamation that are subject to the acreage limitation provisions of Federal reclamation law.

Estimated Total Number of Respondents: 500.

Estimated Number of Responses per Respondent: 1.0.

Estimated Total Number of Annual Responses: 500.

Estimated Total Annual Burden on Respondents: 72 hours.

ESTIMATE OF BURDEN FOR EACH FORM

Form name	Estimated number of respondents	Frequency of response	Total annual responses	Burden Estimate per form (in minutes)	Total burden hours
Limited Recipient Identification Sheet	175	1.00	175	5	15
Trust Information Sheet	150	1.00	150	5	13
Public Entity Information Sheet	100	1.00	100	15	25
Religious or Charitable Identification Sheet	75	1.00	75	15	19
Total	500	1.00	500		72

Comments

Comments are invited on:

(a) Whether the proposed collection of information is necessary for the proper performance of our functions, including whether the information will have practical use;

(b) accuracy of our burden estimate for the proposed collection of information;

(c) ways to enhance the quality, usefulness, and clarity of the information to be collected; and

(d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Reclamation will display a valid OMB control number on the RRA forms.

Before including your address, telephone 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.

Roseann Gonzales,

Director, Policy and Administration, Denver Office.

[FR Doc. 2011–12578 Filed 5–20–11; 8:45 am]

BILLING CODE 4310–MN–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *In Re Certain Flip-Top Vials and Products Using the Same,* DN 2806; the Commission is soliciting comments on any public interest issues raised by the complaint.

FOR FURTHER INFORMATION CONTACT: James R. Holbein, Secretary to the Commission, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov,* and 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 (*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 has received a complaint filed on behalf of CSP Technologies, Inc. on May 17, 2011. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain flip-top vials and products using the same. The complaint names as respondents Süd-Chemie AG of Germany; Süd-Chemie, Inc. of Louisville, KY and Airsec S.A.S. of France.

The complainant, proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five pages in length, on any public interest issues raised by the complaint. Comments should address whether issuance of an exclusion order and/or a cease and desist order in this investigation would negatively affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the orders are used in the United States;

(ii) Identify any public health, safety, or welfare concerns in the United States relating to the potential orders;

(iii) Indicate the extent to which like or directly competitive articles are produced in the United States or are otherwise available in the United States, with respect to the articles potentially subject to the orders; and

(iv) Indicate whether Complainant, Complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to an exclusion order and a cease and desist order within a commercially reasonable time.

Written submissions must be filed no later than by close of business, five business days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the

public interest after the issuance of any final initial determination in this investigation.

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. Submissions should refer to the docket number ("Docket No. 2806") in a prominent place on the cover page and/or the first page. The Commission's rules authorize filing submissions with the Secretary by facsimile or electronic means only to the extent permitted by section 201.8 of the rules (see Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/documents/handbook_on_electronic_filing.pdf*). Persons with questions regarding electronic filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.50(a)(4) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.50(a)(4)).

Issued: May 17, 2011.

By order of the Commission.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–12572 Filed 5–20–11; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–477 and 731–TA–1180–1181 (Preliminary)]

Bottom Mount Combination Refrigerator-Freezers From Korea and Mexico

Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (Commission) determines, pursuant to sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a) and 1673b(a)) (the Act), that there is a reasonable indication that an industry in the United States is materially injured by reason of imports from Korea of bottom mount combination refrigerator-freezers, provided for in subheadings 8418.10.00, 8418.21.00, 8418.99.40, and 8418.99.80 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value (LTFV) and subsidized by the Government of Korea. The Commission further determines, pursuant to section 733(a) of the Act (19 U.S.C. 1673b(a)), that there is a reasonable indication that an industry in the United States is materially injured by reason of imports from Mexico of bottom mount combination refrigerator-freezers, provided for in subheadings 8418.10.00, 8418.21.00, 8418.99.40, and 8418.99.80 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at LTFV.

Commencement of Final Phase Investigations

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigations. The Commission will issue a final phase notice of scheduling, which will be published in the **Federal Register** as provided in section 207.21 of the Commission's rules, upon notice from the Department of Commerce (Commerce) of affirmative preliminary determinations in the investigations under sections 703(b) or 733(b) of the Act, or, if the preliminary determinations are negative, upon notice of affirmative final determinations in those investigations under sections 705(a) or 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigations need not enter a separate appearance for the final phase of the investigations. Industrial users, and, if the merchandise under investigation is sold at the retail level, representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Background

On March 30, 2011, a petition was filed with the Commission and Commerce by Whirlpool Corp., Benton Harbor, MI, alleging that an industry in the United States is materially injured or threatened with material injury by reason of LTFV and subsidized imports of bottom mount combination refrigerator-freezers from Korea and LTFV imports of bottom mount combination refrigerator-freezers from Mexico. Accordingly, effective March 30, 2011, the Commission instituted countervailing duty investigation No. 701–TA–477 and antidumping duty investigation Nos. 731–TA–1180–1181 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of April 6, 2011 (76 FR 19125). The conference was held in Washington, DC, on April 20, 2011, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on May 16, 2011. The views of the Commission are contained in USITC Publication 4232 (May 2011), entitled *Bottom Mount Combination Refrigerator-Freezers from Korea and Mexico: Investigation Nos. 701–TA–477 and 731–TA–1180–1181 (Preliminary).*

Issued: May 17, 2011.

By order of the Commission.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–12573 Filed 5–20–11; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0020]

Agency Information Collection Activities; Proposed Collection; Comments Requested: Firearms Transaction Record, Part 1, Over-the-Counter; Extension Without Change of a Currently Approved Information Collection

ACTION: 60-Day notice and request for comments.

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. This notice requests comments from the public and affected agencies concerning the proposed information collection. Comments are encouraged and will be accepted for "sixty days" until July 22, 2011. This process is conducted in accordance with 5 CFR 1320.8(d)(1).

If you have comments 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 Barbara A. Terrell, Program Analyst, *FederalRegisterNotice ATFF4473@atf.gov*, Chief, Firearms Industry Programs Branch, 99 New York Avenue, NE., Washington, DC 20226. In addition, the current collection instrument and instructions are available on ATF's Web site at: *http://www.atf.gov/forms/firearms/.* 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 Barbara A. Terrell at 202–648–7122 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.

Summary of Information Collection

(1) *Type of Information Collection:* Extension without change of a currently approved collection.

(2) *Title of the Form/Collection:* Firearms Transaction Record, Part 1, Over-the-Counter.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: ATF F 4473 (5300.9) Part 1. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. Other: Business or other for-profit.

Need for Collection

The form is used to determine the eligibility (under the Gun Control Act) of a person to receive a firearm from a Federal firearms licensee and to establish the identity of the buyer. It is also used in law enforcement investigations/inspections to trace firearms.

(5) *Estimates of the total number of annual respondents and the average amount of time for respondent to respond:* ATF estimates that 112,073 respondents will respond to the collection and that the total amount of time to read the instructions and complete the form on average is 25 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* ATF estimates 56,037 annual total burden hours associated with this collection.

If additional information is required contact: Lynn Murray at *http://www.DOJ.PRA@usdoj.gov* Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, Room 2E–808, 145 N Street, NE., Washington, DC 20530.

Dated: May 17, 2011.

Lynn Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2011–12537 Filed 5–20–11; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[OMB Number 1117–0024]

Agency Information Collection Activities: Proposed Collection; Comments Requested: Reports of Suspicious Orders or Theft/Loss of Listed Chemicals/Machines

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** at 76 FR 14994, March 18, 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 June 22, 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 1117–0024

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Reports of Suspicious Orders or Theft/Loss of Listed Chemicals/Machines.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number: Notification of suspicious orders and thefts is provided in writing on an as needed basis and does not occur using a form.

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: Persons handling listed chemicals and tableting and encapsulating machines are required to report thefts, losses and suspicious orders pertaining to these items. These reports provide DEA with information regarding possible diversion to illicit drug manufacture.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* DEA estimates that there are 300 responses to this collection and that responses occur on an as needed basis. Responses take 15 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* DEA estimates that this collection takes 75 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., Suite 2E–808, Washington, DC 20530.

Dated: May 17, 2011.

Lynn Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2011–12538 Filed 5–20–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[OMB Number 1117–0009]

Agency Information Collection Activities: Proposed Collection; Comments Requested: Controlled Substances Import/Export Declaration; DEA Form 236

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** at 76 FR 14993, March 18, 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 June 22, 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 1117–0009:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Controlled Substances Import/Export Declaration.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number: DEA Form 236.

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: DEA–236 provides the DEA with control measures over the importation and exportation of controlled substances as required by United States drug control laws and international treaties.

(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 there are 278 respondents, 4,868 annual responses, and that each response takes 18 minutes to complete.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 1,460.4 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., Suite 2E–502, Washington, DC 20530.

Dated: May 17, 2011.

Lynn Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2011–12535 Filed 5–20–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OMB Number 1121–NEW]

Agency Information Collection Activities: Proposed Collection; Comments Requested: Teen Dating Relationships: Opportunities for Youth To Define What's Healthy and Unhealthy

ACTION: 30-Day notice of information collection under review.

The Department of Justice (DOJ), National Institute of Justice (NIJ) and Office of Justice Programs (OJP) 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 50, page 14072 on March 15, 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 June 22, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to Carrie Mulford, National Institute of Justice, 810 7th Street NW., Washington, DC 20531.

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 email 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 Carrie Mulford 202–307–2959 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 This Information Collection

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection: Teen Dating Relationships:* Opportunities for Youth to Define what's Healthy and Unhealthy.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: ATF F 3312.1 and ATF F 3312.2. National Institute of Justice, Office of Justice Programs.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Youth, ages 11–22 and adult practitioners, advocates and researchers in professions related to youth and youth relationships. A recent review of the teen dating violence research indicated that youth are rarely involved in research designed to better understand this issue. The purpose of this data collection is to better understand how youth conceptualize healthy and unhealthy dating relationships by intentionally involving youth in the research process. In the first phase of the study, concept mapping will be used to create a visual representation of the ways youth and adults perceive teen dating relationships. Concept mapping is a well-documented method of applied research that makes explicit, implicit theoretical models that can be used for planning and action. The process requires respondents to brainstorm a set of statements relevant to the topic of interest ("brainstorming" task), individually sort these statements into piles based on perceived similarity ("sorting" task), rate each statement on one or more scales ("rating" task), and interpret the graphical representation that result from several multivariate analyses. The collection of data for all concept mapping activities will be facilitated via a dedicated project website. The second phase of the study includes a series of eight face-to-face facilitated discussions with relevant stakeholder groups, practitioners, researchers and youth. Guiding questions and discussion prompts, derived from the concept mapping results, will be used to gather information from the respondents on the meaning and potential use of the concept mapping results. This input will be aggregated and linked to the emerging conceptual framework that will result in a better understanding of adolescent relationship features, including the range of healthy, unhealthy, and abusive characteristics, from the standpoint of youth, and determine how prevention and intervention efforts can effectively target relationship characteristics related to abusive behavior.

(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 400 respondents total will participate in the concept mapping phase of this collection, and that 80 respondents total will participate in the facilitated discussions. The table below shows the estimated number of respondents for each portion of the collection:

CONCEPT MAPPING PARTICIPATION TARGETS

Task	Preteens (11–13)	Teens (14–18)	Young Adults (19–22)	Adults	Total task target
Brainstorming	50	100	100	150	400
Sorting	0	25	25	50	100
Rating	0	125	125	150	400
Total group target					400

Facilitated Discussion Participation Targets

Suggested location	Preteens (11–13)	Teens (14–18)	Young Adults (19–22)	Adults	Total regional target
Washington, DC	0	10	10	20	40
Atlanta	0	10	10	20	40
Chicago or Kansas City	0	10	10	20	40
San Francisco	0	10	10	20	40
Total group target	0	40	40	80	160

The brainstorming task will take respondents 5–10 minutes to complete. The sorting task will take respondents approximately 30–60 minutes to complete. The rating task will take respondents approximately 30–60 minutes to complete. None of these tasks will require participants to complete in one sitting; rather, participants can return to work on task completion as often as they chose, until the task deadline. Respondents will have approximately 4 weeks to brainstorm and approximately 6 weeks to sort and rate. Facilitated discussions will require approximately 4–5 hours of respondents' time, including travel.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 1417 annual total public burden hours associated with this collection.

Task	Estimated time (minutes)	Total participants	Total minutes per task
Brainstorming	10	400	4,000
Sorting	90	100	9,000
Rating	60	400	24,000
Facilitated Discussions	300	160	48,000
Total			85,000 (=1417 hours)

If additional information is required contact: Lynn Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, 145 N Street, NE., Room 2E–808, Washington, DC 20530.

Dated: May 17, 2011.

Lynn Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2011–12534 Filed 5–20–11; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Examinations and Testing of Electrical Equipment Including Examinations, Testing, and Maintenance of High Voltage Longwalls

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Mine Safety and Health Administration (MSHA) sponsored information collection request (ICR) titled, "Examinations and Testing of Electrical Equipment Including Examinations, Testing, and Maintenance of High Voltage Longwalls," to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act (PRA) of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

DATES: Submit comments on or before June 22, 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, Mine Safety and Health Administration (MSHA), 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 e-mail at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: MSHA regulations require records to be kept on the examination, testing, calibration, and maintenance of covered atmospheric monitoring systems, electric equipment, grounding offtrack direct-current machines and enclosures of related detached components, circuit breakers, electrical work, and devices for overcurrent protection. The records are intended to verify that examinations and tests were conducted and give insight into the hazardous conditions that have been encountered and those that may be encountered. These records greatly assist those who use them in making decisions during accident investigations to establish root causes and to prevent similar occurrences. These decisions will ultimately affect the safety and health of miners.

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 1219–0116. 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 February 17, 2011 (76 FR 9374).

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 1219–0116. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Mine Safety and Health Administration (MSHA).

Title of Collection: Examinations and Testing of Electrical Equipment Including Examinations, Testing, and Maintenance of High Voltage Longwalls.

OMB Control Number: 1219–0116.

Affected Public: Private sector—businesses or other for-profits.

Total Estimated Number of Respondents: 1547.

Total Estimated Number of Responses: 706,296.

Total Estimated Annual Burden Hours: 128,101.

Total Estimated Annual Other Cost Burden: $0.

Dated: May 18, 2011.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2011–12607 Filed 5–20–11; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Refuse Piles and Impounding Structures, Recordkeeping and Reporting Requirements

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Mine Safety and Health Administration (MSHA) sponsored information collection request (ICR) titled, "Refuse Piles and Impounding Structures, Recordkeeping and Reporting Requirements," to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act (PRA) of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

DATES: Submit comments on or before June 22, 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, Mine Safety and Health Administration (MSHA), 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: MSHA regulations require coal mine operators to submit annual reports and certification on refuse piles and impoundments to the agency and to keep records of the results of weekly examinations and instrumentation monitoring. 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 1219–0015. 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 February 17, 2011 (76 FR 9376).

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 1219–0015. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: Mine Safety and Health Administration (MSHA).

Title of Collection: Refuse Piles and Impounding Structures, Recordkeeping and Reporting Requirements.

OMB Control Number: 1219–0015.

Affected Public: Private Sector—Businesses or other for-profits.

Total Estimated Number of Respondents: 642.

Total Estimated Number of Responses: 10,422.

Total Estimated Annual Burden Hours: 30,579.

Total Estimated Annual Cost Burden: $7,782,720.

Dated: May 17, 2011.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2011–12608 Filed 5–20–11; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–75,218]

International Automotive Components, North America, Including On-Site Leased Workers From At-Work Personnel and CJR Solutions, d/b/a Harvard Resources Solutions, Lebanon, VA; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on April 6, 2011, applicable to workers of International Automotive Components, North America, including on-site leased workers from At-Work Personnel and CJR Solutions, d/b/a Harvard Resources Solutions, Lebanon, Virginia. The notice was published in the **Federal Register** on April 22, 2011 (76 FR 22732).

At the request of the State Agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged employment related to the production of component parts for the automotive industry.

The review shows that on January 28, 2009, a certification of eligibility to apply for adjustment assistance was issued for workers of International Automotive Components, North America, Lebanon, Virginia, separated on or after December 29, 2007 through January 28, 2011. The Department's Notice was published in the **Federal Register** on February 23, 2009 (74 FR 8115).

In order to avoid an overlap in worker group coverage, the Department is amending the February 9, 2010 impact date established for TA–W–75,218 to read January 29, 2011.

The amended notice applicable to TA–W–75,218 is hereby issued as follows:

All workers of International Automotive Components, North America, including on-site leased workers from At-Work Personnel and CJR Solutions, d/b/a Harvard Resource Solutions, Lebanon, Virginia, who became totally or partially separated from employment on or after January 29, 2011, through April 6, 2013, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 11th day of May 2011.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–12579 Filed 5–20–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–74,218; TA–W–74,218A, TA–W–74,218B, TA–W–74,218C, TA–W–74,218D]

Westpoint Home, Inc., New York Corporate Sales Office, New York, NY, Including Employees Working Off-Site in Illinois, Georgia, Minnesota, Indiana, North Carolina; Westpoint Home, Inc., Plano, TX Sales Office, Plano, TX; Westpoint Home, Inc., Daleville, IN Sales Office, Daleville, IN; Westpoint Home, Inc., Rogers, AR Sales Office, Rogers, AR; Westpoint Home, Inc., Winston-Salem, NC Sales Office, Winston-Salem, NC; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on June 25, 2010, applicable to workers of WestPoint Home, Inc., New York Corporate Sales Office, New York, New York. The Department's Notice was published in the **Federal Register** on July 7, 2010 (75 FR 39048).

At the request of the State of New York, the Department reviewed the certification for workers of the subject firm. The workers are engaged in employment related to the supply of administrative and managerial services for WestPoint Home, Inc.

New information shows that worker separations have occurred involving employees under the control of the New York, New York location of WestPoint Home, Inc., New York Corporate Sales Office, working off-site in Illinois, Georgia, Minnesota, Indiana, and North Carolina. Information also shows that worker separations occurred at satellite offices of the subject firm: Plano, Texas; Daleville, Indiana; Rogers, Arkansas; and Winston-Salem, North Carolina. These workers are engaged in employment related to the supply of administrative and managerial services for WestPoint Home, Inc.

Based on these findings, the Department is amending this certification to include employees of the

New York, New York facility of the subject firm working off-site in Illinois, Georgia, Minnesota, Indiana, North Carolina, Texas, and Arkansas, as well as workers in Sales Offices in Plano, Texas, Daleville, Indiana, Rogers, Arkansas, and Winston-Salem, North Carolina.

The intent of the Department's certification is to include all workers of the subject firm who are adversely affected by the shift by the subject firm in the supply of administrative and managerial services to China, Pakistan, India and Bahrain.

The amended notice applicable to TA–W–74,218 is hereby issued as follows:

All workers of WestPoint Home, Inc., New York Corporate Sales Office, New York, New York, including employees working off-site in Illinois, Georgia, Minnesota, Indiana, and North Carolina (TA–W–74,218), and WestPoint Home, Inc., Plano, Texas Sales Office, Plano, Texas (TA–W–74,218A), Daleville, Indiana Sales Office, Daleville, Indiana (TA–W–74,218B), Rogers, Arkansas Sales Office, Rogers, Arkansas (TA–W–74,218C), and Winston-Salem Sales Office, Winston-Salem, North Carolina (TA–W–74,218D), who became totally or partially separated from employment on or after July 1, 2010 through June 25, 2012, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 11th day of May 2011.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–12580 Filed 5–20–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers by (TA–W) number issued during the period of May 2, 2011 through May 6, 2011.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Under Section 222(a)(2)(A), the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The sales or production, or both, of such firm have decreased absolutely; and

(3) One of the following must be satisfied:

(A) Imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

(B) Imports of articles like or directly competitive with articles into which one or more component parts produced by such firm are directly incorporated, have increased;

(C) Imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased;

(D) Imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm, have increased; and

(4) The increase in imports contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

II. Section 222(a)(2)(B) all of the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) One of the following must be satisfied:

(A) There has been a shift by the workers' firm to a foreign country in the production of articles or supply of services like or directly competitive with those produced/supplied by the workers' firm;

(B) There has been an acquisition from a foreign country by the workers' firm of articles/services that are like or directly competitive with those produced/supplied by the workers' firm; and

(3) The shift/acquisition contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in public agencies and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) A significant number or proportion of the workers in the public agency have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The public agency has acquired from a foreign country services like or directly competitive with services which are supplied by such agency; and

(3) The acquisition of services contributed importantly to such workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected secondary workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(c) of the Act must be met.

(1) A significant number or proportion of the workers in the workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm is a Supplier or Downstream Producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act, and such supply or production is related to the article or service that was the basis for such certification; and

(3) Either—

(A) the workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in firms identified by the International Trade Commission and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(f) of the Act must be met.

(1) The workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

(A) An affirmative determination of serious injury or threat thereof under section 202(b)(1);

(B) An affirmative determination of market disruption or threat thereof under section 421(b)(1); or

(C) An affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A));

(2) The petition is filed during the 1-year period beginning on the date on which—

(A) A summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) with respect to the affirmative determination described in paragraph (1)(A) is published in the Federal Register under section 202(f)(3); or

(B) Notice of an affirmative determination described in subparagraph (1) is published in the Federal Register; and

(3) The workers have become totally or partially separated from the workers' firm within—

(A) The 1-year period described in paragraph (2); or

(B) Notwithstanding section 223(b)(1), the 1-year period preceding the 1-year period described in paragraph (2).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
74,848	Thomas & Betts Corporation	Bowling Green, OH	November 5, 2009.
75,104	Eaton Corporation, FEPC Division, Including On-Site Leased Workers from Bartech Workforce.	Three Rivers, MI	January 14, 2010.
75,127	Ashland Aqualon Functional Ingredients Missouri Chemical Works, An Ashland Hercules Water Technologies Facilities, Lee Mechancial.	Louisiana, MO	January 20, 2010.
75,144	Cincinnati Tyrolit, Inc., Subsidiary of Tyrolit North America Holdings.	Cincinnati, OH	January 27, 2010.
75,205	Data Listing Services, LLC, DBA: The Connection	Holdrege, NE	February 4, 2010.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production or services) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
75,268	Nestlé HealthCare Nutrition, Inc., Wholly Owned by Nestlé Holdings, Inc.; Leased Workers from Adecco USA.	St. Louis Park, MN	February 11, 2010.

Negative Determinations for Worker Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

The investigation revealed that the criterion under paragraph (a)(1), or (b)(1), or (c)(1)(employment decline or threat of separation) of section 222 has not been met.

TA–W No.	Subject firm	Location	Impact date
75,235	Verizon Communications, Inc.	Ashburn, VA.	

The investigation revealed that the criteria under paragraphs(a)(2)(A) (increased imports) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W No.	Subject firm	Location	Impact date
75,054	Plastic Suppliers, Inc	Mt. Laurel, NJ	November 23, 2009.
75,060	Sitel Operating Corporation	Painted Post, NY	
75,061	Liberty Homes, Inc., Oregon Division	Sheridan, OR	
75,206	Hewlett Packard Company, Enterprise Services Division	Paducah, KY	
75,239	Superior Fibers, LLC, Bremen, Ohio Division	Bremen, OH	
75,270	Sterling Life Insurance Company, Leased Workers from Manpower.	Bellingham, WA	

I hereby certify that the aforementioned determinations were issued during the period of May 2, 2011 through May 6, 2011. Copies of these determinations may be requested under the Freedom of Information Act. Requests may be submitted by fax, courier services, or mail to FOIA Disclosure Officer, Office of Trade Adjustment Assistance (ETA), U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 or *tofoiarequest@dol.gov.* These determinations also are available on the Department's Web site at *http://*

www.doleta.gov/tradeact under the searchable listing of determinations.

Dated: May 13, 2011.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–12583 Filed 5–20–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers (TA–W) number and alternative trade adjustment assistance (ATAA) by (TA–W) number issued during the period of May 2, 2011 through May 6, 2011.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Section (a)(2)(A) all of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. The sales or production, or both, of such firm or subdivision have decreased absolutely; and

C. Increased imports of articles like or directly competitive with articles produced by such firm or subdivision have contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

II. Section (a)(2)(B) both of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. There has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

C. One of the following must be satisfied:

1. The country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

2. The country to which the workers' firm has shifted production of the articles to a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

3. There has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

Also, in order for an affirmative determination to be made for secondarily affected workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) Significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm (or subdivision) is a supplier or downstream producer to a firm (or subdivision) that employed a group of workers who received a certification of eligibility to apply for trade adjustment assistance benefits and such supply or production is related to the article that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied for the firm (or subdivision) described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss or business by the workers' firm with the firm (or subdivision) described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for the Division of Trade Adjustment Assistance to issue a certification of eligibility to apply for Alternative Trade Adjustment Assistance (ATAA) for older workers, the group eligibility requirements of Section 246(a)(3)(A)(ii) of the Trade Act must be met.

1. Whether a significant number of workers in the workers' firm are 50 years of age or older.

2. Whether the workers in the workers' firm possess skills that are not easily transferable.

3. The competitive conditions within the workers' industry (i.e., conditions within the industry are adverse).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) of the Trade Act have been met.

None.

Affirmative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

80,029	Photronics, Inc	Allen, TX	March 7, 2010.
80,033	Photronics, Inc	Brookfield, CT	March 7, 2010.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

None.

Negative Determinations for Alternative Trade Adjustment Assistance

In the following cases, it has been determined that the requirements of 246(a)(3)(A)(ii) have not been met for the reasons specified.

The Department has determined that criterion (1) of Section 246 has not been met. The firm does not have a significant number of workers 50 years of age or older.

None.

The Department has determined that criterion (2) of Section 246 has not been met. Workers at the firm possess skills that are easily transferable.

None.

The Department has determined that criterion (3) of Section 246 has not been met. Competition conditions within the workers' industry are not adverse.

None.

Negative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

Because the workers of the firm are not eligible to apply for TAA, the workers cannot be certified eligible for ATAA.

The investigation revealed that criteria (a)(2)(A)(I.A.) and (a)(2)(B)(II.A.) (employment decline) have not been met.

None.

The investigation revealed that criteria (a)(2)(A)(I.B.) (Sales or production, or both, did not decline) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

None.

The investigation revealed that criteria (a)(2)(A)(I.C.) (increased imports) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

80,034	Tennessee Valley Parts LLC	Fort Payne, AL.	
80,079	The Loomis Company	Wyomissing, PA	

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

The investigation revealed that criteria of Section 222(b)(2) has not been met. The workers' firm (or subdivision) is not a supplier to or a downstream producer for a firm whose workers were certified eligible to apply for TAA.

None.

Determinations Terminating Investigations of Petitions for Worker Adjustment Assistance

After notice of the petitions was published in the **Federal Register** and on the Department's Web site, as required by Section 221 of the Act (19 U.S.C. 2271), the Department initiated investigations of these petitions.

The following determinations terminating investigations were issued because the petitioner has requested that the petition be withdrawn.

None.

I hereby certify that the aforementioned determinations were issued during the period of May 2, 2011 through May 6, 2011. Copies of these determinations may be requested under the Freedom of Information Act. Request may be submitted by fax, courier services, or mail to FOIA Disclosure Officer, Office of Trade Adjustment Assistance (ETA), U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 or *tofoiarequest@dol.gov.* These determinations also are available on the Department's Web site at *http://www.doleta.gov/tradeact* under the searchable listing of determinations.

Dated: May 13, 2011.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–12581 Filed 5–20–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221 (a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221 (a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than June 2, 2011.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than June 2, 2011.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC this 13th day of May 2011.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

Appendix—17 TAA Petitions Instituted Between 5/2/11 and 5/6/11

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
80143	Global Tex LLC (State/One-Stop)	Attleboro, MA	05/02/11	04/29/11
80144	Paramount Home Furnishings, Inc (Workers)	Greensboro, NC	05/03/11	05/02/11
80145	Truelove Dental Lab (Workers)	Norman, OK	05/03/11	04/29/11
80146	IBM CIO Division (State/One-Stop)	Armonk, NY	05/04/11	05/02/11
80147	Travelers Property Casualty (Workers)	Syracuse, NY	05/04/11	05/02/11
80148	LORD Corporation (Company)	Cary, NC	05/04/11	05/03/11
80149	Doral Manufacturing, Inc. (Company)	Doral, FL	05/05/11	05/04/11
80150	Hale Products, Inc. (Workers)	Conshohocken, PA	05/05/11	03/31/11
80151	Sound Publishing (State/One-Stop)	Everett, WA	05/05/11	05/03/11
80152	Compone Services LTD (Workers)	Ithaca, NY	05/05/11	05/05/11
80153	IHG (Workers)	Atlanta, GA	05/05/11	05/04/11
80154	State Street Bank and Trust Company (Workers)	Irvine, CA	05/05/11	05/04/11
80155	Apogee Medical LLC (Company)	Youngsville, NC	05/05/11	05/04/11
80156	Bank Of America (State/One-Stop)	Dallas, TX	05/06/11	05/04/11
80157	Cognis Corporation North American (State/One-Stop)	Cincinnati, OH	05/06/11	05/04/11
80158	Flextronics (State/One-Stop)	San Diego, CA	05/06/11	05/03/11
80159	Creganna Medical Devices, Inc. (State/One-Stop)	Marlborough, MA	05/06/11	05/03/11

[FR Doc. 2011–12582 Filed 5–20–11; 8:45 am]

BILLING CODE 4510–FN–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before June 22, 2011. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting the Life Cycle Management Division (NWML) using one of the following means:

Mail: NARA (NWML), 8601 Adelphi Road, College Park, MD 20740–6001.

E-mail: request.schedule@nara.gov.

FAX: 301–837–3698.

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Laurence Brewer, Director, Life Cycle Management Division (NWML), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: 301–837–1539. E-mail: *records.mgt@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval, using the Standard Form (SF) 115, Request for Records Disposition Authority. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

The schedules listed in this notice are media neutral unless specified otherwise. An item in a schedule is media neutral when the disposition instructions may be applied to records regardless of the medium in which the records are created and maintained. Items included in schedules submitted to NARA on or after December 17, 2007, are media neutral unless the item is limited to a specific medium. (See 36 CFR 1225.12(e).)

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of

origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it too includes information about the records. Further information about the disposition process is available on request.

Schedules Pending

1. Department of Agriculture, Grain Inspection, Packers, and Stockyards Administration (N1–545–08–1, 13 items, 12 temporary items). Records relating to outside organizations that provide grain inspection and weighing services on behalf of the agency, including non-significant policy and case files and non-rulemaking **Federal Register** notices. Proposed for permanent retention are substantive reports and comprehensive nonrecurring reports.

2. Department of Agriculture, Grain Inspection, Packers, and Stockyards Administration (N1–545–11–3, 1 item, 1 temporary item). Master files of an electronic information system containing information on swine purchase contracts.

3. Department of the Army, Agency-wide (N1–AU–10–81 1 item, 1 temporary item). Master files of an electronic information system used to estimate the total life-cycle cost of equipment use, maintenance actions, and provision stock levels.

4. Department of the Army, Agency-wide (N1–AU–10–107, 1 item, 1 temporary item). Master files of an electronic information system containing cost, risk, and contract data retrievable as graphics charts or reports used in support of Army acquisitions.

5. Department of the Army, Agency-wide (N1–AU–11–23, 1 item, 1 temporary item). Master files of an electronic information system used to manage human resources information of soldiers.

6. Department of the Army, Agency-wide (N1–AU–11–28, 1 item, 1 temporary item). Master files of an electronic information system used to track the movement and location of service members' military personnel records.

7. Department of the Army, Agency wide (N1–AU–11–29, 1 item, 1 temporary item). Master files of an electronic information system used to track accountable property.

8. Department of Health and Human Services, Centers for Medicare & Medicaid Services (N1–440–11–1, 1 item, 1 temporary item). Records that document employee suggestions and ideas for employee awards and agency awards ceremonies.

9. Department of Homeland Security, U.S. Immigration and Customs Enforcement (N1–567–11–10, 1 item, 1 temporary item). Master files of an electronic information system containing information about agency credential holders.

10. Department of Homeland Security, U.S. Immigration and Customs Enforcement (N1–567–11–12, 3 items, 3 temporary items). Master files of an electronic information system containing recordings, transcriptions, and translations of oral, wire, and electronic communications authorized by Federal court order.

11. Department of Homeland Security, U.S. Immigration and Customs Enforcement (N1–567–11–14, 1 item, 1 temporary item). Records documenting individuals held for more than 24 hours in a detention center.

12. Department of Justice, Bureau of Prisons (N1–129–09–31, 2 items, 2 temporary items). Records of the Correctional Program Division, including master files of an electronic information system containing inmate communications requiring translation and a workflow tracking system of translation service requests.

13. Department of Justice, Bureau of Prisons (N1–129–10–2, 1 item, 1 temporary item). Federal correctional facilities' video surveillance recordings of routine prison activities not resulting in an investigation or case file.

14. Department of Justice, Bureau of Prisons (N1–129–10–3, 4 items, 4 temporary items). Records of the Director and Deputy Director consisting of administrative files, technical assistance case files, and working papers of cooperative and interagency agreements.

15. Department of Justice, Civil Division (N1–60–10–33, 1 item, 1 temporary item). Records related to a survey and study of the Department of Defense's satisfaction with the legal services provided by the Department of Justice.

16. Department of State, Bureau of Diplomatic Security (N1–59–10–23, 3 items, 2 temporary items). Records relating to administrative project planning files and general subject files. Proposed for permanent retention are significant program and policy files.

17. Department of State, Office of the Secretary (N1–59–10–5, 3 items, 3 temporary items). Internal Web site records of the Coordinator for Reconstruction and Stabilization, including Web content and Web management and operations records.

18. Department of State, Office of the Secretary (N1–59–10–6, 3 items, 3 temporary items). External Web site records of the Coordinator for Reconstruction and Stabilization, including Web content and Web management and operations records.

19. Department of Transportation, Federal Highway Administration (N1–406–09–7, 131 items, 124 temporary items). Records of the Office of Infrastructure, including administrative files, reference files, training files, project files, research files, contracts, and correspondence. Proposed for permanent retention are record copies of international files, cost studies, status maps, annual reports, rulemaking files, publications, and policy files.

20. Department of Transportation, Federal Transit Administration (N1–408–11–9, 1 item, 1 temporary item). Records of the Office of Civil Rights, including Americans With Disabilities Act case files.

21. Department of Transportation, Federal Transit Administration (N1–408–11–11, 1 item, 1 temporary item). Records of the Office of Civil Rights, including Title VI/Environmental Justice case files.

22. National Aeronautics and Space Administration, Agency-wide (N1–255–11–1, 3 items, 3 temporary items). Records relating to harassment reports, including non-significant case files, preliminary fact finding notes, and administrative records.

23. Office of the Director of National Intelligence, Office of the Chief Financial Officer (N1–576–10–3, 13 items, 5 temporary items). Includes internal briefings, Web site records, non-substantive drafts and working papers as well as reference material. Proposed for permanent retention are records associated with budget formulation and justification, budgetary policy and program records, external briefings, files of boards and working groups, and substantive working papers.

Dated: May 18, 2011.

Sharon G. Thibodeau,

Deputy Assistant Archivist for Records Services—Washington, DC.

[FR Doc. 2011–12765 Filed 5–20–11; 8:45 am]

BILLING CODE 7515–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2011–0057]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of pending NRC action to submit an information collection request to the Office of Management and Budget (OMB) and solicitation of public comment.

SUMMARY: The NRC invites public comment about our intention to request the OMB's approval for renewal of an existing information collection that is summarized below. We are required to publish this notice in the **Federal Register** under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* 10 CFR Part 75—Safeguards on Nuclear Material, Implementation of US/IAEA Agreement.

2. *Current OMB approval number:* OMB 3150–0055.

3. *How often the collection is required:* Occasionally.

4. *Who is required or asked to report:* Licensees of facilities on the U.S. eligible list who have been selected by the International Atomic Energy Agency (IAEA) for reporting or recordkeeping activities.

5. *The number of annual respondents:* 6.

6. *The number of hours needed annually to complete the requirement or request:* 2,400.4 (6 Respondents × 400 hours per response).

7. *Abstract:* 10 CFR part 75 requires selected licensees to permit inspections by IAEA representatives, give immediate notice to the NRC in specified situations involving the possibility of loss of nuclear material, and give notice for imports and exports of specified amounts of nuclear material. These licensees will also follow written material accounting and control procedures, although actual reporting of transfer and material balance records to the IAEA will be done through the U. S. State system (Nuclear Materials Management and Safeguards System, collected under OMB clearance numbers 3150–0003, 3150–0004, 3150–0057, and 3150–0058). The NRC needs this information to implement its responsibilities under the US/IAEA agreement.

Submit, by July 22, 2011, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

The public may examine and have copied for a fee publicly available documents, including the draft supporting statement, at the NRC's Public Document Room, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. OMB clearance requests are available at the NRC Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice. Comments submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed. Comments submitted should reference Docket No. NRC–2011–0057. You may submit your comments by any of the following methods. Electronic comments: Go to *http://www.regulations.gov* and search for Docket No. NRC–2011–0057. Mail comments to NRC Clearance Officer, Tremaine Donnell (T–5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Questions about the information collection requirements may be directed to the NRC Clearance Officer, Tremaine Donnell (T–5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by telephone at 301–415–6258, or by e-mail to *INFOCOLLECTS.Resource@NRC.GOV.*

Dated at Rockville, Maryland this 17th day of May, 2011.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2011–12542 Filed 5–20–11; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for OMB Emergency Review: Request for Information for Multi-State Plans

AGENCY: Office of Personnel Management.

ACTION: Emergency Clearance Notice and request for comments.

SUMMARY: Office of Personnel Management (OPM) submitted a request to the Office of Management and Budget (OMB) for emergency clearance and review for the Request for Information, Multi-State Plans. As required by the Paperwork Reduction Act of 1995, (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106). The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

DATES: Comments on this proposal for emergency review should be received within June 2, 2011. We are requesting OMB to take action within 10 calendar days from the close of this **Federal Register** Notice on the request for emergency review. This process is conducted in accordance with 5 CFR 1320.13.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory

Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: The Patient Protection and Affordable Care Act of 2010 (Pub. L. 111–148 and Pub. L. 111–152, collectively referred to as the Affordable Care Act or the Act), creates State-based Health Insurance Exchanges (Exchanges) and Small Business Health Options Program (SHOP) Exchanges as marketplaces for individuals and small groups to purchase health insurance. These Exchanges will offer qualified health insurance plans to eligible individuals and small employers.

Section 1334 of the Affordable Care Act directs the United States Office of Personnel Management (OPM) to contract with health insurance issuers to offer multi-State qualified health plans through Exchanges. The OPM will contract with at least two multi-State qualified health plans (Multi-State Plans) that will offer health insurance coverage for purchase to individuals and small employers through Exchanges beginning in 2014. ("State" refers to the 50 States and the District of Columbia.)

The OPM is issuing a Request for Information (RFI) to gather information related to our requirement to contract with health insurance issuers under section 1334 of the Affordable Care Act. The goal of the RFI is to better understand potential offerors' interests and capabilities. The RFI poses specific questions to aid us in the development of our procurement documents.

Agency: Office of Personnel Management.

Title: Request for Information, Multi-State Plans.

OMB Number: 3206–NEW.

Frequency: Once.

Affected Public: Potential Multi-State Plan issuer offerors, private sector.

Number of Respondents: 40.

Estimated Time per Respondent: 3 hours.

Total Burden Hours: 120 hours.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2011–12531 Filed 5–20–11; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: Verification of Full-Time School Attendance, RI 25–49

AGENCY: U.S. Office of Personnel Management.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Retirement Services, Office of Personnel Management (OPM) offers the general public and other Federal agencies the opportunity to comment on a revised information collection request (ICR) 3206–0215, Verification of Full-Time School Attendance. As required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection. The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of 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, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

DATES: Comments are encouraged and will be accepted until July 22, 2011. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to U.S. Office of Personnel Management, Linda Bradford (Acting), Deputy Associate Director, Retirement Operations, Retirement Services, 1900 E Street, NW., Room 3305, Washington, DC 20415–3500, or sent via electronic mail to *Martha.Moore@opm.gov.*

FOR FURTHER INFORMATION CONTACT: A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the Retirement Services Publications Team, Office of Personnel Management, 1900 E Street, NW., Room 4332, Washington, DC 20415, Attention: Cyrus S. Benson or sent via electronic mail to *Cyrus.Benson@opm.gov* or faxed to (202) 606–0910.

SUPPLEMENTARY INFORMATION: RI 25–49, Verification of Full-Time School Attendance, is used to verify that adult student annuitants are entitled to payment. The Office of Personnel Management must confirm that a full-time enrollment has been maintained.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: Verification of Full-Time School Attendance.

OMB Number: 3206–0215.

Frequency: On occasion.

Affected Public: Individuals or households.

Number of Respondents: 10,000.

Estimated Time per Respondent: 60 minutes.

Total Burden Hours: 10,000.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2011–12532 Filed 5–20–11; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Notice of Revision of Standard Form 62

AGENCY: U.S. Office of Personnel Management.

ACTION: Notice of revision.

SUMMARY: The U.S. Office of Personnel Management (OPM) has revised Standard Form (SF) 62, *Agency Request To Pass Over A Preference Eligible or Object To An Eligible,* to update legal citations to reflect the December 31, 1994, subset of the Federal Personnel Manual and the recent changes to 5 CFR parts 332, 338, 339, and 731. The SF 62 is used by agencies to pass over a preference eligible or object to an eligible based on qualification, medical, or conduct reasons. The agency must submit appropriate documentation for its decision. The revised form is PDF fillable and is located on OPM's Web site at *http://www.opm.gov/forms/html.sf.asp* for agency use. This version supersedes all previous versions. Please destroy any versions you may have in stock.

DATES: The revised form is effective June 22, 2011.

FOR FURTHER INFORMATION CONTACT: Mike Gilmore by telephone at (202)

606–2429; by fax at (202) 606–2329; by TTY at (202) 418–3134; or by e-mail at *Michael.gilmore@opm.gov.*

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2011–12533 Filed 5–20–11; 8:45 am]

BILLING CODE 6325–39–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64506; File No. SR–NYSE–2011–20]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change To Add New Section 907.00 to the Listed Company Manual That Sets Forth Certain Complimentary Products and Services That Are Offered to Currently and Newly Listed Issuers

May 17, 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 May 5, 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 and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Listed Company Manual (the "Manual") by adding a new Section 907.00 that sets forth certain complimentary products and services that are offered to currently and newly listed issuers. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com*, and on the Commission's Web site 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 self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Manual by adding a new Section 907.00 that sets forth certain complimentary products and services that are offered to currently and newly listed issuers. These products and services are developed or delivered by NYSE or by a third party for use by NYSE-listed companies. Some of these products are commercially available by such third-party vendors. All listed issuers receive the same complimentary products and services through the NYSE Market Access Center. Certain tiers of listed issuers receive additional products and services.

NYSE Market Access Center

NYSE Euronext has developed a market information analytics platform, complimentary to all listed companies, that is a combination of technology-enabled market intelligence insight and a team of highly skilled market professionals. This platform, called the NYSE Market Access Center, was created to provide issuers with better market insight and information across all exchanges and trading venues. The Market Access Center includes products and services that were either (a) developed by NYSE using proprietary data and/or intellectual property or (b) built by a third party expressly for NYSE-listed companies. Within this platform all issuers have access to tools and information related to market intelligence, education, investor outreach, media visibility, corporate governance, and advocacy initiatives. For example, the Market Access Center offers daily trading summaries; a trading alert system highlighting user-defined trading or market events; a Web site featuring timely content for NYSE-listed senior executives; exclusive events; and the opportunity to exchange ideas and leverage shared experiences with listed company peers; trading information and market data; and a series of institutional ownership reports; weekly economic updates; and regularly scheduled executive educational programming. In addition, the Market Access Center provides all issuers with access to discounted products and services from the same third-party vendors. A description of all the Market Access Center offerings is available on the Exchange's Web site.[3] All issuers listed on the Exchange have access to the NYSE Market Access Center on the same basis. The products and services currently available through the NYSE Market Access Center have a commercial value of approximately $50,000.

Tiered Products and Services Offered to Certain Companies [4]

In addition to the Market Access Center, NYSE offers products and services to certain currently listed and newly listed issuers on a tiered basis. Currently listed issuers are categorized into two tiers, Tier One and Tier Two. Tier One issuers include U.S. issuers that have 270 million or more total shares of common stock issued and outstanding in all share classes, including and in addition to Treasury shares, and Foreign Private Issuers that have 270 million or more in American Depositary Receipts ("ADRs") issued and outstanding, each calculated annually as of December 31 of the preceding year.[5] Tier Two issuers include U.S. issuers that have 160 million to 269,999,999 total shares of common stock issued and outstanding in all share classes, including and in addition to Treasury shares, and Foreign Private Issuers that have 160 million to 269,999,999 in ADRs issued and outstanding, each calculated annually as of December 31 of the preceding year.

Newly listed issuers similarly are categorized into two tiers, Tier A and Tier B.[6] Tier A includes issuers with a global market value of $400 million or more based on the public offering price. Tier B includes issuers with a global market value of less than $400 million based on the public offering price.

Products and Services Within Each Tier

In addition to the NYSE Market Access Center products and services,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Web site address is *http://www.nyse.com/about/listed/1224630025065.html.*

[4] A description of the products and services follows in a later section.

[5] For example, if a company had issued Class A and Class B shares, both classes would be counted in determining total shares issued and outstanding.

[6] The term "newly listed issuers" means U.S. issuers conducting an initial public offering ("IPO"), issuers emerging from bankruptcy, spinoffs (where a company lists new shares in the absence of a public offering), and carve-outs (where a company carves out a business line or division, which then conducts a separate IPO). Newly listed issuers do not include issuers that transfer their listings from another national securities exchange; rather, transferring issuers are eligible for the services available to currently listed issuers, as described above.

each company in the tiers is offered an identical suite of products and services provided by third-party vendors that the Exchange selects, described in more detail below:

Currently Listed Companies

- Tier One companies receive market surveillance and Web-hosting products and services.
- Tier Two companies receive either Web-hosting or market analytics products and services; each company may elect whether to receive Web-hosting or market analytics.

Newly Listed Companies

- Tier A companies receive either market surveillance products and services for a period of 12 calendar months from the date of listing or market analytics products and services for a period of 24 calendar months from the date of listing, at each company's election; in addition, Tier A companies receive Web-hosting and news distribution products and services for a period of 24 calendar months from the date of listing.
- Tier B companies receive Web-hosting and news distribution products and services for a period of 24 calendar months from the date of listing.
- At the conclusion of the 24-month period, companies would receive Tier One or Tier Two products and services if they qualified based on total shares or total ADRs issued and outstanding as described above. For example, if an issuer conducted an IPO and became listed as a Tier A company on the Exchange on May 1, 2010, it would receive the Tier A products and services until April 30, 2012. On May 1, 2012, if that issuer qualified for Tier One or Tier Two, it would be eligible to receive the products and services available to the Tier for which it qualified.

Description of Products and Services Offered to Tiers

Market surveillance products and services, which have a commercial value of approximately $45,000 annually, help a company understand factors driving the performance of its stock, sector, and the broader market. Various reports are made available to the company on a daily, weekly, and monthly basis. In addition, analysts employed by the vendors of these products and services, and who are organized by industry, review trading data and are available to discuss their findings with the company.

Web-hosting products and services, which have a commercial value ranging from approximately $12,000–$16,000 annually, allow a company to outsource the investor relations component of their company Web site to a third party for development as well as ongoing maintenance. The hosted Web site generally includes financial reports, an interactive company calendar and email alerts, stock quotes, stock charts, fundamental data, and analyst estimates.

Market analytics products and services, which have a commercial value of approximately $20,000 annually, provide stock pricing data, news, institutional ownership information, research analyst pricing estimates, key ratios and valuation metrics across multiple companies and indices, and other analytic tools to companies. These market analytics products and services provide more detailed information than is currently available on the Market Access Center. News distribution products and services, which have a commercial value of approximately $10,000 annually, are used to distribute company news to various media outlets.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Securities Exchange Act of 1934 (the "Act") [7] in general and Section 6(b)(4) [8] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Exchange also believes that the proposed rule change is consistent with Section 6(b)(5) [9] of the Act in that it is designed to promote just and equitable principles of trade, protect investors and the public interest, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed rule change provides greater transparency in the types of products and services offered to currently and newly listed companies. NYSE Market Access Center products and services are available to all listed companies. Additional products and services beyond those provided with the NYSE Market Access Center are made available on a tiered basis to certain companies based on their total shares or total ADRs issued and outstanding or company valuation. NYSE believes that these metrics are positively correlated to increased trading volumes and market activity, and as a result these issuers have higher demands for the types of products and services provided through the tiers than issuers that do not qualify for one of the tiers.

The Exchange notes that the Market Access Center would continue to be available to all issuers. Furthermore, the Exchange believes that the criteria for satisfying the tiers are transparent and quantitative, and they are applied consistently to all listed companies. As such, the Exchange believes that the products and services are equitably allocated among issuers. In addition, the products and services help issuers to better understand trading patterns and developments associated with their securities. They also benefit shareholders by providing broader access to information about the issuers; for example, Web-hosting may make information about listed companies more accessible on the Internet, and news distribution products and services help distribute timely information about listed companies.

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. In this regard, NYSE notes that it does not have exclusive agreements or arrangements with the vendors providing the products and services, and NYSE may use multiple vendors for the same type of product or service. NYSE also notes that currently listed and newly listed companies would not be required to accept the offered products and services from NYSE, and an issuer's receipt of an NYSE listing is not conditioned on the issuer's acceptance of such products and services. In addition, NYSE notes that, from time to time, issuers elect to purchase products and services from other vendors at their own expense instead of accepting the products and services described above offered by the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 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

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78f(b)(5).

90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2011–20 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–2011–20. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–NYSE–2011–20 and should be submitted on or before June 13, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–12518 Filed 5–20–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64512; File No. SR–FINRA–2011–017]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Accelerated Approval of a Proposed Rule Change To Amend FINRA Rule 5131 (New Issue Allocations and Distributions)

May 18, 2011.

I. Introduction

On April 26, 2011, the Financial Industry Regulatory Authority, Inc. ("FINRA") 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 amend FINRA Rule 5131 (New Issue Allocations and Distributions) to simplify the spinning provision in that Rule and to delay the implementation date of paragraphs (b) and (d)(4) under that Rule. This proposal was published for comment in the **Federal Register** on April 29, 2011.[3] The Commission received no comments regarding the proposal.[4] This order approves this proposed rule change on an accelerated basis.

II. Description of the Proposed Rule Change

On November 29, 2010, FINRA issued *Regulatory Notice* 10–60 announcing Commission approval of SR–NASD–2003–140[5] and designating the effective date of new Rule 5131 (the "Rule") as May 27, 2011.[6]

Paragraph (b) of the Rule (Spinning), implements a recommendation from the IPO Advisory Committee Report[7] 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. 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 proposes to delete paragraph (b)(1). FINRA believes that benefits of the anti-spinning provisions can be attained without this particular provision

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[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 64341 (Apr. 26, 2011), 76 FR 24076 (Apr. 29, 2011) (SR–FINRA–2011–017).

[4] The Commission received one comment whose caption indicated that it was filed in response to this proposal, but whose substance was directed to another proposal by the Commission. *See* comment letter submitted by Nancy DeTine, dated April 29, 2011.

[5] *See* Securities Exchange Act Release No. 63010 (September 29, 2010), 75 FR 61541 (October 5, 2010) (Order Approving File No. SR–NASD–2003–140).

[6] *See Regulatory Notice* 10–60 (November 2010) (Approval of New Issue Rule).

[7] *NYSE/NASD IPO Advisory Committee Report and Recommendations* (May 2003). *http://ww.finra.org/web/groups/industry/@ip/@reg/@guide/documents/industry/p010373.pdf.*

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,[8] FINRA proposes to delay the implementation date of paragraph (b), as amended, until September 26, 2011.

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. Accordingly, FINRA proposes to delay the implementation date of paragraph (d)(4) until September 26, 2011.

FINRA represented that these proposed rule changes would be effective on the date of Commission approval.

III. Discussion and Findings

After careful review, the Commission finds that the proposed rule change to amend FINRA Rule 5131 is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to a national securities association.[9] In particular, the Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[10] which requires, among other things, that FINRA rules 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. The proposed rule change reflects the concern that the Rule, as written, would prohibit certain necessary functions traditionally performed by syndicate personnel. To respond to this concern, the Rule simplifies FINRA members' obligations with respect to Rule 5131, thereby aiding member compliance efforts and helping to maintain investor confidence in the capital markets. Further, delay of the implementation date of paragraphs (b) and (d)(4) until September 26, 2011 will enable FINRA members 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.

In addition, the Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,[11] for approving the proposed rule change on an accelerated basis. Without accelerated approval the Rule would take effect on May 27, 2011, even though the Commission is approving delaying the effective date of the Rule until September 26, 2011. Moreover, accelerated approval is appropriate because the proposed rule changes are minor and do not raise material or novel issues. Accordingly, the Commission finds that good cause exists for approving the rule change on an accelerated basis.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[12] that the proposed rule change (File No. SR–FINRA–2011–017) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–12620 Filed 5–20–11; 8:45 am]

BILLING CODE 8011–01–P

[8] 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.

[9] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[10] 15 U.S.C. 78o–3(b)(6).

[11] 15 U.S.C. 78s(b)(2).

[12] 15 U.S.C. 78s(b)(2).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64511; File No. SR–NYSEAmex–2011–18]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change Relating to the Formation of a Joint Venture Between the Exchange, Its Ultimate Parent NYSE Euronext, and Seven Other Entities To Operate an Electronic Trading Facility for Options Contracts

May 18, 2011.

On March 23, 2011, NYSE Amex LLC ("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 relating to the formation of a joint venture between the Exchange, its ultimate parent NYSE Euronext, and seven other entities to establish a Delaware limited liability company to operate an electronic trading facility for options contracts. The proposed rule change was published for comment in the **Federal Register** on April 4, 2011.[3] The Commission received three comments on the proposal.[4]

Section 19(b)(2) of the Act[5] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day for this filing is May 19, 2011.

The Commission is hereby extending the 45-day time period for Commission action on the proposed rule change. The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change. In particular, the extension

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 64144 (March 29, 2011), 76 FR 18591.

[4] *See* Letter from Andrew Rothlein, to the Commission, dated April 14, 2011; Letter from Benjamin Kerensa, to the Commission, dated April 25, 2011; and Letter from Joan C. Conley, Senior Vice President and Corporate Secretary, Nasdaq OMX Group, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated April 29, 2011.

[5] 15 U.S.C. 78s(b)(2).

of time will ensure that the Commission has sufficient time to consider and take action on the Exchange's proposal, in light of, among other things, the comments received on the proposal.

Accordingly, pursuant to Section 19(b)(2) of the Act,[6] the Commission designates July 1, 2011 as the date by which the Commission should either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File Number SR–NYSEAmex–2011–18).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–12575 Filed 5–20–11; 8:45 am]

BILLING CODE 8011–01–P

[6] 15 U.S.C. 78s(b)(2).

[7] 17 CFR 200.30–3(a)(31).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12580 and #12581]

Mississippi Disaster #MS–00048

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for the State of Mississippi (FEMA–1983–DR), dated 05/11/2011.

Incident: Flooding.

Incident Period: 05/03/2011 and continuing.

Effective Date: 05/11/2011.

Physical Loan Application Deadline Date: 07/11/2011.

Economic Injury (EIDL) Loan Application Deadline Date: 02/13/2012.

ADDRESSES: *Submit completed loan applications to:* U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 05/11/2011, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans):

Adams, Bolivar, Claiborne, Coahoma, Desoto, Humphreys, Issaquena, Jefferson, Sharkey, Tunica, Warren, Washington, Wilkinson, Yazoo.

Contiguous Counties (Economic Injury Loans Only):

Mississippi: Amite, Attala, Copiah, Franklin, Hinds, Holmes, Leflore, Lincoln, Madison, Marshall, Panola, Quitman, Sunflower, Tallahatchie, Tate.

Arkansas: Chicot, Crittenden, Desha, Lee, Phillips.

Louisiana: Concordia, East Carroll, East Feliciana, Madison, Tensas, West Feliciana.

Tennessee: Shelby.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	5.375
Homeowners Without Credit Available Elsewhere	2.688
Businesses With Credit Available Elsewhere	6.000
Businesses Without Credit Available Elsewhere	4.000
Non-Profit Organizations With Credit Available Elsewhere	3.250
Non-Profit Organizations Without Credit Available Elsewhere	3.000
For Economic Injury:	
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Non-Profit Organizations Without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 125806 and for economic injury is 125810.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008).

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2011–12522 Filed 5–20–11; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12584 and #12585]

Alabama Disaster #AL–00037

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of labama (FEMA–1971–DR), dated 05/10/2011.

Incident: Severe storms, tornadoes, straight-line winds, and flooding.

Incident Period: 04/15/2011 and continuing.

Effective Date: 05/10/2011.

Physical Loan Application Deadline Date: 07/11/2011.

Economic Injury (EIDL) Loan Application Deadline Date: 02/10/2012.

ADDRESSES: *Submit completed loan applications to:* U.S. Small Business Administration, Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 05/10/2011, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Bibb, Blount, Calhoun, Cullman, De Kalb, Elmore, Franklin, Jackson, Limestone, Madison, Marion, Marshall, Walker, Winston.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations With Credit Available Elsewhere	3.250
Non-Profit Organizations Without Credit Available Elsewhere	3.000
For Economic Injury:	
Non-Profit Organizations Without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 12584C and for economic injury is 12585C.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008).

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2011–12524 Filed 5–20–11; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12586 and #12587]

North Dakota Disaster #ND–00025

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of North Dakota (FEMA–1981–DR), dated 05/10/2011.

Incident: Flooding.

Incident Period: 02/14/2011 and continuing.

Effective Date: 05/10/2011.

Physical Loan Application Deadline Date: 07/11/2011.

Economic Injury (EIDL) Loan Application Deadline Date: 02/10/2012.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 05/10/2011, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Barnes, Benson, Bottineau, Burke, Cass, Cavalier, Dickey, Eddy, Foster, Grand Forks, Grant, Griggs, Kidder, Lamoure, Logan, Mchenry, Mcintosh, Mclean, Mercer, Morton, Mountrail, Nelson, Pembina, Pierce, Ramsey, Ransom, Renville, Richland, Rolette, Sargent, Sheridan, Steele, Stutsman, Towner, Traill, Walsh, Ward, Wells, Williams, and the Spirit Lake Nation, the Three Affiliated Tribes of the Fort Berthold Indian Reservation, and the Turtle Mountain Band of Chippewa Reservation.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations With Credit Available Elsewhere ...	3.250
Non-Profit Organizations Without Credit Available Elsewhere	3.000
For Economic Injury:	
Non-Profit Organizations Without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 125866 and for economic injury is 125876.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2011–12525 Filed 5–20–11; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Disaster Declaration #12588 and #12589

[Minnesota Disaster #MN–00030]

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Minnesota (FEMA–1982–DR), dated 05/10/2011.

Incident: Severe storms and flooding.

Incident Period: 03/16/2011 and continuing.

Effective Date: 05/10/2011.

Physical Loan Application Deadline Date: 07/11/2011.

Economic Injury (EIDL) Loan Application Deadline Date: 02/10/2012.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 05/10/2011, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Big Stone, Blue Earth, Brown, Carver, Chippewa, Clay, Grant, Lac Qui Parle, Le Sueur, Lyon, McLeod, Nicollet, Redwood, Renville, Scott, Sibley, Stevens, Traverse, Wilkin, Yellow Medicine.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations With Credit Available Elsewhere ...	3.250
Non-Profit Organizations Without Credit Available Elsewhere	3.000
For Economic Injury:	
Non-Profit Organizations Without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 12588B and for economic injury is 12589B.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2011–12527 Filed 5–20–11; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2011–0039]

Finding Regarding Foreign Social Insurance or Pension System—St. Vincent and the Grenadines

AGENCY: Social Security Administration (SSA)

ACTION: Notice of Finding Regarding Foreign Social Insurance or Pension System—St. Vincent and the Grenadines.

Finding: Section 202(t)(1) of the Social Security Act (42 U.S.C. 402(t)(1)) prohibits payment of monthly benefits to any individual who is not a United States citizen or national for any month after he or she has been outside the United States for 6 consecutive months. This prohibition does not apply to such an individual where one of the exceptions described in section 202(t)(2) through 202(t)(5) of the Social Security Act (42 U.S.C. 402(t)(2) through 402(t)(5) affects his or her case.

Section 202(t)(2) of the Social Security Act provides that, subject to certain residency requirements of Section 202(t)(11), the prohibition against payment shall not apply to any individual who is a citizen of a country which the Commissioner of Social Security finds has in effect a social insurance or pension system which is of general application in such country and which:

(a) Pays periodic benefits, or the actuarial equivalent thereof, on account of old age, retirement, or death; and

(b) Permits individuals who are United States citizens but not citizens of that country and who qualify for such benefits to receive those benefits, or the actuarial equivalent thereof, while outside the foreign country regardless of the duration of the absence.

The Commissioner of Social Security has delegated the authority to make

such a finding to the Associate Commissioner of the Office of International Programs. Under that authority, the Associate Commissioner of the Office of International Programs has approved a finding that St. Vincent and the Grenadines, beginning December 1, 2009, has a social insurance system of general application which:

(a) Pays periodic benefits, or the actuarial equivalent thereof, on account of old age, retirement, or death; and

(b) Permits United States citizens who are not citizens of St. Vincent and the Grenadines to receive such benefits, or their actuarial equivalent, at the full rate without qualification or restriction while outside St. Vincent and the Grenadines.

Accordingly, it is hereby determined and found that St. Vincent and the Grenadines has in effect, beginning December 1, 2009, a social insurance system which meets the requirements of section 202(t)(2) of the Social Security Act (42 U.S.C. 402(t)(2).

St. Vincent and the Grenadines became an independent nation on October 27, 1979. At that time, it was determined that St. Vincent and the Grenadines did not have a pension system that met the requirements of section 202(t)(2) of the Social Security Act. The country's provident system did not provide for the payment of periodic benefits as required under section 202(t)(2)(A). Notice appeared in the **Federal Register** on March 12, 1982. Based on the 1981 determination of record, citizens of St. Vincent and the Grenadines cannot meet the exception provided under section 202(t)(2) of the Social Security Act. However, they have been afforded the limited exceptions provided under section 202(t)(4) of the Act.

In 1986, St. Vincent and the Grenadines instituted a social insurance system that became operational in 1987. The system provides old-age, disability, and survivor's benefits, as well as other types of social insurance. Information recently obtained from St. Vincent and the Grenadines' National Insurance Institute contains detailed information on the country's social insurance system and the coverage of its labor force. This information required a new determination under the section 202(t)(2) provisions.

FOR FURTHER INFORMATION CONTACT: Donna Powers, 3700 Robert Ball Building, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 965–3558.

(Catalog of Federal Domestic Assistance: Program Nos. 96.001 Social Security—Disability Insurance; 96.002 Social Security—Retirement Insurance; 96.004 Social Security—Survivors Insurance)

Diane K. Braunstein,

Associate Commissioner, Office of International Programs.

[FR Doc. 2011–12596 Filed 5–20–11; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 7463]

In the Matter of the Designation of Army of Islam, aka Jaish al-Islam, aka Jaysh al-Islam; as a Specially Designated Global Terrorist Pursuant to Section 1(b) of Executive Order 13224, as Amended

Acting under the authority of and in accordance with section 1(b) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, and Executive Order 13284 of January 23, 2003, I hereby determine that the organization known as Army of Islam, also known as Jaish al-Islam, also known as Jaysh al-Islam, has committed, or poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

Consistent with the determination in section 10 of Executive Order 13224 that "prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously," I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Dated: May 9, 2011.

Hillary Rodham Clinton,

Secretary of State, Department of State.

[FR Doc. 2011–12618 Filed 5–20–11; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF STATE

[Public Notice 7464]

In the Matter of the Designation of Army of Islam, aka Jaish al-Islam, aka Jaysh al-Islam, as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended

Based upon a review of the Administrative Record assembled in this matter, and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that there is a sufficient factual basis to find that the relevant circumstances described in section 219 of the Immigration and Nationality Act, as amended (hereinafter "INA") (8 U.S.C. 1189), exist with respect to Army of Islam, also known as Jaish al-Islam, also known as Jaysh al-Islam.

Therefore, I hereby designate the aforementioned organization and its aliases as a Foreign Terrorist Organization pursuant to section 219 of the INA.

This determination shall be published in the **Federal Register**.

Dated: May 9, 2011.

Hillary Rodham Clinton,

Secretary of State.

[FR Doc. 2011–12614 Filed 5–20–11; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF STATE

[Public Notice: 7461]

Issuance of a Presidential Permit for a Border Crossing Called "San Ysidro" at the International Boundary Between the United States and Mexico

SUMMARY: The Department of State issued a Presidential permit to the General Services Administration on May 2, 2011, authorizing that agency to expand, renovate, and maintain the commercial and pedestrian border crossing called "San Ysidro" in San Diego, California, at the International Boundary between the United States and Mexico. In making this determination, the Department complied with the procedures required under Executive Order 11423, as amended.

FOR FURTHER INFORMATION CONTACT: Stewart Tuttle, U.S.-Mexico Border Affairs Coordinator, via e-mail at *WHA-BorderAffairs@state.gov;* by phone at 202–647–9894; or by mail at Office of Mexican Affairs—Room 3909, Department of State, 2201 C St., NW., Washington, DC 20520. Information about Presidential permits is available

on the Internet at *http://www.state.gov/p/wha/rt/permit/.*

SUPPLEMENTARY INFORMATION: Following is the text of the issued permit:

By virtue of the authority vested in me as Under Secretary of State for Economic, Energy, and Agricultural Affairs under Executive Order 11423, 33 FR 11741 (1963), as amended by Executive Order 12847 of May 17, 1993, 58 FR 29511 (1993), Executive Order 13284 of January 23, 2003, 68 FR 4075 (2003), and Executive Order 13337 of April 30, 2004, 69 FR 25299 (2004) and Department of State Delegation of Authority number 118–2 of January 26, 2006; having considered the environmental effects of the proposed action consistent with the National Environmental Policy Act of 1969, as amended (83 Stat. 852, 42 U.S.C. 4321 *et seq.*) and other statutes relating to environmental concerns; having considered the proposed action consistent with the National Historic Preservation Act of 1966, as amended (80 Stat. 917, 16 U.S.C. 470f *et seq.*); and having requested and received the views of various of the federal departments and other interested persons; I hereby grant permission, subject to the conditions herein set forth, to the United States General Services Administration (GSA) (hereinafter referred to as the "permittee"), to expand, renovate, operate and maintain a vehicle and pedestrian land border crossing (hereinafter referred to as "San Ysidro"), in San Diego, CA.

* * * * *

The term "facilities" as used in this permit means the facilities to be constructed and/or renovated at the San Ysidro border crossing in San Diego, California, consisting of the following improvements and structures:

- Inspection and X–Ray Facilities
- Main Administrative Building
- A new Auto Inspection building
- Entry and Exit Control Booths
- Southbound Inspection Facilities
- Roadways and related Infrastructure, Pathways, Parking Lots, and related Lots
- Landscaping
- Ancillary Support Facilities
- Non-commercial Inspection facilities and lanes
- Pedestrian Crossings
- Pedestrian Inspection facilities
- Related Improvements and Infrastructure
- Renovation or expansion of the Historic Customs House
- Modifications of the U.S. Border Fence

These facilities are the subject of a Final Environmental Impact Statement (FEIS), which was completed by GSA in August 2009 (*http://www.gsa.gov/NEPA_Library*), and a Record of Decision by the Acting Regional Administrator, GSA Region 9, dated September 9, 2009, selecting a preferred alternative, specifying certain avoidance, minimization and mitigation measures and adopting a mitigation monitoring and enforcement program. EPA published a notice of availability of the FEIS in the **Federal Register** (74 FR 39697, August 7, 2009).

This permit is subject to the following conditions:

Article 1. The facilities herein described, and all aspects of their operation, shall be subject to all the conditions, provisions and requirements of this permit and any amendment thereof. This permit may be terminated upon a determination of the Executive Branch that the San Ysidro border crossing shall be closed. This permit may be amended by the Secretary of State or the Secretary's delegate in consultation with the permittee and, as appropriate, other Executive Branch agencies; the permittee's obligation to implement such an amendment is subject to the availability of funds. The permittee shall make no substantial change in the location of the facilities or in the operation authorized by this permit until such changes have been approved by the Secretary of State or the Secretary's delegate.

Article 2. The permittee shall comply with all applicable federal laws and regulations regarding the construction, operation and maintenance of the facilities. Further, the permittee shall comply with nationally recognized codes to the extent required under 40 U.S.C. 3312(b). The permittee shall cooperate with state and local officials to the extent required under 40 U.S.C. 3312(d).

Article 3. In the event that the San Ysidro Port of Entry is permanently closed and is no longer used as an international crossing, this permit shall terminate and the permittee may manage, utilize, or dispose of the facilities in accordance with its statutory authorities.

Article 4. The permittee is a federal agency that is responsible for managing and operating the San Ysidro Port of Entry, as authorized by applicable federal laws and regulations. This permit shall continue in full force and effect for only so long as the permittee shall continue the operations hereby authorized.

Article 5. This Article applies to transfer of the facilities or any part thereof as an operating land border crossing. The permittee shall immediately notify the United States Department of State of any decision to transfer custody and control of the facilities or any part thereof to any other any agency or department of the United States Government. Said notice shall identify the transferee agency or department and seek the approval of the United States Department of State for the transfer of the permit. In the event of approval by the Department of State of such transfer of custody and control to another agency or department of the United States Government, the permit shall remain in force and effect, and the facilities shall be subject to all the conditions, permissions and requirements of this permit and any amendments thereof. The permittee may transfer ownership or control of the facilities to a non-federal entity or individual only upon the prior express approval of such transfer by the United States Department of State, which approval may include such conditions, permissions and requirements that the Department of State, in its discretion, determines are appropriate and necessary for inclusion in the permit, to be effective on the date of transfer.

Article 6. (1) The permittee or its agent shall acquire such right-of-way grants or easements and permits as may become necessary and appropriate.

(2) The permittee shall maintain the facilities and every part thereof.

Article 7. (1) The permittee shall take or cause to be taken all appropriate measures to prevent or mitigate adverse environmental impacts or disruption of significant archeological resources in connection with the construction, operation and maintenance of the facilities, including avoidance, minimization and mitigation measures and the mitigation monitoring and enforcement program adopted by the permittee in the Record of Decision issued in connection with the Final Environmental Impact Statement.

(2) Before issuing the notice to proceed for construction, the permittee shall obtain the concurrence of the U.S. Section of the International Boundary and Water Commission.

Article 8. The permittee shall file any applicable statements and reports that might be required by applicable federal law in connection with this project.

Article 9. The permittee shall not issue a notice to proceed for construction work until the Department of State has provided notification to the permittee that the Department has completed its exchange of diplomatic notes with the Government of Mexico regarding authorization of construction. The permittee shall provide written notice to the Department of State at such

time as the construction authorized by this permit is begun, and again at such time as construction is completed, interrupted for more than ninety days or discontinued.

Article 10. This permit is not intended to, and does not, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies, instrumentalities or entities, its officers or employees, in their individual or official capacities, or any other person.

In witness whereof, I, Robert D. Hormats, Under Secretary of State for Economic, Energy, and Agricultural Affairs of the United States, have hereunto set my hand this day of April 15, 2011, in the City of Washington, District of Columbia.

End Permit text.

Dated: May 16, 2011.

Alex Lee,

Director, Office of Mexican Affairs, Department of State.

[FR Doc. 2011–12619 Filed 5–20–11; 8:45 am]

BILLING CODE 4710–29–P

Department of State

[Public Notice: 7465]

Statutory Debarment and Reinstatement of BAE Systems plc

Bureau of Political-Military Affairs; Statutory Debarment and Reinstatement of BAE Systems plc and Policy of Denial Concerning Certain Non-U.S. Subsidiaries Under the Arms Export Control Act and the International Traffic in Arms Regulations

ACTION: Notice.

SUMMARY: Notice is hereby given that the Department of State, acting pursuant to section 127.7(c) of the International Traffic in Arms Regulations ("ITAR") (22 CFR Parts 120–130), imposed a statutory debarment on BAE Systems plc ("BAES") as a result of its conviction of conspiracy (18 U.S.C. 371) to violate certain provisions of U.S. law, including section 38 of the Arms Export Control Act, as amended, ("AECA") (22 U.S.C. 2778) and at the same time reinstated BAES. Concurrently, pursuant to section 126.7 of the ITAR, the Department of State is providing notice of a presumption of denial (also referred to as a policy of denial) regarding certain of BAES' non-U.S. subsidiaries because of their substantial involvement in activities related to the conviction. These non-U.S. subsidiaries are: BAE Systems CS&S International, Red Diamond Trading Ltd., and Poseidon Trading Investments Ltd.

DATES: *Effective Date(s):* May 16, 2011.

FOR FURTHER INFORMATION CONTACT: Office of Defense Trade Controls Compliance, Bureau of Political-Military Affairs, Department of State (202) 632–2798.

SUPPLEMENTARY INFORMATION: Section 38(g)(4) of the AECA, 22 U.S.C. 2778(g)(4), prohibits the Department of State from issuing licenses or other approvals for the export of defense articles, including technical data, or defense services where the applicant, or any party to the export, has been convicted of violating certain statutory provisions, including provisions of the AECA, and conspiracy (18 U.S.C. 371) to violate the AECA. The statute permits limited exceptions to be made on a case-by-case basis. In implementing this provision, section 127.7(c) of the ITAR provides for a "statutory debarment" of any person who has been convicted of violating or conspiring to violate the AECA. Persons subject to a statutory debarment are prohibited from participating directly or indirectly in the export of defense articles, including technical data, or in the furnishing of defense services for which a license or other approval is required. Statutory debarment is based solely upon conviction in a criminal proceeding, conducted by a court of the United States, and as such the administrative debarment procedures outlined in Part 128 of the ITAR are not applicable.

On March 2, 2010, the United States District Court in the District of Columbia, filed judgment against BAES for conspiracy to violate, *inter alia,* the AECA and the ITAR, in violation of section 38 of the AECA and parts 127 and 130 of the ITAR. Notice is hereby given that, pursuant to section 38(g)(4) of the AECA and section 127.7(c) of the ITAR, BAES, headquartered in Farnborough, England, in the United Kingdom of Great Britain and Northern Ireland, was statutorily debarred on May 16, 2011, but that in accordance with section 38(g)(4) of the AECA and section 127.7 of the ITAR, and in conjunction with a Consent Agreement between the Department and BAES, the statutory debarment was concurrently rescinded. Ineligible status and statutory debarment may be terminated after consultation with other appropriate U.S. agencies, after a thorough review of the circumstances surrounding the conviction, and a finding that appropriate steps have been taken to mitigate any law enforcement concerns. The Department of State reviewed the circumstances and consulted with other appropriate U.S. agencies, and determined that BAES took appropriate steps to address the causes of the violations and to mitigate any law enforcement concerns.

Further notice is hereby given that the Department of State, pursuant to section 38 of the AECA and section 126.7 of the ITAR, imposed on May 16, 2011 a policy of denial on the following BAES' non-U.S. subsidiaries: BAE Systems CS&S International, Red Diamond Trading Ltd., and Poseidon Trading Investments Ltd., including their divisions and business units, and successor entities. This means that there will be an initial presumption of denial for all applications for licenses and other approvals involving these subsidiaries unless upon case-by-case review the Department determines that it is in the foreign policy or national security interests of the United States to provide an approval. Section 126.7(a) of the ITAR provides that any application for an export license or other approval under the ITAR may be disapproved, and any license or other approval or exemption granted may be revoked, suspended, or amended without prior notice, in part, whenever: (1) An applicant or any party to the export or the agreement has been convicted of violating any of the U.S. criminal statutes enumerated in section 120.27 of the ITAR, which include the AECA; (2) the Department of State believes that 22 U.S.C. 2778, any regulation contained in the ITAR, or the terms of any U.S. Government export authorization has been violated by any party to the export or other person having a significant interest in the transaction; or, (3) whenever the Department of State deems such action to be in furtherance of world peace, the national security or the foreign policy of the United States, or is otherwise advisable. All new applications for licenses or other approvals to which BAE Systems CS&S International, Red Diamond Trading Ltd., and Poseidon Trading Investments Ltd., including their divisions and business units, and successor entities are a party will be reviewed consistent with this presumption of denial.

Exceptions, also known as "transaction exceptions," may be made to the policy of denial on a case-by-case basis. However, such a "transaction exception" would be granted only after a full review of all circumstances, and paying particular attention to the following factors: whether an exception is warranted by overriding U.S. foreign policy or national security interests; whether an exception would further law

enforcement concerns that are consistent with the foreign policy or national security interests of the United States; or, whether other compelling circumstances exist that are consistent with the foreign policy or national security interests of the United States and that do not conflict with law enforcement concerns. Even if exceptions are granted, the policy of denial for BAE Systems CS&S International, Red Diamond Trading Ltd., and Poseidon Trading Investments Ltd., including their divisions and business units, and successor entities will continue until it is lifted by the Department.

This notice is provided for the purpose of making the public aware that BAE Systems CS&S International, Red Diamond Trading Ltd., and Poseidon Trading Investments Ltd., including their divisions and business units, and successor entities are under a policy of denial and are presumed not to be qualified to participate directly or indirectly in activities regulated by the ITAR except as outlined herein. This includes engaging in any brokering activities; use of exemptions by or for the benefit of the BAES non-U.S. subsidiaries listed above; and, in any export from or temporary import into the United States of defense articles, related technical data, or defense services in all situations covered by the ITAR. Notwithstanding the foregoing language, all licenses, agreements, and other authorizations involving those parties under a policy of denial issued prior May 16, 2011 are not affected and are not revoked. In the event of reorganization, the terms of the policy of denial will follow and apply to all affected entities or units.

Dated: May 16, 2011.

Andrew J. Shapiro,

Assistant Secretary of State for Political-Military Affairs, Department of State.

[FR Doc. 2011–12628 Filed 5–20–11; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

May 18, 2011.

The Department of the Treasury will submit the following public information collection requirements to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. A copy of the submissions may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding these information collections should be addressed to the OMB reviewer listed and to the Treasury PRA Clearance Officer, Department of the Treasury, 1750 Pennsylvania Avenue, NW., Suite 11010, Washington, DC 20220.

DATES: Written comments should be received on or before June 22, 2011 to be assured of consideration.

Alcohol and Tobacco Tax And Trade Bureau (TTB)

OMB Number: 1513–0017.

Type of Review: Extension without change of a currently approved collection.

Title: Drawback on Beer Exported.

Form: TTB F 5130.6

Abstract: When tax-paid beer is removed from a brewery and ultimately exported, the brewer exporting the beer is eligible for a drawback (refund) of Federal taxes paid. By completing this form and submitting documentation of exportation, the brewer may receive a refund of Federal taxes paid.

Respondents: Private Sector: Businesses or other for-profits.

Estimated Total Burden Hours: 5,000.

OMB Number: 1513–0034.

Type of Review: Extension without change of a currently approved collection.

Title: Schedule of Tobacco Products, Cigarette Papers, or Tubes Withdrawn from the Market.

Forms: TTB F 5200.7.

Abstract: TTB F 5200.7 is used by persons who intend to withdraw tobacco products from the market for which the taxes have already been paid or determined. The form describes the products that are to be withdrawn to determine the amount of tax to be claimed later as a tax credit or refund. The form notifies TTB when withdrawal or destruction is to take place, and TTB may elect to supervise withdrawal or destruction.

Respondents: Private Sector: Businesses or other for-profits.

Estimated Total Burden Hours: 1,539.

OMB Number: 1513–0062.

Type of Review: Extension without change of a currently approved collection.

Title: Usual and Customary Business Records Relating to Denatured Spirits—TTB REC 5150/1.

Abstract: Denatured Spirits are used for non-beverage industrial purposes in the manufacture of personal household products. The manufacturer maintains and TTB inspects records to ensure spirits accountability. By ensuring that spirits have not been diverted to beverage use, TTB protects tax revenue and public safety. These are normal business records that the manufacturer already keeps.

Respondents: Private Sector: Businesses or other for-profits; State, Local, and Tribal Governments.

Estimated Total Burden Hours: 1.

OMB Number: 1513–0113.

Type of Review: Extension without change of a currently approved collection.

Title: Special Tax "Renewal" Registration and Return/Special Tax Location Registration Listing.

Form: 5630.5R.

Abstract: 26 U.S.C. Chapter 52 authorizes collection of special taxes from persons engaging in certain tobacco businesses. TTB F 5630.5R is used to compute tax and as an application for registry.

Respondents: Private Sector: Businesses or other for-profits.

Estimated Total Burden Hours: 100.

Clearance Officer: Gerald Isenberg, Alcohol and Tobacco Tax and Trade Bureau, Room 200 East, 1310 G Street, NW., Washington, DC 20005; (202) 453–2165.

OMB Reviewer: Shagufta Ahmed, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; (202) 395–7873.

Dawn D. Wolfgang,

Treasury PRA Clearance Officer.

[FR Doc. 2011–12577 Filed 5–20–11; 8:45 am]

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FEDERAL REGISTER

Vol. 76 Monday,

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Part II

Commodity Futures Trading Commission

17 CFR Part 1

Securities and Exchange Commission

17 CFR Part 240

Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping; Proposed Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 1

RIN 3038–AD46

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 33–9204; 34–64372; File No. S7–16–11]

RIN 3235–AL14

Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping

AGENCIES: Commodity Futures Trading Commission; Securities and Exchange Commission.

ACTION: Joint proposed rules; proposed interpretations.

SUMMARY: In accordance with section 712(a)(8), section 712(d)(1), sections 712(d)(2)(B) and (C), sections 721(b) and (c), and section 761(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), the Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission ("SEC") (collectively, "Commissions"), in consultation with the Board of Governors of the Federal Reserve System ("Board"), are jointly issuing proposed rules and proposed interpretive guidance under the Commodity Exchange Act ("CEA") and the Securities Exchange Act of 1934 ("Exchange Act") to further define the terms "swap," "security-based swap," and "security-based swap agreement" (collectively, "Product Definitions"), regarding "mixed swaps," and governing books and records with respect to "security-based swap agreements."

DATES: Comments should be received on or before July 22, 2011.

ADDRESSES: Comments may be submitted, identified by File No. S7–16–11, by any of the following methods:

CFTC:

- *Agency Web site,* via its Comments Online process: *http://comments.cftc.gov.* Follow the instructions for submitting comments through the Web site.
- *Mail:* David A. Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.
- *Hand Delivery/Courier:* Same as mail above.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Please submit your comments using only one method. "*Product Definitions*" must be in the subject field of responses submitted via e-mail, and clearly indicated on written submissions. All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the CFTC to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in section 145.9 of the CFTC's regulations.[1]

The CFTC reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from www.cftc.gov that it may deem to be inappropriate for publication, including obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

SEC

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*);
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–16–11 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 S7–16–11. 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 SEC will post all comments on the SEC's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for Web site viewing and printing in the SEC'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; the SEC does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

[1] 17 CFR 145.9.

FOR FURTHER INFORMATION CONTACT: CFTC: Julian E. Hammar, Assistant General Counsel, at 202–418–5118, *jhammar@cftc.gov,* Mark Fajfar, Assistant General Counsel, at 202–418–6636, *mfajfar@cftc.gov,* or David E. Aron, Counsel, at 202–418–6621, *daron@cftc.gov,* Office of General Counsel, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581; SEC: Matthew A. Daigler, Senior Special Counsel, at 202–551–5578, Cristie L. March, Attorney-Adviser, at 202–551–5574, or Leah M. Drennan, Attorney-Adviser, at 202–551–5507, Division of Trading and Markets, or Michael J. Reedich, Special Counsel, or Tamara Brightwell, Senior Special Counsel to the Director, at 202–551–3500, Division of Corporation Finance, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION: The Commissions jointly are proposing new rules and interpretive guidance under the CEA and the Exchange Act relating to the Product Definitions, mixed swaps, and security-based swap agreements.

Table of Contents

I. Background
II. Scope of Definitions of Swap and Security-Based Swap
A. Introduction
B. Proposed Rules and Interpretive Guidance Regarding Certain Transactions Outside the Scope of the Definitions of the Terms "Swap" and "Security-Based Swap"
1. Insurance Products
(a) Types of Insurance Products
(b) Providers of Insurance Products
2. The Forward Contract Exclusion
(a) Forward Contracts in Nonfinancial Commodities
(b) Commodity Options and Commodity Options Embedded in Forward Contracts
(c) Security Forwards
3. Consumer and Commercial Agreements, Contracts, and Transactions
4. Loan Participations
C. Proposed Rules and Interpretive Guidance Regarding Certain Transactions Within the Scope of the Definitions of the Terms "Swap" and "Security-Based Swap"
1. In General

2. Foreign Exchange Products
(a) Foreign Exchange Products Subject to the Secretary's Swap Determination: Foreign Exchange Forwards and Foreign Exchange Swaps
(b) Foreign Exchange Products Not Subject to the Secretary's Swap Determination
(i) Foreign Currency Options
(ii) Non-Deliverable Forward Contracts Involving Foreign Exchange
(iii) Currency Swaps and Cross-Currency Swaps
3. Forward Rate Agreements
4. Combinations and Permutations of, or Options on, Swaps and Security-Based Swaps
5. Contracts for Differences
D. Certain Interpretive Issues
1. Agreements, Contracts, or Transactions That May Be Called, or Documented Using Form Contracts Typically Used for, Swaps or Security-Based Swaps
2. Transactions in Regional Transmission Organizations and Independent System Operators
III. The Relationship Between the Swap Definition and the Security-Based Swap Definition
A. Introduction
B. Title VII Instruments Based on Interest Rates, Other Monetary Rates, and Yields
1. Title VII Instruments Based on Interest Rates or Other Monetary Rates That Are Swaps
2. Title VII Instruments Based on Yields
3. Title VII Instruments Based on Government Debt Obligations
C. Total Return Swaps
D. Security-Based Swaps Based on a Single Security or Loan and Single-Name Credit Default Swaps
E. Title VII Instruments Based on Futures Contracts
F. Use of Certain Terms and Conditions in Title VII Instruments
G. The Term "Narrow-Based Security Index" in the Security-Based Swap Definition
1. Introduction
2. Applicability of the Statutory Narrow-Based Security Index Definition and Past Guidance of the Commissions to Title VII Instruments
3. Narrow-Based Security Index Criteria for Index Credit Default Swaps
(a) In General
(b) Proposed Rules Regarding the Definitions of "Issuers of Securities in a Narrow-Based Security Index" and "Narrow-Based Security Index" for Index Credit Default Swaps
(i) Number and Concentration Percentages of Reference Entities or Securities
(ii) Public Information Availability Regarding Reference Entities and Securities
(iii) Treatment of Indexes Including Reference Entities That Are Issuers of Exempted Securities or Including Exempted Securities
4. Security Indexes
5. Evaluation of Title VII Instruments on Security Indexes That Move From Broad-Based to Narrow-Based or Narrow-Based to Broad-Based
(a) In General
(b) Title VII Instruments on Security Indexes Traded on Designated Contract Markets, Swap Execution Facilities, Foreign Boards of Trade, Security-Based Swap Execution Facilities, and National Securities Exchanges
H. Method of Settlement of Index CDS
I. Security-Based Swaps as Securities Under the Exchange Act and Securities Act
IV. Mixed Swaps
A. Scope of the Category of Mixed Swap
B. Regulation of Mixed Swaps
1. Introduction
2. Bilateral Uncleared Mixed Swaps Entered Into by Dually-Registered Dealers or Major Participants
3. Regulatory Treatment for Other Mixed Swaps
V. Security-Based Swap Agreements
A. Introduction
B. Swaps That Are Security-Based Swap Agreements
C. Books and Records Requirements for Security-Based Swap Agreements
VI. Process for Requesting Interpretations of the Characterization of a Title VII Instrument
VII. Anti-Evasion
A. CFTC Proposed Anti-Evasion Rules
B. SEC Request for Comment Regarding Anti-Evasion
VIII. Administrative Law Matters—CEA Revisions
IX. Administrative Law Matters—Exchange Act Revisions
X. Statutory Basis and Rule Text

I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Act into law.[2] Title VII of the Dodd-Frank Act[3] ("Title VII") established a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted, among other reasons, to reduce risk, increase transparency, and promote market integrity within the financial system, including by: (i) Providing for the registration and comprehensive regulation of swap dealers, security-based swap dealers, major swap participants, and major security-based swap participants; (ii) imposing clearing and trade execution requirements on swaps and security-based swaps, subject to certain exceptions; (iii) creating rigorous recordkeeping and real-time reporting regimes; and (iv) enhancing the rulemaking and enforcement authorities of the Commissions with respect to, among others, all registered entities and intermediaries subject to the Commissions' oversight.

Section 712(d)(1) of the Dodd-Frank Act provides that the Commissions, in consultation with the Board, shall jointly further define the terms "swap," "security-based swap," and "security-based swap agreement" ("SBSA").[4] Section 712(a)(8) of the Dodd-Frank Act provides further that the Commissions shall jointly prescribe such regulations regarding "mixed swaps" as may be necessary to carry out the purposes of Title VII. In addition, sections 721(b) and 761(b) of the Dodd-Frank Act provide that the Commissions may adopt rules to further define terms included in subtitles A and B, respectively, of Title VII, and sections 721(c) and 761(b) of the Dodd-Frank Act provide the Commissions with authority to define the terms "swap" and "security-based swap," as well as the terms "swap dealer," "major swap participant," "security-based swap dealer," and "major security-based swap participant," to include transactions and entities that have been structured to evade the requirements of subtitles A and B, respectively, of Title VII.

Section 712(d)(2)(B) of the Dodd-Frank Act requires the Commissions, in consultation with the Board, to jointly adopt rules governing books and records requirements for SBSAs by persons registered as swap data repositories ("SDRs") under the CEA,[5] including uniform rules that specify the data elements that shall be collected and maintained by each SDR.[6] Similarly,

[2] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act is available at *http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm.*

[3] Pursuant to section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

[4] In addition, section 719(d)(1)(A) of the Dodd-Frank Act requires the Commissions to conduct a joint study, within 15 months of enactment, to determine whether stable value contracts, as defined in section 719(d)(2) of the Dodd-Frank Act, are encompassed by the swap definition. If the Commissions determine that stable value contracts are encompassed by the swap definition, section 719(d)(1)(B) of the Dodd-Frank Act requires the Commissions jointly to determine whether an exemption for those contracts from the swap definition is appropriate and in the public interest. Section 719(d)(1)(B) also requires the Commissions to issue regulations implementing the determinations made under the required study. Until the effective date of such regulations, the requirements under Title VII do not apply to stable value contracts, and stable value contracts in effect prior to the effective date of such regulations are not considered swaps. *See* section 719(d) of the Dodd-Frank Act. The Commissions currently are conducting the required joint study and will consider whether to propose any implementing regulations (including, if appropriate, regulations determining that stable value contracts: (i) are not encompassed within the swap definition; or (ii) are encompassed within the definition but are exempt from the swap definition) at the conclusion of that study.

[5] 7 U.S.C. 1 *et seq.*

[6] The CFTC has issued proposed rules regarding SDRs and, separately, swap data recordkeeping and reporting. *See* Regulations Establishing and

Continued

section 712(d)(2)(C) of the Dodd-Frank Act requires the Commissions, in consultation with the Board, to jointly adopt rules governing books and records for SBSAs, including daily trading records, for swap dealers, major swap participants, security-based swap dealers, and security-based swap participants.[7]

Under the comprehensive framework for regulating swaps and security-based swaps established in Title VII, the CFTC is given regulatory authority over swaps,[8] the SEC is given regulatory authority over security-based swaps,[9] and the Commissions shall jointly prescribe such regulations regarding mixed swaps as may be necessary to carry out the purposes of Title VII.[10] In addition, the SEC is given antifraud authority over, and access to information from, certain CFTC-regulated entities regarding SBSAs, which are a type of swap related to securities over which the CFTC is given regulatory authority.[11]

To assist the Commissions in further defining the Product Definitions (as well as certain other definitions) and in prescribing regulations regarding mixed swaps as may be necessary to carry out the purposes of Title VII, the Commissions published an advance notice of proposed rulemaking ("ANPR") in the **Federal Register** on August 20, 2010.[12] The comment period for the ANPR closed on September 20, 2010.[13] The Commissions received comments addressing the Product Definitions and/or mixed swaps in response to the ANPR, as well as comments in response to the Commissions' informal solicitations,[14] from a wide range of commenters.

The Commissions have reviewed the comments received, and the staffs of the Commissions have met with many market participants and other interested parties to discuss the definitions.[15] Moreover, the Commissions' staffs have consulted extensively with each other as required by sections 712(a)(1) and (2) of the Dodd-Frank Act and have consulted with staff of the Board as required by section 712(d) of the Dodd-Frank Act.

Based on this review and consultation, the Commissions are proposing interpretive guidance, and in some instances also proposing rules, regarding, among other things: (i) The regulatory treatment of insurance products; (ii) the exclusion of forward contracts from the swap and security-based swap definitions; (iii) the regulatory treatment of certain consumer and commercial contracts; (iv) the regulatory treatment of certain foreign-exchange related and other instruments; (v) swaps and security-based swaps involving interest rates (or other rates) and yields; (vi) total return swaps ("TRS"); (vii) the application of the definition of "narrow-based security index" in distinguishing between certain swaps and security-based swaps, including credit default swaps ("CDS") and index CDS; and viii) the specification of certain swaps and security-based swaps that are, and are not, mixed swaps. In addition, the Commissions are proposing rules: (i) establishing books and records requirements applicable to SBSAs; (ii) providing a mechanism for requesting the Commissions to interpret whether a particular type of agreement, contract, or transaction (or class of agreements, contracts, or transactions) is a swap, security-based swap, or both (*i.e.,* a mixed swap); and (iii) providing a mechanism for evaluating the applicability of certain regulatory requirements to particular mixed swaps. Finally, the CFTC is proposing rules to

Governing the Duties of Swap Dealers and Major Swap Participants, 75 FR 71397, Nov. 23, 2010; Swap Data Recordkeeping and Reporting Requirements, 75 FR 76573, Dec. 8, 2010. The SEC has also issued proposed rules regarding security-based swap data repositories ("SBSDRs"), including rules specifying data collection and maintenance standards for SBSDRs, as well as rules regarding security-based swap data recordkeeping and reporting. *See* Security-Based Swap Data Repository Registration, Duties, and Core Principles, 75 FR 77306, Dec. 10, 2010; Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, 75 FR 75208, Dec. 2, 2010.

[7] The CFTC has issued proposed rules regarding recordkeeping requirements for swap dealers and major swap participants. *See* Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants, 75 FR 76666, Dec. 9, 2010.

[8] Section 721(a) of the Dodd-Frank Act defines the term "swap" by adding section 1a(47) to the CEA, 7 U.S.C. 1a(47). This new swap definition also is cross-referenced in new section 3(a)(69) of the Exchange Act, 15 U.S.C. 78c(a)(69). Citations to provisions of the CEA and the Exchange Act, 15 U.S.C. 78a *et seq.,* in this release refer to the numbering of those provisions after the effective date of Title VII, except as indicated.

[9] Section 761(a) of the Dodd-Frank Act defines the term "security-based swap" by adding new section 3(a)(68) to the Exchange Act, 15 U.S.C. 78c(a)(68). This new security-based swap definition also is cross-referenced in new CEA section 1a(42), 7 U.S.C. 1a(42). The Dodd-Frank Act also explicitly includes security-based swaps in the definition of security under the Exchange Act and the Securities Act of 1933 ("Securities Act"), 15 U.S.C. 77a *et seq.*

[10] Section 721(a) of the Dodd-Frank Act describes the category of "mixed swap" by adding new section 1a(47)(D) to the CEA, 7 U.S.C. 1a(47)(D). Section 761(a) of the Dodd-Frank Act also includes the category of "mixed swap" by adding new section 3(a)(68)(D) to the Exchange Act, 15 U.S.C. 78c(68)(D). A mixed swap is defined as a subset of security-based swaps that also are based on the value of 1 or more interest or other rates, currencies, commodities, instruments of indebtedness, indices, quantitative measures, other financial or economic interest or property of any kind (other than a single security or a narrow-based security index), or the occurrence, non-occurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence (other than the occurrence, non-occurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer).

[11] Section 761(a) of the Dodd-Frank Act defines the term "security-based swap agreement" by adding new section 3(a)(78) to the Exchange Act, 15 U.S.C. 78c(a)(78). The CEA includes the definition of "security-based swap agreement" in subparagraph (A)(v) of the swap definition in CEA section 1a(47), 7 U.S.C. 1a(47). The only difference between these definitions is that the definition of SBSA in the Exchange Act specifically excludes security-based swaps (*see* section 3(a)(78)(B) of the Exchange Act, 15 U.S.C. 78c(a)(78)(B)), whereas the definition of SBSA in the CEA does not contain a similar exclusion. Instead, under the CEA, the exclusion for security-based swaps is placed in the general exclusions from the swap definition (*see* CEA section 1a(47)(B)(x), 7 U.S.C. 1a(47)(B)(x)). Although the statutes are slightly different structurally, the Commissions interpret them to have consistent meaning that the category of security-based swap agreements excludes security-based swaps.

[12] *See* Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, 75 FR 51429, Aug. 20, 2010. The ANPR also solicited comment regarding the definitions of the terms "swap dealer," "security-based swap dealer," "major swap participant," "major security-based swap participant," and "eligible contract participant." These definitions are the subject of a separate joint proposed rulemaking by the Commissions. *See* Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 75 FR 80174, Dec. 21, 2010 ("Entity Definitions"). The Commissions also provided the public with the ability to present their views more generally on implementation of the Dodd-Frank Act through their Web sites, dedicated electronic mailboxes, and meetings with interested parties. *See* Public Comments on SEC Regulatory Initiatives Under the Dodd-Frank Act/Meetings with SEC Officials located at *http://www.sec.gov/spotlight/regreform comments.shtml;* Public Submissions, located at *http://comments.cftc.gov/PublicComments/ReleasesWithComments.aspx;* External Meetings, located at *http://www.cftc.gov/LawRegulation/DoddFrankAct/ExternalMeetings/index.htm.*

[13] Copies of all comments received by the SEC on the ANPR are available on the SEC's Internet Web site, located at *http://www.sec.gov/comments/s7-16-10/s71610.shtml.* Comments are also available for Web site viewing and printing in the SEC'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 all comments received by the CFTC on the ANPR are available on the CFTC's Internet Web site, located at *http://www.cftc.gov/LawRegulation/DoddFrankAct/OTC_2_Definitions.html.*

[14] *See supra* note 12.

[15] Information about meetings that CFTC staff have had with outside organizations regarding the implementation of the Dodd-Frank Act is available at *http://www.cftc.gov/LawRegulation/DoddFrankAct/ExternalMeetings/index.htm.* Information about meetings that SEC staff have had with outside organizations regarding the product definitions is available at *http://www.sec.gov/comments/s7–16–10/s71610.shtml#meetings.* The views expressed in the comments in response to the ANPR, in response to the Commissions' informal solicitations, and at such meetings are collectively referred to as the views of "commenters."

implement the anti-evasion authority provided in the Dodd-Frank Act.

The Commissions believe that the proposed rules and interpretive guidance will further the purposes of Title VII. While the Commissions believe that these proposals, if adopted, would appropriately effect the intent of the Dodd-Frank Act, the Commissions are very interested in commenters' views as to whether those purposes have been achieved, and, if not, how to improve these proposals.

II. Scope of Definitions of Swap and Security-Based Swap

A. Introduction

Title VII of the Dodd-Frank Act applies to a wide variety of agreements, contracts, and transactions classified as swaps or security-based swaps. The statute lists these agreements, contracts, and transactions in the definition of the term "swap." [16] The statutory definition of the term "swap" also has various exclusions,[17] rules of construction, and other provisions for the interpretation of the definition.[18] One of the exclusions to the definition of the term "swap" is for security-based swaps.[19] The term "security-based swap," in turn, is defined as an agreement, contract, or transaction that is a "swap" (without regard to the exclusion from that definition for security-based swaps) and that also has certain characteristics specified in the statute.[20] Thus, the statutory definition of the term "swap" also determines the scope of agreements, contracts, and transactions that could be security-based swaps.

The statutory definitions of "swap" and "security-based swap" are detailed and comprehensive, and the Commissions believe that extensive "further definition" of the terms by rule is not necessary. Nevertheless, several commenters have stated,[21] and the Commissions agree, that the definitions could be read to include certain types of agreements, contracts, and transactions that previously have not been considered swaps or security-based swaps and that nothing in the legislative history of the Dodd-Frank Act appears to suggest that Congress intended such agreements, contracts, and transactions to be regulated as swaps or security-based swaps under Title VII. The Commissions thus believe that it is important to clarify the treatment under the definitions of certain types of agreements, contracts, and transactions, such as insurance products and certain consumer and commercial contracts.

In addition, commenters also raised questions regarding, and the Commissions believe that it is important to clarify: (i) The exclusion for forward contracts from the definitions of the terms "swap" and "security-based swap;" and (ii) the status of certain commodity-related products (including various foreign exchange products and forward rate agreements ("FRAs")) under the definitions of the terms "swap" and "security-based swap." Finally, the Commissions are providing guidance regarding certain interpretive issues related to the definitions.[22]

B. Proposed Rules and Interpretive Guidance Regarding Certain Transactions Outside the Scope of the Definitions of the Terms "Swap" and "Security-Based Swap"

1. Insurance Products

A number of commenters expressed concern that the definitions of the terms "swap" and "security-based swap" potentially could include certain types of insurance products [23] because the statutory definition of the term "swap" includes, in part, any agreement, contract, or transaction "that provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence." [24] The Commissions do not interpret this clause to mean that products historically treated as insurance products should be included within the swap or security-based swap definition.[25]

The Commissions are aware of nothing in Title VII to suggest that Congress intended for insurance products to be regulated as swaps or security-based swaps. Moreover, that swaps and insurance products are subject to different regulatory regimes is reflected in section 722(b) of the Dodd-Frank Act which, in new section 12(h) of the CEA, provides that a swap "shall not be considered to be insurance" and "may not be regulated as an insurance contract under the law of any State." [26]

[16] *See* CEA section 1a(47)(A), 7 U.S.C. 1a(47)(A). This swap definition is also cross-referenced in new section 3(a)(69) of the Exchange Act, 15 U.S.C. 78c(a)(69).

[17] *See* CEA section 1a(47)(B), 7 U.S.C. 1a(47)(B), clauses (i)–(x).

[18] *See* CEA sections 1a(47)(C)–(F), 7 U.S.C. 1a(47)(C)–(F).

[19] *See* CEA section 1a(47)(B)(x), 7 U.S.C. 1a(47)(B)(x).

[20] *See* section 3(a)(68) of the Exchange Act, 15 U.S.C. 78c(a)(68).

[21] *See, e.g.,* Letter from Edward J. Rosen, Cleary Gottlieb Steen & Hamilton LLP, Sept. 21, 2010 ("Cleary Letter"); Letter from Robert Pickel, Executive Vice President, International Swaps and Derivatives Association, Inc., Sept. 20, 2010 ("ISDA Letter").

[22] Some commenters raised concerns regarding the treatment of inter-affiliate swaps and security-based swaps. *See, e.g.,* Cleary Letter; Letter from Coalition for Derivatives End Users, Sept. 20, 2010 ("CDEU Letter"); ISDA Letter; Letter from Richard A. Miller, Vice President and Corporate Counsel, Prudential Financial Inc., Sept. 17, 2010; Letter from Richard M. Whiting, The Financial Services Roundtable, Sept. 20, 2010. A few commenters suggested that the Commissions should further define the term "swap" or "security-based swap" to exclude inter-affiliate transactions. *See* Cleary Letter; CDEU Letter. The Commissions are considering whether inter-affiliate swaps or security-based swaps should be treated differently from other swaps or security-based swaps in the context of the Commissions' other Title VII rulemakings.

[23] *See, e.g.,* Letter from Ernest C. Goodrich, Jr., Managing Director—Legal Department, and Marcelo Riffaud, Managing Director—Legal Department, Deutsche Bank AG, Sept. 20, 2010 ("Deutsche Bank Letter"); Letter from Sean W. McCarthy, Chairman, Association of Financial Guaranty Insurers, Sept. 20, 2010 ("AFGI Letter"); Letter from Robert J. Duke, The Surety & Fidelity Association of America, Sept. 20, 2010 ("SFAA Letter"); Letter from J. Stephen Zielezienski, Senior Vice President & General Counsel, American Insurance Association, Sept. 20, 2010; Letter from Franklin W. Nutter, President, Reinsurance Association of America, Sept. 20, 2010 ("RAA Letter"); Letter from James M. Olsen, Senior Director Accounting and Investment Policy, Property Casualty Insurers Association of America, Sept. 17, 2010; Letter from Jane L. Cline, President, and Therese M. Vaughan, Chief Executive Officer, National Association of Insurance Commissioners, Sept. 20, 2010; Letter from Joseph W. Brown, Chief Executive Officer, MBIA Inc., Sept. 20, 2010 ("MBIA Letter"); Cleary Letter; Letter from White & Case LLP ("White & Case Letter"), Sept. 20, 2010; Letter from Carl B. Wilkerson, Vice President and Chief Counsel, Securities & Litigation, American Council of Life Insurers, Nov. 12, 2010 ("ACLI Letter"); Letter from Stephen E. Roth, James M. Cain, and W. Thomas Conner, Sutherland Asbill & Brennan LLP, for the Committee of Annuity Insurers, Dec. 3, 2010.

[24] CEA section 1a(47)(A)(ii), 7 U.S.C. 1a(47)(A)(ii).

[25] The Commissions also believe it was not the intent of Congress through the swap and security-based swap definitions to preclude the provision of insurance to individual homeowners and small businesses that purchase property and casualty insurance. *See* CEA section 2(e), 7 U.S.C. 2(e) and section 6(l) of the Exchange Act, 15 U.S.C. 78f(l) (prohibiting individuals and small businesses that do not meet specified financial thresholds or other conditions from entering into swaps or security-based swaps other than on or subject to the rules of regulated futures and securities exchanges).

[26] 7 U.S.C. 16(h). Moreover, other provisions of the Dodd-Frank Act address the status of insurance more directly, and more extensively, than Title VII. For example, Title V of the Dodd-Frank Act requires the newly established Federal Insurance Office to conduct a study and submit a report to Congress, within 18 months of enactment of the Dodd-Frank Act, on the regulation of insurance, including the consideration of Federal insurance regulation. Notably, the Federal Insurance Office's authority under Title V extends primarily to monitoring and information gathering; its ability to promulgate Federal insurance regulation that preempts state insurance regulation is significantly restricted. *See* section 502 of the Dodd-Frank Act (codified in various sections of 31 U.S.C.). Title X of the Dodd-Frank Act also specifically excludes the business of insurance from regulation by the Bureau of Consumer Financial Protection. *See* section 1027(m) of the Dodd-Frank Act, 12 U.S.C. 5517(m) ("The [Bureau of Consumer Financial Protection]

Continued

Accordingly, the Commissions believe that state or Federally regulated insurance products that are provided by state or Federally regulated insurance companies [27] that otherwise could fall within the definitions should not be considered swaps or security-based swaps so long as they satisfy the proposed rules or comport with the related proposed interpretive guidance.[28] At the same time, however, the Commissions are concerned that agreements, contracts, or transactions that are swaps or security-based swaps might be characterized as insurance products to evade the regulatory regime under Title VII of the Dodd-Frank Act. Accordingly, the Commissions are proposing rules and interpretive guidance that would clarify that agreements, contracts, or transactions meeting certain requirements would be considered insurance and not swaps or security-based swaps.

The proposed rules contain two subparts; the first subpart addresses the agreement, contract, or transaction and the second subpart addresses the entity providing that agreement, contract, or transaction. More specifically, with respect to the former, paragraph (i) of proposed rule 1.3(xxx)(4) under the CEA and paragraph (a) of proposed rule 3a69–1 under the Exchange Act would clarify, as discussed in more detail below, that the terms "swap" and "security-based swap" would not include an agreement, contract, or transaction that, by its terms or by law, as a condition of performance:

- Requires the beneficiary of the agreement, contract, or transaction to have an insurable interest that is the subject of the agreement, contract, or transaction and thereby carry the risk of loss with respect to that interest continuously throughout the duration of the agreement, contract, or transaction;
- Requires that loss to occur and to be proved, and that any payment or indemnification therefor be limited to the value of the insurable interest;
- Is not traded, separately from the insured interest, on an organized market or over-the-counter; and
- With respect to financial guaranty insurance only, in the event of payment default or insolvency of the obligor, any acceleration of payments under the policy is at the sole discretion of the insurer.

In addition, the second subpart of the proposed rules, in paragraph (ii) of proposed rule 1.3(xxx)(4) under the CEA and paragraph (b) of proposed rule 3a69–1 under the Exchange Act, would require that, in order to be excluded from the swap and security-based swap definitions as an insurance product, the agreement, contract, or transaction must be provided:

- By a company that is organized as an insurance company whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies and that is subject to supervision by the insurance commissioner (or similar official or agency) of any state [29] or by the United States or an agency or instrumentality thereof, and such agreement, contract, or transaction is regulated as insurance under the laws of such state or the United States;
- By the United States or any of its agencies or instrumentalities, or pursuant to a statutorily authorized program thereof; or
- In the case of reinsurance only, by a person located outside the United States to an insurance company that is eligible under the proposed rules, provided that: (i) such person is not prohibited by any law of any state or of the United States from offering such agreement, contract, or transaction to such an insurance company; (ii) the product to be reinsured meets the requirements under the proposed rules to be an insurance product; and (iii) the total amount reimbursable by all reinsurers for such insurance product cannot exceed the claims or losses paid by the cedant.[30]

In order for an agreement, contract, or transaction to qualify as an insurance product that would not be a swap or security-based swap: (i) The agreement, contract, or transaction would have to meet the criteria in the first subpart of the proposed rules and (ii) the person or entity providing the agreement, contract, or transaction would have to meet the criteria in the second subpart of the proposed rules.[31] The fact that an agreement, contract, or transaction qualifies as an insurance product does not exclude it from the swap or security-based swap definitions if it is not provided by a qualifying person or entity, nor does the fact that a product is regulated by an insurance regulator exclude it from the swap or security-based swap definitions if the agreement, contract, or transaction does not satisfy the criteria for insurance set forth in the proposed rules.[32]

In addition, the Commissions are proposing interpretive guidance to clarify that, independent of paragraph (i) of proposed rule 1.3(xxx)(4) under the CEA and paragraph (a) of proposed rule 3a69–1 under the Exchange Act, certain insurance products do not fall within the swap or security-based swap definitions so long as they are provided in accordance with paragraph (ii) of proposed rule 1.3(xxx)(4) under the CEA and paragraph (b) of proposed rule 3a69–1 under the Exchange Act.

(a) Types of Insurance Products [33]

Paragraph (i) of proposed rule 1.3(xxx)(4) under the CEA and paragraph (a) of proposed rule 3a69–1 under the Exchange Act would set forth four criteria for an agreement, contract, or transaction to be considered insurance. First, the proposed rules would require that the beneficiary have an "insurable interest" underlying the

may not define as a financial product or service, by regulation or otherwise, engaging in the business of insurance."); section 1027(f) of the Dodd-Frank Act, 12 U.S.C. 5517(f) (excluding persons regulated by a state insurance regulator, except to the extent they are engaged in the offering or provision of consumer financial products or services or otherwise subject to certain consumer laws as set forth in Title X of the Dodd-Frank Act).

[27] As discussed above, the establishment of the Federal Insurance Office under Title V of the Dodd-Frank Act suggests that Federal insurance law could be established in the future. The Commissions believe that the proposed rules should, therefore, include a specific reference to Federal insurance law.

[28] To the extent an insurance product does not fall within the language of the swap definition by its terms, it would not need to satisfy the requirements under the proposed rules in order to avoid being considered a swap or security-based swap.

[29] The term "State" is defined in section 3(a)(16) of the Exchange Act to mean "any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States." 15 U.S.C. 78c(a)(16). The CFTC is proposing to incorporate this definition into proposed rule 1.3(xxx)(4) for purposes of ensuring consistency between the CFTC and SEC rules further defining the term "swap."

[30] The "cedant" is the insurer writing the risk being ceded or transferred to such person located outside the United States.

[31] The Commissions note that certain variable life insurance and annuity products are securities and would not be swaps or security-based swaps regardless of whether they met the requirements under the proposed rules. *See* CEA section 1a(47)(B)(v), 7 U.S.C. 1a(47)(B)(v) (excluding from the definition of "swap" any "agreement, contract, or transaction providing for the purchase or sale of 1 or more securities on a fixed basis that is subject to—(I) the [Securities Act]; and (II) the [Exchange Act]"). *See also SEC* v. *United Benefit Life Ins. Co.,* 387 U.S. 202 (1967) (holding that a "flexible fund" annuity contract was not entitled to exemption under section 3(a)(8) of the Securities Act, 15 U.S.C. 77c(a)(8), for insurance and annuities); *SEC* v. *Variable Annuity Life Ins. Co.,* 359 U.S. 65 (1959) (holding that a variable annuity was not entitled to exemption under section 3(a)(8) of the Securities Act, 15 U.S.C. 77c(a)(8), for insurance and annuities).

[32] The Commissions note that Title VII provides flexibility to address the facts and circumstances of new products that may be marketed or sold as insurance, for the purpose of determining whether they satisfy the requirements of the proposed rules, through joint interpretations pursuant to section 712(d)(4) of the Dodd-Frank Act.

[33] *See supra* note 23, regarding comments received addressing this criterion.

agreement, contract, or transaction at every point in time during the term of the agreement, contract, or transaction for that agreement, contract, or transaction to qualify as insurance. The requirement that the beneficiary be at risk of loss (which could be an adverse financial, economic, or commercial consequence) with respect to the interest that is the subject of the agreement, contract, or transaction at all times throughout the term of the agreement, contract, or transaction would ensure that an insurance contract beneficiary has a stake in the interest on which the agreement, contract, or transaction is written.[34] Similarly, the provision of the proposed rules that would require the beneficiary to have the insurable interest continuously during the term of the agreement, contract, or transaction is designed to ensure that payment on the insurance product is inextricably connected to both the beneficiary and the interest on which the insurance product is written. In contrast to an insurance product, a CDS (which may be a swap or a security-based swap) does not require the purchaser of protection to hold any underlying obligation issued by the reference entity on which the CDS is written.[35]

Second, the requirement that an actual loss occur and be proved under the proposed rules similarly would ensure that the beneficiary has a stake in the insurable interest that is the subject of the agreement, contract, or transaction. If the beneficiary can demonstrate actual loss, that loss would "trigger" performance by the insurer on the agreement, contract, or transaction such that, by making payment, the insurer is indemnifying the beneficiary for such loss. In addition, limiting any payment or indemnification to the value of the insurable interest aids in distinguishing swaps and security-based swaps (where there is no such limit) from insurance.[36]

Third, the proposed rules would require that the insurance product not be traded, separately from the insured interest, on an organized market or over-the-counter. With limited exceptions,[37] insurance products traditionally have been neither entered into on or subject to the rules of an organized exchange nor traded in secondary market transactions (*i.e.,* they are not traded on an organized market or over-the-counter). Whereas swaps and security-based swaps also generally have not been tradable at-will in secondary market transactions (*i.e.,* on an organized market or over-the-counter) without counterparty consent, the Commissions understand that swaps and security-based swaps are routinely novated or assigned to third parties, usually pursuant to industry standard terms and documents.[38] For the foregoing reasons, the Commissions believe that lack of trading separately from the insured interest is a feature of insurance that is useful in distinguishing insurance from swaps and security-based swaps.

Fourth, the proposed rules would address financial guarantee policies, also known as bond insurance or bond wraps.[39] Although such products can be economically similar to products such as CDS, they have certain key characteristics that distinguish them from swaps and security-based swaps.[40] For example, under a financial guarantee policy, the insurer typically is required to make timely payment of any shortfalls in the payment of scheduled interest to the holders of the underlying guaranteed obligation. Also, for particular bonds that are covered by a financial guarantee policy, the indenture, related documentation, and/or the financial guarantee policy will provide that a default in payment of principal or interest on the underlying bond will not result in acceleration of the obligation of the insurer to make payment of the full amount of principal on the underlying guaranteed obligation unless the insurer, in its sole discretion, opts to make payment of principal prior to the final scheduled maturity date of the underlying guaranteed obligation. Conversely, under a CDS, a protection seller frequently is required to make payment of the relevant settlement amount to the protection buyer upon demand by the protection buyer after any credit event involving the issuer.[41]

The Commissions do not believe that financial guarantee policies, in general, should be regulated as swaps or security-based swaps. However, because of the close economic similarity of financial guarantee insurance policies guaranteeing payment on debt securities to CDS, the Commissions also are proposing that, in addition to the criteria noted above with respect to insurance generally, financial guarantee policies also would have to satisfy the requirement that they not permit the beneficiary of the policy to accelerate the payment of any principal due on the debt securities. This requirement would further distinguish financial guarantee policies from CDS because, as discussed above, the latter generally requires payment of the relevant settlement amount on the CDS after demand by the protection buyer.

[34] Requiring that a beneficiary of an insurance policy have a stake in the interest traditionally has been justified on public policy grounds. For example, a beneficiary that does not have a property right in a building might have an incentive to profit from arson.

[35] Standard CDS documentation stipulates that the incurrence or demonstration of a loss may not be made a condition to the payment on the CDS or the performance of any obligation pursuant to the CDS. *See, e.g.,* Int'l Swaps and Derivatives Ass'n, "2003 ISDA Credit Derivatives Definitions," art. 9.1(b)(i) (2003) ("2003 Definitions) ("[T]he parties will be obligated to perform * * * irrespective of the existence or amount of the parties' credit exposure to a Reference Entity, and Buyer need not suffer any loss nor provide evidence of any loss as a result of the occurrence of a Credit Event.").

[36] To the extent an insurance product provides for such items as, for example, a rental car for use while the car that is the subject of an automobile insurance policy is being repaired, the Commissions would consider such items as constituting part of the value of the insurable interest.

[37] *See, e.g.,* "Life Settlements Task Force, Staff Report to the United States Securities and Exchange Commission" ("In an effort to help make the bidding process more efficient and to facilitate trading of policies after the initial settlement occurs, some intermediaries have considered or instituted a trading platform for life settlements."), available at *http://www.sec.gov/news/studies/2010/lifesettlements-report.pdf* (July 22, 2010).

[38] *See, e.g.,* Int'l Swaps and Derivatives Ass'n, "2005 Novation Protocol," available at *http://www.isda.org/2005novationprot/docs/NovationProtocol.pdf* (2005); Int'l Swaps and Derivatives Ass'n, "ISDA Novation Protocol II," available at *http://www.isda.org/isdanovationprotII/docs/NPII.pdf* (2005); Int'l Swaps and Derivatives Ass'n, 2003 Definitions, *supra* note 35, Exhibits E (Novation Agreement) and F (Novation Confirmation).

[39] Several commenters expressed concern that the swap and security-based swap definitions could encompass financial guarantee policies. *See, e.g.,* AFGI Letter; Letter from James M. Michener, General Counsel, Assured Guaranty, Dec. 14, 2010 ("Assured Guaranty Letter"); MBIA Letter; Letter from the Committee on Futures and Derivatives Regulation of the New York City Bar Association, Sept. 20, 2010. Financial guarantee policies are used by entities such as municipalities to provide greater assurances to potential purchasers of their bonds and thus reduce their interest costs. *See* "Report by the United States Securities and Exchange Commission on the Financial Guarantee Market: The Use of the Exemption in section 3(a)(2) of the Securities Act of 1933 for Securities Guaranteed by Banks and the Use of Insurance Policies to Guarantee Debt Securities" (Aug. 28, 1987).

[40] *See, e.g.,* AFGI Letter (explaining the differences between financial guaranty policies and CDS); Letter from James M. Michener, General Counsel, Assured Guaranty, Sept. 13, 2010 (noting that the Financial Accounting Standards Board has issued separate guidance on accounting for financial guaranty insurance and CDS); Deutsche Bank Letter (noting that financial guaranty policies require the incurrence of loss for payment, whereas CDS do not).

[41] While a CDS requires payment in full on the occurrence of a credit event, the Commissions recognize that there are other financial instruments, such as corporate guarantees of commercial loans and letters of credit supporting payments on loans or debt securities, that allow for acceleration of payment obligations without such guarantees or letters of credit being swaps or security-based swaps.

The Commissions believe that requiring all of the criteria in paragraph (i) of proposed rule 1.3(xxx)(4) under the CEA and paragraph (a) of proposed rule 3a69–1 under the Exchange Act would help limit the application of the proposed rules to products appropriately regulated as insurance and provide that products appropriately subject to the regulatory regime under Title VII of the Dodd-Frank Act are regulated as swaps or security-based swaps. As a result, the Commissions believe that these requirements would help prevent the proposed rules from being used to circumvent the applicability of the swap and security-based swap regulatory regimes under Title VII.

However, the Commissions are considering an additional criterion as well. One ANPR commenter suggested that the proposed rules require that, in order to qualify as insurance that is excluded from the swap definition, payment on an agreement, contract, or transaction not be based on the price, rate, or level of a financial instrument, asset, or interest or any commodity.[42] Such a requirement could help to prevent swaps from being executed in the guise of insurance in order to avoid the regulatory regime established by Title VII. It may ensure that an agreement, contract, or transaction is not treated as insurance if it is used for speculative purposes or to influence prices in derivatives markets. Yet, another ANPR commenter stated that such a requirement for an agreement, contract, or transaction to qualify as insurance rather than a swap "is not consistent with common variable life insurance and variable annuity products, which deliver insurance guarantees that do vary with the performance of specified assets."[43]

The Commissions request comment on whether, in order for an agreement, contract, or transaction to be considered insurance pursuant to paragraph (i) of proposed rule 1.3(xxx)(4) under the CEA and paragraph (a) of proposed rule 3a69–1 under the Exchange Act, the Commissions should require that payment not be based on the price, rate, or level of a financial instrument, asset, or interest or any commodity. If so, the Commissions also request comment on whether variable annuity contracts (where the income is subject to tax treatment under section 72 of the Internal Revenue Code) and variable universal life insurance should be excepted from such a requirement.[44]

Although the proposed criteria should appropriately identify agreements, contracts, and transactions that should be considered to be insurance, the Commissions also are proposing interpretive guidance that certain enumerated types of insurance products are outside the scope of the statutory definitions of swap and security-based swap under the Dodd-Frank Act. These products are surety bonds, life insurance, health insurance, long-term care insurance, title insurance, property and casualty insurance, and annuity products the income on which is subject to tax treatment under section 72 of the Internal Revenue Code.[45] The Commissions believe that these enumerated insurance products do not bear the characteristics of the transactions that Congress subjected to the regulatory regime for swaps and security-based swaps under the Dodd-Frank Act.[46] As a result, excluding these enumerated insurance products should appropriately place traditional insurance products outside the scope of the swap and security-based swap definitions. Such insurance products, however, would need to be provided in accordance with paragraph (ii) of proposed rule 1.3(xxx)(4) under the CEA and paragraph (b) of proposed rule 3a69–1 under the Exchange Act, as discussed below, and such insurance products would need to be regulated as insurance.

(b) Providers of Insurance Products

The second subpart of the proposed rules, in paragraph (ii) of proposed rule 1.3(xxx)(4) under the CEA and paragraph (b) of proposed rule 3a69–1 under the Exchange Act, would require that, in addition to meeting the product requirements discussed above (or being subject to the interpretive guidance regarding enumerated insurance products provided above) the agreement, contract, or transaction be provided by a person or entity that meets certain criteria. Generally, the product would have to be provided by a company that is organized as an insurance company whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by companies whose insurance business is subject to supervision by the insurance commissioner (or similar official or agency) of any state[47] or by the United States or an agency or instrumentality thereof, and such agreement, contract, or transaction is regulated as insurance under the laws of such state or of the United States.[48]

The requirement that the agreement, contract, or transaction be provided by a state or Federally regulated insurance company would help ensure that entities that are not regulated under insurance laws are not able to avoid regulation under Title VII of the Dodd-Frank Act as well. The Commissions believe that this requirement also should help prevent regulatory gaps that otherwise might exist between insurance regulation and the regulation of swaps and security-based swaps.

The proposed rules also would require that the agreement, contract, or transaction provided by the insurance company be regulated as insurance under the laws of the state in which it is regulated or the United States. The purpose of this proposed requirement is that an agreement, contract, or transaction that satisfies the other conditions of the proposed rules must be subject to regulatory oversight as an insurance product. As a result of the requirement that an insurance regulator must have determined that the agreement, contract, or transaction being sold is insurance (*i.e.,* because state insurance regulators are banned from regulating swaps as insurance),[49] the Commissions believe that this condition would help prevent products that are swaps or security-based swaps from being characterized as insurance products in order to evade the regulatory regime under Title VII of the Dodd-Frank Act.

The Commissions also believe that it is appropriate to exclude insurance that is issued by the United States or any of its agencies or instrumentalities, or pursuant to a statutorily authorized program thereof, from regulation as swaps or security-based swaps. Such

[42] *See* Cleary Letter.

[43] *See* ACLI Letter.

[44] 26 U.S.C. 72. *See also supra* note 31.

[45] *Id.*

[46] The list of enumerated insurance products is generally consistent with the provisions of section 302(c)(2) of the Gramm-Leach-Bliley Act ("GLBA"), 15 U.S.C. 6712(c)(2), which addresses insurance underwriting in national banks.

[47] *See supra* note 29, regarding the definition of "State" contained in the proposed rules.

[48] This paragraph of the proposed rules is substantially similar to the definition of an insurance company under the Federal securities laws. *See* section 2(a)(13) of the Securities Act, 15 U.S.C. 77b(a)(13); section 2(a)(17) of the Investment Company Act of 1940, 15 U.S.C. 80a–2(a)(17). These definitions also include reinsurance companies. In order to ensure regulatory consistency, the Commissions believe that it is appropriate to include substantially the same definition of an insurance company as currently exists elsewhere in the Federal securities laws, but the Commissions are requesting comment regarding the role played by a receiver or similar official or any liquidating agent for such insurance company, in its capacity as such, rather than proposing this provision of the insurance company definition.

[49] *See* section 722(b) of the Dodd-Frank Act.

insurance would include, for example, Federal insurance of savings in banks, savings associations, and credit unions; catastrophic crop insurance; flood insurance; Federal insurance of certain pension obligations; and terrorism risk insurance. Accordingly, the proposed rules would provide that products meeting the criteria discussed above that are required for an agreement, contract, or transaction to qualify as insurance are excluded from the swap and security-based swap definitions if they are provided by the Federal government or pursuant to a statutorily authorized program thereof.

Finally, the Commissions believe that where an agreement, contract, or transaction qualifies as insurance excluded from the swap and security-based swap definitions, the lawful reinsurance of that agreement, contract, or transaction similarly should be excluded. Such reinsurance would be excluded from the definitions even if the reinsurer is located abroad and is not state or Federally regulated. Accordingly, the proposed rules would provide that an agreement, contract, or transaction of reinsurance would be excluded from the swap and security-based swap definitions if it is provided by a person located outside the United States, if such person is not prohibited by any law of any state or the United States from offering such reinsurance to a state or Federally regulated insurance company, so long as the product to be reinsured meets the requirements under the proposed rules to be an insurance product, and the total amount reimbursable by all reinsurers for such insurance product cannot exceed the claims or losses paid by the cedant.

The proposed rules would cover only an agreement, contract, or transaction by an insurance company and would not affect the characterization of the asset that is being insured. For example, if an agreement, contract, or transaction insures or guarantees the payment on a security, the security would remain subject to all applicable securities laws. The guarantee agreement, contract, or transaction, however, would not be regulated as a swap or security-based swap if it meets all of the requirements of the proposed rules.[50]

One commenter has stated that monoline insurance companies (also called financial guarantors) continue to guarantee payments under interest rate swaps related to municipal debt.[51] The CFTC believes that an insurance "wrap" of a swap may not be sufficiently different from the underlying swap to suggest that Congress intended the former to fall outside the definition of the term "swap" in Title VII.

The SEC, however, believes that, where an agreement, contract, or transaction is a security-based swap, the insurance of that security-based swap should not be regulated pursuant to Title VII, provided that the insurance meets the proposed requirements discussed above.[52]

The Commissions request comment on this issue generally, and also on the particular questions set forth in the Request for Comment section below.

The Commissions also are considering whether the issuer of such insurance (or guarantee) in respect of swaps or security-based swaps entered into by an affiliate or third party could be considered to be a major swap participant or major security-based swap participant. The Commissions have requested comment in the proposing release for the definitions of the terms "major swap participant" and "major security-based swap participant".[53]

Request for Comment

1. The Commissions request comment on all aspects of proposed rule 1.3(xxx)(4) under the CEA and proposed rule 3a69–1 under the Exchange Act and the interpretive guidance in this section.

2. Do the proposed criteria for identifying an agreement, contract, or transaction that would not fall within the swap or security-based swap definitions appropriately encompass insurance and reinsurance products? If not, what types of insurance or reinsurance products are not encompassed, and why?

3. Are there certain products that are commonly known as swaps or security-based swaps, or that more appropriately should be considered swaps or security-based swaps, that could satisfy the criteria in proposed rule 1.3(xxx)(4) under the CEA and proposed rule 3a69–1 under the Exchange Act?

4. Is the proposed requirement that the beneficiary of an agreement, contract, or transaction have an insurable interest that is the subject of the agreement, contract, or transaction, and thereby carry the risk of loss with respect to that interest continuously throughout the duration of the agreement, contract, or transaction in order for the agreement, contract, or transaction not to fall within the swap or security-based swap definition, an effective criterion in determining whether a product is insurance? Why or why not?

5. Is the proposed requirement that loss occur and be proved, and that any payment or indemnification therefor be limited to the value of the insurable interest, in order for an agreement, contract, or transaction not to fall within the swap or security-based swap definition, an effective criterion in determining whether a product is insurance? Why or why not? Is the requirement that any payment or indemnification for proved loss be limited to the value of the insurable interest consistent with conventional insurance analysis across a broad range of products (including traditional property and casualty products)? Are there particular products where such a limitation would not be appropriate? If so, please provide a detailed description of such products and why such a limitation would not be appropriate.

6. Is the proposed requirement that the agreement, contract, or transaction is not traded, separately from the insured interest, on an organized market or over-the-counter, an effective criterion in determining whether a product is insurance? Why or why not?

7. Should the Commissions add, as a requirement for an insurance agreement, contract, or transaction to not be characterized as a swap, that the agreement, contract, or transaction not be based on the price, rate, or level of a financial instrument, asset, or interest or any commodity? Would such a requirement be an effective criterion in distinguishing insurance from swaps and security-based swaps? Why or why not? If so, should the Commissions add any carve outs from the requirement, such as, for example, variable universal life insurance, or annuity contracts where the income is subject to tax treatment under section 72 of the Internal Revenue Code? Why or why not? Would such a requirement help preclude the use of the proposed rules for products that are swaps or security-based swaps? Why or why not? Would such a requirement preclude the use of the proposed rules for products that currently are insurance? If so, what

[50] The guarantee agreement, contract, or transaction, however, could itself be a security that is subject to the Federal securities laws." *See, e.g.,* section 2(a)(1) of the Securities Act, 15 U.S.C. 77b(a)(1) (including in the statutory definition of "security" a guarantee of a security).

[51] *See* Letter from Bruce E. Stern, Chairman, Association of Financial Guaranty Insurers Government Affairs Committee, Feb. 18, 2011, at 11–12 ("[F]inancial guarantors have often guaranteed, through the issuance of a financial guaranty insurance policy, the obligations of unaffiliated parties under swaps with other unaffiliated parties. These insurance policies typically cover obligations of municipalities under interest rate or basis swaps relating to bonds issued by municipalities or in connection with asset backed securities.").

[52] *See supra* note 32.

[53] *See* proposed Entity Definitions, *supra* note 12.

insurance products would be precluded by such a requirement, and how? How are insurance payments determined today?

8. Is the proposed requirement that, with respect to financial guaranty insurance, in the event of payment default or insolvency of the obligor, any acceleration of payments under the policy be at the sole discretion of the insurer an effective criterion in determining whether a financial guaranty policy is insurance that does not fall within the swap or security-based swap definition? Why or why not?

9. Does the interpretive guidance proposed in this section appropriately identify certain enumerated insurance products as traditional insurance products that would not fall within the swap or security-based swap definition if the provider of the product satisfies the requirements of the proposed rules? Why or why not? Is the interpretive guidance proposed in this section sufficient? Why or why not? Are there additional types of traditional insurance that should be similarly enumerated? If so, which ones and why? Could the exclusion of any of the enumerated insurance products serve to exclude products that should be regulated as swaps or security-based swaps? If so, which ones and why? Should the enumerated insurance products be required to be provided in accordance with paragraph (ii) of proposed rule 1.3(xxx)(4) under the CEA and paragraph (b) of proposed rule 3a69–1 under the Exchange Act? Why or why not? If not, please provide a detailed explanation of the insurance products that should not be subject to these requirements. Are there insurance products currently offered that do not meet these criteria? If so, please provide details regarding such products and their providers.

10. The Commissions are proposing guidance that certain enumerated types of insurance products, including property and casualty insurance, are outside the scope of the statutory definitions of the terms "swap" and "security-based swap" under the Dodd-Frank Act. The Commissions request comment generally as to the proposed guidance regarding property and casualty insurance. The CFTC also requests comment on whether the products specified in section 302(c)(2) of the GLBA, which names certain insurance products, including private passenger or commercial automobile, homeowners, mortgage, commercial multiperil, general liability, professional liability, workers' compensation, fire and allied lines, farm owners multiperil, aircraft, fidelity, surety, medical malpractice, ocean marine, inland marine, and boiler and machinery insurance, should be considered traditional property and casualty insurance. Why or why not? If so, please provide an explanation of the product and how it differs from transactions that should be subject to the swap regulatory regime of the Dodd-Frank Act. The SEC also requests comment on whether the products specified in section 302(c)(2) of the GLBA should be enumerated in the Commissions' proposed guidance regarding property and casualty insurance as outside of the scope of the swap and security-based swap definitions? Are there other categories of traditional property and casualty insurance that should be specifically enumerated? If so, please provide a detailed description of such other categories of property and casualty insurance that should be specifically identified, and why. If there are certain types of property and casualty insurance that fall within the swap definition, will that affect the ability of persons, including consumers and businesses, to protect their properties against losses? If so, please provide a detailed explanation.

11. Are there situations in which an insurance product may be assigned to another party that are not addressed by the criteria in proposed rule 1.3(xxx)(4) under the CEA and proposed rule 3a69–1 under the Exchange Act? Is additional clarification necessary to address such situations? If so, what clarification?

12. Is the proposed requirement that the agreement, contract, or transaction be provided by a company that is organized as an insurance company whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies and that is subject to supervision by the insurance commissioner (or similar official or agency) of any state, as defined in section 3(a)(16) of the Exchange Act, or by the United States or an agency or instrumentality thereof, and that the agreement, contract, or transaction be regulated as insurance under the laws of such state or of the United States, an effective criterion in determining whether an agreement, contract, or transaction falls within the swap or security-based swap definition? Does it sufficiently preclude the use of the proposed rules by unregulated entities? Why or why not? Does it sufficiently prevent evasion of the requirements of Title VII with respect to agreements, contracts, or transactions that are swaps or security-based swaps? Why or why not?

13. Are there circumstances under which a receiver or similar official or any liquidating agency for a state or Federally regulated insurance company, acting in its capacity as such, would be providing insurance rather than administering an insurance product that is provided by an insurance company? Please provide a detailed explanation of any such circumstances. If there are such circumstances, should the proposed rules include a provision that an agreement, contract, or transaction that satisfies the criteria of insurance but that is provided by a receiver or similar official or any liquidating agency for a state or Federally regulated insurance company, in its capacity as such, qualify as insurance that is excluded from the swap and security-based swap definition? Why or why not?

14. Do the proposed rules appropriately treat an agreement, contract, or transaction that satisfies the criteria of insurance but that is provided by the United States or any of its agencies or instrumentalities, or pursuant to a statutorily authorized program thereof, as insurance that is excluded from the swap and security-based swap definition? Why or why not? Are there other types of government-issued insurance products that are not covered by paragraph (ii) of proposed rule 1.3(xxx)(4) under the CEA and paragraph (b) of proposed rule 3a69–1 under the Exchange Act? Do states or state agencies or instrumentalities provide insurance products? Should the proposed requirement also include a provision that the agreement, contract, or transaction can be provided by any state or any of its agencies or instrumentalities, or pursuant to a statutorily authorized program thereof? Why or why not?

15. Do the proposed rules appropriately treat reinsurance by a person located outside the United States of a product meeting the requirements for insurance under the proposed rules, so long as the total amount reimbursable by all of the reinsurers for such insurance product cannot exceed the claims or losses paid by the cedant, as insurance excluded from the swap and security-based swap definitions if such person is not prohibited by any law of any state or of the United States from offering such reinsurance to a state or Federally regulated insurance company? Do these provisions of the proposed rules sufficiently prevent evasion of the requirements of Title VII with respect to agreements, contracts, or transactions that are swaps or security-based swaps? Why or why not?

16. Are there additional criteria for identifying contracts, agreements, or transactions that are insurance and not swaps or security-based swaps that the Commissions should consider? Please provide detailed information and empirical data, to the extent possible, supporting any suggested criteria.

17. Should the proposed rules relating to insurance include a provision related to whether a product is recognized at fair value on an ongoing basis with changes in fair value reflected in earnings under U.S. generally accepted accounting principles? If so, what specific challenges may be encountered in light of the proposed Accounting Standards Update "Accounting for Financial Instruments and Revisions to the Accounting for Derivative Instruments and Hedging Activities," issued by the Financial Accounting Standards Board ("FASB") on May 26, 2010? Is recognizing a product at fair value on an ongoing basis (with changes in fair value reflected in earnings) inconsistent with treating such a product as insurance rather than a swap or security-based swap? Why or why not? Please provide examples of specific products and their correct accounting treatment under U.S. generally accepted accounting principles.

18. Where an agreement, contract, or transaction falls within the swap definition, should insurance of that agreement, contract, or transaction also be included in the swap definition? Why or why not? Is the insurance wrap of a swap sufficiently different (economically or otherwise) from the swap that is insured? Why or why not? Would the regulation of such swap "wraps" as swaps impose costs on or otherwise impact the underlying cash markets (*e.g.,* the ability to issue, and cost of issuing, municipal debt)? Please quantify to the extent possible. Would treating such "wraps" as insurance falling outside the swap definition frustrate or undermine Title VII's objectives in regulating the swap markets in any way? Why or why not? Please provide empirical data and analysis to the extent possible.

19. Where an agreement, contract, or transaction falls within the security-based swap definition, should the insurance of that agreement, contract, or transaction also be included in the security-based swap definition? Why or why not? Would the regulation of insurance on a security-based swap as a security-based swap under Title VII impose costs or otherwise impact the underlying cash markets (*e.g.,* the ability to issue, and cost of issuing, municipal debt)? Please quantify to the extent possible. Would regulating such products as insurance rather than as security-based swaps frustrate or undermine Title VII's objectives in regulating the security-based swap and swap markets? Why or why not? Please provide a detailed explanation and empirical data to the extent possible.

20. Should the proposed rules include a provision similar to section 302(c)(1) of the GLBA [54] that would provide that any product regulated as insurance before July 21, 2010 (the date the Dodd-Frank Act was signed into law) and provided in accordance with paragraph (ii) of proposed rule 1.3(xxx)(4) under the CEA and paragraph (b) of proposed rule 3a69–1 would be considered insurance and not fall within the swap definition? Why or why not? Should different criteria apply to products regulated as insurance before July 21, 2010? Why or why not? If so, please provide a detailed description of what different criteria should apply.

21. The Commissions understand that swap guarantees may be offered by non-insurance companies. Should the Commissions provide guidance as to whether swap or security-based swap guarantees (that are not guarantees or insurance policies offered by insurance companies discussed above) should be considered swaps or security-based swaps? Why or why not?

2. The Forward Contract Exclusion

The definitions of the terms "swap" and "security-based swap" do not include forward contracts. They exclude "any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled".[55] Commenters have requested guidance from the Commissions regarding the scope of this exclusion. The Commissions believe it is appropriate to provide guidance to market participants regarding the applicability of the exclusion from the definitions of swap and security-based swap for forward contracts with respect to nonfinancial commodities [56] and securities.

(a) Forward Contracts in Nonfinancial Commodities

The wording of the forward contract exclusion from the swap definition with respect to nonfinancial commodities is similar, but not identical, to the forward contract exclusion from the definition of "future delivery" in the CEA, which excludes "any sale of any cash commodity for deferred shipment or delivery".[57] Several ANPR commenters expressed the view that, with respect to nonfinancial commodities, the forward contract exclusion from the swap definition should be interpreted in the same manner as the CFTC has interpreted the forward contract exclusion from the term "future delivery" and, in particular, that the CFTC's "Brent Interpretation" [58] should apply to "book out" transactions for purposes of the forward exclusion from the swap definition.[59] The CFTC believes that clarification of the scope of the forward contract exclusion from the swap definition with respect to nonfinancial commodities is appropriate.[60]

[54] 15 U.S.C. 6712(c)(1).

[55] CEA section 1a(47)(B)(ii), 7 U.S.C. 1a(47)(B)(ii).

[56] The discussion in subsections (a) and (b) of this section applies solely to the exclusion of nonfinancial commodity forwards from the swap definition in the Dodd-Frank Act.

[57] CEA section 1a(27), 7 U.S.C. 1a(27). The CEA does not define the term "futures contract." Rather, the CEA refers to a futures contract as a "contract of sale of a commodity for future delivery." *See, e.g.,* CEA section 2(a)(1)(A), 7 U.S.C. 2(a)(1)(A) (providing the CFTC with exclusive jurisdiction over "contracts of sale of a commodity for future delivery" (other than security futures) traded or executed on, among other things, a designated contract market ("DCM")); CEA section 4(a), 7 U.S.C. 6(a) (a "contract for the purchase or sale of a commodity for future delivery" other than a contract made on an exchange located outside the United States must be conducted on or subject to the rules of, among other things, a DCM). Accordingly, by excluding forward contracts from the CEA's definition of the term "future delivery," the CEA provides that a forward contract is not a contract of sale of a commodity for future delivery and, hence, not a futures contract.

[58] Statutory Interpretation Concerning Forward Transactions, 55 FR 39188, Sept. 25, 1990 ("Brent Interpretation").

[59] *See* Letter from Joanne T. Medero, Managing Director, BlackRock, Sept. 20, 2010 ("BlackRock Letter"), Letter from Matt Schatzman, Senior Vice President, Energy Marketing, BG Americas and Global LNC, Sept. 20, 2010 ("BG Letter"); Cleary Letter; Letter from Edward W. Gallagher, President, Dairy Risk Management Services, a division of Dairy Farmers of America, Inc., Sept. 20, 2010 ("DFA Letter"); Letter from Eric Dennison, Sr. Vice President and General Counsel, Stephanie Miller, Assistant General Counsel—Commodities, and Bill Hellinghausen, Director of Regulatory Affairs, EDF Trading North America, LLC, Sept. 20, 2010 ("EDF Letter"); Richard F. McMahon, Jr., Executive Director, Edison Electric Institute, Sept. 20, 2010 ("EEI Letter"); Letter from John M. Damgard, President, Futures Industry Association, Sept. 20, 2010 ("FIA Letter"); Letter from Richard Ostrander, Managing Director and Counsel, Morgan Stanley, Sept. 20, 2010 ("Morgan Stanley Letter"); Letter of Michael Greenberger, JD, Law School Professor, University of Maryland School of Law, Sept. 20, 2010 ("University of Maryland Letter"); R. Michael Sweeney, Jr., Mark W. Menezes, and David T. McIndoe, Hunton & Williams, LLP, on behalf of the Working Group of Commercial Energy Firms, Sept, 20, 2010 ("WGCEF Letter"); Letter from Paul H. Stebbins, Chairman and Chief Executive Officer, World Fuel Services Corporation, Sept. 17, 2010 ("World Fuel Letter").

[60] As discussed in part II.D.1 below, the terminology and documentation used by the parties are not dispositive of whether a particular agreement, contract, or transaction is a swap or security-based swap under the CEA or Exchange Act. Thus, if an agreement, contract, or transaction

Continued

Forward contracts with respect to nonfinancial commodities are commercial merchandising transactions. The primary purpose of the contract is to transfer ownership of the commodity and not to transfer solely its price risk. The CFTC has noted:

> The underlying postulate of the [forward] exclusion is that the [CEA's] regulatory scheme for futures trading simply should not apply to private commercial merchandising transactions which create enforceable obligations to deliver but in which delivery is deferred for reasons of commercial convenience or necessity.[61]

The CFTC believes that the forward contract exclusion in the Dodd-Frank Act with respect to nonfinancial commodities should be read consistently with this established, historical understanding that a forward contract is a commercial merchandising transaction.

Many commenters discussed the issue of whether the requirement in the Dodd-Frank Act that a transaction be "intended to be physically settled" in order to qualify for the forward exclusion from the swap definition with respect to nonfinancial commodities reflects a change in the standard for determining whether a transaction is a forward contract.[62] Because a forward contract is a commercial merchandising transaction, intent to deliver historically has been an element of the CFTC's analysis of whether a particular contract is a forward contract.[63] In assessing the parties' expectations or intent regarding delivery, the CFTC consistently has applied a "facts and circumstances" test.[64] Therefore, the CFTC reads the "intended to be physically settled" language in the swap definition with respect to nonfinancial commodities to reflect a directive that intent to deliver a physical commodity be a part of the analysis of whether a given contract is a forward contract or a swap, just as it is a part of the CFTC's analysis of whether a given contract is a forward contract or a futures contract.

Commenters also requested clarification of the treatment of one type of forward contract—"book-out" transactions—in the context of the forward exclusion from the swap definition with respect to nonfinancial commodities. The issue of book-outs first arose in 1990 in the Brent Interpretation[65] because the parties to the crude oil contracts in that case could individually negotiate cancellation agreements, or "book-outs," with other parties.[66] In describing these transactions, the CFTC stated:

> It is noteworthy that while such [book-out] agreements may extinguish a party's delivery obligation, they are separate, individually negotiated, new agreements, there is no obligation or arrangement to enter into such agreements, they are not provided for by the terms of the contracts as initially entered into, and any party that is in a position in a distribution chain that provides for the opportunity to book-out with another party or parties in the chain is nevertheless entitled to require delivery of the commodity to be made through it, as required under the contracts.[67]

Thus, in the scenario at issue in the Brent Interpretation, the contracts created a binding obligation to make or take delivery without providing any right to offset, cancel, or settle on a payment-of-differences basis. The "parties enter[ed] into such contracts with the recognition that they may be required to make or take delivery."[68]

On these facts, the Brent Interpretation concluded that the

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with respect to a nonfinancial commodity qualifies for the forward exclusion from the swap definition, it would not be a swap even if the parties refer to it as a swap or document it using an industry standard form agreement that is typically used for swaps. Conversely, such an agreement, contract, or transaction that does not qualify for the forward exclusion from the swap definition would not be excluded even if the parties refer to it as a forward contract.

[61] Brent Interpretation, *supra* note 58, at 39190. The CFTC has reiterated this view in more recent adjudicative orders. *See, e.g., In re Grain Land Coop.,* [2003–2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,636 (CFTC Nov. 25, 2003); *In re Competitive Strategies for Agric., Ltd.,* [2003–2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,635 (CFTC Nov. 25, 2003). Courts have expressed this view as well. *See, e.g., Salomon Forex, Inc.* v. *Tauber,* 8 F.3d 966, 971 (4th Cir. 1993) ("[C]ash forwards are generally individually negotiated sales * * * in which actual delivery of the commodity is anticipated, but is deferred for reasons of commercial convenience or necessity."); *CFTC* v. *Int'l Fin. Serv. (N.Y.),* 323 F. Supp. 2d 482, 495 (S.D.N.Y. 2004). *See also CFTC* v. *Co Petro Mktg. Grp., Inc., 680 F.2d 573, 579–580 (9th Cir. 1982); CFTC* v. *Noble Metals Int'l, Inc.,* 67 F.3d 766, 772–773 (9th Cir. 1995; *CFTC* v. *Am. Metal Exch. Corp.,* 693 F. Supp. 168, 192 (D.N.J. 1988); *CFTC* v. *Morgan, Harris & Scott, Ltd.,* 484 F. Supp. 669, 675 (S.D.N.Y. 1979) (forward contract exclusion does not apply to speculative transactions in which delivery obligations can be extinguished under the terms of the contract or avoided for reasons other than commercial convenience or necessity).

[62] *See, e.g.,* BG Letter (forward exclusion for swaps should be consistent with the forward exclusion from futures); BlackRock Letter (the CFTC should interpret "intended to be physically settled" consistently with existing CFTC principles, including book outs); DFA Letter (forward exclusion for swaps should be interpreted consistently with the CFTC's prior forward contract interpretations and precedent, including forwards requiring delivery but including embedded options); EDF Letter (forward exclusion from the definition of swap should be construed in a consistent manner with the forward exclusion under the CEA); EEI Letter (forward exclusion from swap definition should be interpreted consistently with the forward exclusion from futures); FIA Letter (the Commissions should, through rulemaking or interpretation, provide that the "intent" standard in the forward exclusion with respect to swaps will be interpreted the same as the existing forward exclusion with respect to futures); Morgan Stanley Letter (the forward exclusion from the swap definition should be interpreted consistently with the forward exclusion from futures); University of Maryland Letter (forward exclusion from swap definition intended to be consistent with the forward exclusion from futures); WGCEF Letter (physical delivery forwards should be distinguished from swaps under standards identical to those used in forwards vs. futures); World Fuel Letter (forward exclusion for swaps should be interpreted in a manner consistent with the forward exclusion from futures).

[63] As recently as October 25, 2010, the CFTC observed in *In re Wright* that "it is well-established that the intent to make or take delivery is the critical factor in determining whether a contract qualifies as a forward." *In re Wright,* CFTC Docket No. 97–02, 2010 WL 4388247 at *3 (CFTC Oct. 25, 2010) (*citing In re Stovall, et al.,* [1977–1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) 20,941 (CFTC Dec. 6, 1979); Brent Interpretation, *supra* note 58). In *Wright,* the CFTC noted that "[i]n distinguishing futures from forwards, the [CFTC] and the courts have assessed the transaction as a whole with a critical eye toward its underlying purpose. Such an assessment entails a review of the overall effect of the transaction as well as a determination as to what the parties intended." *Id.* at *3 (*quoting* Policy Statement Concerning Swap Transactions, 54 FR 30694, July 21, 1989 ("Swap Policy Statement") (citations and internal quotations omitted).

[64] In its recent decision in *In re Wright,* the CFTC applied its facts and circumstances test in an administrative enforcement action involving hedge-to-arrive contracts for corn, and observed that "[o]ur views of the appropriateness of a multi-factor analysis remain unchanged." *Wright, supra* note 63, n.13. The CFTC let stand the administrative law judge's conclusion that the hedge-to-arrive contracts at issue in the case were forward contracts. *Id.* at **5–6. *See also Grain Land, supra* note 61; *Competitive Strategies for Agric., supra* note 61.

[65] *See* Brent Interpretation, *supra* note 58. The CFTC issued the Brent Interpretation in response to a Federal court decision that held that certain 15-day Brent system crude oil contracts were illegal off-exchange futures contracts. *See Transnor (Bermuda) Ltd.* v. *BP N. Am. Petroleum,* 738 F. Supp. 1472 (S.D.N.Y. 1990). The Brent Interpretation provided clarification that the 15-day Brent system crude oil contracts were forward contracts that were excluded from the CEA definition of "future delivery," and thus were not futures contracts. *See* Brent Interpretation, *supra* note 58.

[66] The Brent Interpretation described these "book-outs" as follows: "In the course of entering into 15-day contracts for delivery of a cargo during a particular month, situations often arise in which two counterparties have multiple, offsetting positions with each other. These situations arise as a result of the effectuation of multiple, independent commercial transactions. In such circumstances, rather than requiring the effectuation of redundant deliveries and the assumption of the credit, delivery and related risks attendant thereto, the parties may, but are not obligated to and may elect not to, terminate their contracts and forego such deliveries and instead negotiate payment-of-differences pursuant to a separate, individually negotiated cancellation agreement referred to as a 'book-out.' Similarly, situations regularly arise when participants find themselves selling and purchasing oil more than once in the delivery chain for a particular cargo. The participants comprising these 'circles' or 'loops' will frequently attempt to negotiate separate cancellation agreements among themselves for the same reasons and with the same effect described above." Brent Interpretation, *supra* note 58, at 39190.

[67] *Id.* at 39192.

[68] *Id.* at 39189.

contracts were forward contracts, not futures contracts:

> Under these circumstances, the [CFTC] is of the view that transactions of this type which are entered into between commercial participants in connection with their business, which create specific delivery obligations that impose substantial economic risks of a commercial nature to these participants, but which may involve, in certain circumstances, string or chain deliveries of the type described * * * are within the scope of the [forward contract] exclusion from the [CFTC's] regulatory jurisdiction.[69]

Although the CFTC did not expressly discuss intent to deliver, the Brent Interpretation concluded that transactions retained their character as commercial merchandising transactions, notwithstanding the practice of terminating commercial parties' delivery obligations through "book-outs" as described. At any point in the chain, one of the parties could refuse to enter into a new contract to book-out the transaction and, instead, insist upon delivery pursuant to the parties' obligations under their contract.

The CFTC believes that the principles underlying the Brent Interpretation similarly should apply to the forward exclusion from the swap definition with respect to nonfinancial commodities. To summarize, then, the CFTC believes that: (i) The forward contract exclusion from the swap definition with respect to nonfinancial commodities should be interpreted in a manner that is consistent with the CFTC's historical interpretation of the forward contract exclusion from the definition of the term "future delivery"; (ii) intent to deliver is an essential element of a forward contract excluded from both the swap and future delivery definitions, and such intent in both instances should be evaluated based on the CFTC's established multi-factor approach; and (iii) book-out transactions in nonfinancial commodities that meet the requirements specified in the Brent Interpretation, and that are effectuated through a subsequent, separately-negotiated agreement, should qualify for the forward exclusion from the swap definition.[70]

As noted above, the Brent Interpretation applies to "commercial participants in connection with their business."[71] Market participants that regularly make or take delivery of the referenced commodity (in the case of the Brent Interpretation, a tanker full of Brent oil) in the ordinary course of their business meet that standard. Such entities qualify for the forward exclusion from both the future delivery and swap definitions for their forward transactions under the Brent Interpretation even if they enter a subsequent transaction to "book out" the forward contract rather than make or take delivery. Intent to make or take delivery can be inferred from the binding delivery obligation for the referenced commodity in the contract and the fact that the parties to the contract do, in fact, regularly make or take delivery of the referenced commodity in the contract in the ordinary course of their business.

Some commenters to the ANPR requested clarification with regard to the application of the CFTC's 1993 order exempting certain energy contracts from regulation under the CEA (the "Energy Exemption")[72] after enactment of the Dodd-Frank Act.[73] The Energy Exemption extended the Brent Interpretation regarding the forward contract exclusion from the term "future delivery" to energy commodities other than oil. The CFTC believes that the book-out provisions of the Brent Interpretation similarly should apply to the forward contract exclusion from the swap definition for nonfinancial commodities besides oil. Further, the CFTC also is proposing interpretive guidance herein that the Brent Interpretation with respect to the application of the forward contract exclusion from the term "future delivery" in the context of book-out transactions applies not just to oil, but to all nonfinancial commodities. The CFTC, therefore, is proposing to withdraw the Energy Exemption, while retaining and extending through this interpretive guidance the Brent Interpretation regarding book-outs under the forward contract exclusion with respect to nonfinancial commodities.[74]

(b) Commodity Options and Commodity Options Embedded in Forward Contracts

Some commenters responding to the ANPR requested clarification regarding the status of commodity options under the swap definition.[75] Questions also were raised regarding options embedded in forward contracts, *i.e.,* whether a forward contract with respect to a nonfinancial commodity that contains an embedded option can still qualify for the forward contract exclusion from the swap definition.[76]

The statutory swap definition explicitly provides that commodity

[69] *Id.* at 39192.

[70] This interpretive guidance is consistent with legislative history. *See* 156 Cong. Rec. H5247 (June 30, 2010) (colloquy between U.S. House Committee on Agriculture Chairman Collin Peterson and Representative Leonard Boswell during the debate on the Conference Report for the Dodd-Frank Act, in which Chairman Peterson stated: "Excluding physical forward contracts, including book-outs, is consistent with the CFTC's longstanding view that physical forward contracts in which the parties later agree to book-out their delivery obligations for commercial convenience are excluded from its jurisdiction. Nothing in this legislation changes that result with respect to commercial forward contracts."). *See also* 156 Cong. Rec. H5248–49 (June 30, 2010) (introducing into the record a letter authored by Senator Blanche Lincoln, Chairman of the U.S. Senate Committee on Agriculture, Nutrition and Forestry, and Christopher Dodd, Chairman U.S. Senate Committee on Banking, Housing, and Urban Affairs, stating that the CFTC is encouraged "to clarify through rulemaking that the exclusion from the definition of swap for 'any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled' is intended to be consistent with the forward contract exclusion that is currently in the [CEA] and the CFTC's established policy and orders on this subject, including situations where commercial parties agree to 'book-out' their physical delivery obligations under a forward contract.").

[71] *See* Brent Interpretation, *supra* note 58, at 39192.

[72] Exemption for Certain Contracts Involving Energy Products, 58 FR 21286, Apr. 20, 1993. The Energy Exemption generally applies to certain energy contracts: (i) Entered into by persons reasonably believed to be within a specified class of commercial and governmental entities; (ii) that are bilateral contracts between two parties acting as principals; (iii) the material economic terms of which are subject to individual negotiation by the parties; and (iv) that impose binding obligations on the parties to make and receive delivery of the underlying commodity, with no right of either party to effect a cash settlement of their obligations without the consent of the other party (except pursuant to a bona fide termination right such as default). Like the Brent Interpretation, the Energy Exemption provides that the parties can enter into a subsequent book-out settlement of the obligation in a manner other than by physical delivery of the commodity specified in the contract. *Id.* at 21294.

[73] *See, e.g.,* WGCEF letter. The CFTC issued the Energy Exemption shortly after Congress had provided the CFTC with exemptive authority pursuant to CEA section 4(c), 7 U.S.C. 6(c), in section 502 of the Futures Trading Practices Act of 1992, Public Law 102–546, 106 Stat. 3590 (1993).

[74] To avoid any uncertainty, the CFTC also notes that the Dodd-Frank Act supersedes the Swap Policy Statement. The CFTC is aware that some commenters have suggested that the Commissions should exercise their authority to further define the term "eligible contract participant" to encompass the "line of business" provision of the Swap Policy Statement. *See* Swap Policy Statement, supra note 63, at 30696–30697. The Commissions will address these comments in their joint final rulemaking with respect to the Entity Definitions. *See supra* note 12.

[75] *See, e.g.,* World Fuel Letter (exclusion for commercial options set forth in CFTC Regulation 32.4 should also be an exclusion from the swap definition).

[76] *See, e.g.,* Letter from Patrick Kelly, Policy Advisor, API, Sept. 20, 2010 ("API Letter"), EEI Letter; Letter from Daniel S.M. Dolan, VP, Policy Research & Communications, Electric Power Supply Association, Sept. 20, 2010 ("EPSA Letter") (physically settled options should be included in the forward exclusion from the swap definition); DFA Letter; ISDA Letter. One commenter suggested that the CFTC should apply to each contract with an enforceable delivery obligation a rebuttable presumption of intent to deliver, even if an option to cash settle is included in that contract. *See* WGCEF Letter.

options are swaps.[77] Accordingly, the CFTC recently proposed revisions to its existing options rules in parts 32 and 33 of its regulations with respect to the treatment of commodity options under the Dodd-Frank Act, and requested public comment on those proposed revisions.[78] The question of the application of the forward exclusion from the swap definition with respect to nonfinancial commodities, where commodity options are embedded in forward contracts (including embedded options to cash settle such contracts), is similar to that arising under the CEA's existing forward contract exclusion from the definition of the term "future delivery." The CFTC's Office of General Counsel addressed forward contracts that contained embedded options in a 1985 interpretive statement ("1985 Interpretation"),[79] which the CFTC recently adhered to in its adjudicatory Order in the *Wright* case.[80] While both were issued prior to the effective date of the Dodd-Frank Act, the CFTC believes that it would be appropriate to apply this guidance to the treatment of forward contracts in nonfinancial commodities that contain embedded options under the Dodd-Frank Act.

In *Wright,* the CFTC described the 1985 Interpretation and stated that the CFTC traditionally has engaged in a two-step analysis of "embedded options" in which the first step focuses on whether the option operates on the price or the delivery term of the forward contract and the second step focuses on secondary trading.[81] The CFTC believes that these same principles can be applied with respect to the forward contract exclusion from the swap definition for nonfinancial commodities in the Dodd-Frank Act, too. That is, a forward contract that contains an embedded commodity option or options[82] would be considered an excluded nonfinancial commodity forward contract (and not a swap) if the embedded option(s): (i) May be used to adjust the forward contract price, but do not undermine the overall nature of the contract as a forward contract; (ii) do not target the delivery term, so that the predominant feature of the contract is actual delivery; and (iii) cannot be severed and marketed separately from the overall forward contract in which they are embedded.[83] Conversely, where the embedded commodity option(s) render delivery optional, the predominant feature of the contract cannot be actual delivery and, therefore, the embedded option(s) to not deliver preclude treatment of the contract as a forward contract for a nonfinancial commodity. The CFTC would look to the specific facts and circumstances of the transaction as a whole to evaluate whether any embedded optionality operates on the price or delivery term of the contract, and whether an embedded commodity option is marketed or traded separately from the underlying contract, to determine whether that transaction qualifies for the forward contract exclusion from the swap definition for nonfinancial commodities.[84] The CFTC believes that such an approach would help prevent commodity options that should fall within the swap definition from qualifying for the forward contract exclusion for nonfinancial commodities instead.

(c) Security Forwards[85]

No commenters sought clarification of the exclusion from the swap and security-based swap definitions for the "sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled," in the context of most sales of securities for deferred shipment or delivery; however, some commenters sought clarification of this exclusion in the context of mortgage securitizations.[86] The Commissions believe it is appropriate to address how the exclusions from the definitions of swap and security-based swap apply to security forwards and other purchases and sales of securities.

The Dodd-Frank Act excludes purchases and sales of securities from the definitions of swap and security-based swap in a number of different clauses.[87] Under these exclusions, purchases and sales of securities on a fixed or contingent basis[88] and sales of securities for deferred shipment or delivery that are intended to be physically delivered[89] are explicitly excluded from the definitions of swap and security-based swap.[90] The exclusion from the definitions of swap and security-based swap of a sale of a security for deferred shipment or delivery involves an agreement to purchase securities, or groups or indexes of securities, at a future date at a certain price.

[77] 7 U.S.C. 1a(47)(A)(i). Options on securities and certain options on foreign currency are excluded from the swap definition by CEA sections 1a(47)(B)(iii) and (iv), respectively. 7 U.S.C. 1a(47)(B)(iii) and (iv). These options are not subject to the Commissions' proposed guidance in this section.

[78] *See* Commodity Options and Agricultural Swaps, 76 FR 6095, Feb. 3, 2011.

[79] *See* Characteristics Distinguishing Cash and Forward Contracts and "Trade" Options, 50 FR 39656, Sept. 30, 1985.

[80] *Wright, supra* note 63.

[81] *Id.* at n.5. In *Wright,* the CFTC affirmed the Administrative Law Judge's holding that an option embedded in a hedge-to-arrive contract did not violate CFTC rules regarding the sale of agricultural trade options. The CFTC first concluded that the puts at issue operated to adjust the forward price and did not render the farmer's overall obligation to make delivery optional. Then, turning to the next step of the analysis, the CFTC explained that "the put and [hedge-to-arrive contract] operated as a single contract, and in most cases were issued simultaneously * * *. We do not find that any put was severed from its forward or that either of [the put or the hedge-to-arrive contract] was traded separately from the other. We hold that in these circumstances, no freestanding option came into being. * * *" *Id.* at *7.

[82] The CFTC believes that "options" in the plural would include, for example, a situation in which the embedded optionality involves option combinations, such as costless collars, that operate on the price term of the agreement, contract, or transaction.

[83] *See Wright, supra* note 63, at **6–7.

[84] This facts and circumstances approach to determining whether a particular embedded option takes a transaction out of the forward contract exclusion for nonfinancial commodities is consistent with the CFTC's historical approach to determining whether a particular embedded option takes a transaction out of the forward contract exclusion from the CEA definition of the term "future delivery." *See Wright, supra* note 63, at *5 ("As we have held since *Stovall,* the nature of a contract involves a multi-factor analysis . * * *").

[85] The discussion above regarding the exclusion from the swap definition for forward contracts on nonfinancial commodities does not apply to the exclusion from the swap and security-based swap definitions for security forwards or to the distinction between security forwards and security futures products.

[86] Specifically, commenters requested clarification that the swap and security-based swap definitions do not include buying and selling mortgages and forward trading of agency (*i.e.,* Federal Home Loan Mortgage Corporation ("Freddie Mac"), Federal National Mortgage Association ("Fannie Mae"), and Government National Mortgage Association ("Ginnie Mae") mortgage-backed securities ("MBS") in the "To-Be-Announced" ("TBA") market in order to provide the certainty needed to avoid unnecessary disruption of the securitization market. *See* Letter from Stephen H. McElhennon, Vice President & Deputy General Counsel, Fannie Mae, Sept. 20, 2010 ("Fannie Mae Letter"); Letter from Lisa M. Ledbetter, Freddie Mac, Sept. 20, 2010.

[87] *See* CEA sections 1a(47)(B)(ii), (v), and (vi), 7 U.S.C. 1a(47)(B)(ii), (v), and (vi).

[88] *See* CEA section 1a(47)(B)(v), 7 U.S.C. 1a(47)(B)(v) (excluding from the swap and security-based swap definitions "any agreement, contract, or transaction providing for the purchase or sale of 1 or more securities on a fixed basis that is subject to [the Securities Act and Exchange Act]"); CEA section 1a(47)(B)(vi), 7 U.S.C. 1a(47)(B)(vi) (excluding from the swap and security-based swap definitions "any agreement, contract, or transaction providing for the purchase or sale of 1 or more securities on a contingent basis that is subject to [the Securities Act and Exchange Act], unless the agreement, contract, or transaction predicates the purchase or sale on the occurrence of a bona fide contingency that might reasonably be expected to affect or be affected by the creditworthiness of a party other than a party to the agreement, contract, or transaction").

[89] *See* CEA section 1a(47)(B)(ii), 7 U.S.C. 1a(47)(B)(ii).

[90] The Commissions note that calling an agreement, contract, or transaction a swap or security-based swap does not determine its status. *See* discussion *supra* part II.D.1.

As with other purchases and sales of securities, security forwards are excluded from the definitions of swap and security-based swap. The sale of the security in this case occurs at the time the forward contract is entered into with the performance of the contract deferred or delayed. If such agreement, contract, or transaction is intended to be physically settled, the Commissions believe it would be within the security forward exclusion and therefore outside the swap and security-based swap definitions.[91] Moreover, as a purchase or sale of a security, the Commissions believe it also would be within the exclusions for the purchase or sale of one or more securities on a fixed basis (or, depending on its terms, a contingent basis) and, therefore, outside the swap and security-based swap definitions.[92]

As noted above, commenters requested specific guidance in the context of forward sales of MBS that are guaranteed or sold by Fannie Mae, Freddie Mac, and Ginnie Mae and the mortgages underlying such MBS.

MBS guaranteed or sold by Fannie Mae, Freddie Mac and Ginnie Mae are eligible to be sold in the TBA market, which is essentially a forward or delayed delivery market.[93] The TBA market has been described as one that "allows mortgage lenders essentially to sell the loans they intend to fund even before the loans are closed." [94] In the TBA market, the lender enters into a forward contract to sell MBS and agrees to deliver MBS on the settlement date in the future. The specific MBS that will be delivered in the future may not yet be created at the time the forward contract is entered into.[95] The Commissions believe that such forward sales of MBS in the TBA market would fall within the exclusion for sales of securities on a deferred settlement or delivery basis even though the precise MBS are not in existence at the time the forward MBS sale is entered into.[96] Moreover, as the purchase or sale of a security, the Commissions believe such forward sales of MBS in the TBA market would fall within the exclusions for the purchase or sale of one or more securities on a fixed basis (or, depending on its terms, a contingent basis) and therefore outside the swap and security-based swap definitions.[97]

Request for Comment

22. The Commissions request comment on all aspects of the proposed interpretive guidance set forth in this section regarding the forward contract exclusion from the swap and security-based swap definitions with respect to nonfinancial commodities and securities.

23. Is the proposed interpretive guidance set forth in this section sufficient with respect to the application of the forward contract exclusion from the swap definition with respect to nonfinancial commodities? If not, what changes should be made? Commenters also are invited to comment on whether the application of the Brent Interpretation generally, and its conclusions regarding book-outs in particular, is appropriate to the forward exclusion from the swap definition with respect to nonfinancial commodities. Would it permit transactions that should be subject to the swap regulatory regime to fall outside of the Dodd-Frank Act?

24. Is it appropriate, in light of the Dodd-Frank Act, for the CFTC to withdraw the Energy Exemption while concurrently retaining the Brent Interpretation, and extending it to the forward contract exclusion from the definition of "future delivery" and the swap definition, for book-out transactions in all nonfinancial commodities? Why or why not? Is the conclusion that the Dodd-Frank Act supersedes the Swap Policy Statement appropriate? Why or why not?

25. Are there any provisions of the Energy Exemption or Swap Policy Statement that the Commissions should consider incorporating into the definitions rulemakings (other than the request already submitted by some commenters in response to the proposed Entity Definitions that the "line of business" provision of the Swap Policy Statement be incorporated into the definition of the term "eligible contract participant" ("ECP"))? If so, please explain in detail how such provisions are consistent with the requirements of the Dodd-Frank Act and would not permit transactions that should be subject to the swap regulatory regime to fall outside of the Dodd-Frank Act.

26. How frequently do book-out transactions of the type described in the Brent Interpretation occur with respect to nonfinancial commodities? Please provide descriptions of any such transactions, and data with respect to their frequency. Are there any nonfinancial commodities or transactions to which the Brent Interpretation should not apply, either with respect to the forward contract exclusion from the definition of "future delivery" or the forward contract exclusion from the swap definition, or both? Why or why not?

27. Should a minimum contract size for a transaction in a nonfinancial commodity (*e.g.,* a tanker full of Brent oil) be required in order for the transaction to qualify as a forward contract under the Brent Interpretation with respect to the future delivery and swap definitions? Why or why not? If so, what standards should apply to determine such a minimum contract size? Should the Brent Interpretation for nonfinancial commodities with respect to the future delivery and swap definitions be limited to market participants that meet certain requirements? Why or why not? If so, does the "eligible commercial entity" definition in CEA section 1a(17) [98] provide an appropriate requirement? Why or why not? What other requirements, if any, should be imposed?

28. How often, and to what extent, do entities that do not regularly make or take delivery of the commodity in the ordinary course of their business engage in transactions that should qualify as forward contracts? Should such contracts qualify for the safe harbor provided by the Brent Interpretation? Why or why not? If so, how can it be demonstrated that the primary purpose of such transaction is to acquire or sell the physical commodity? Would including these transactions in the scope of the Brent Interpretation permit transactions that should be subject to the swap regulatory regime to fall outside of the Dodd-Frank Act? If so, could this concern be addressed by imposing conditions in order to qualify for the forward exclusion? What conditions, if any, would be appropriate?

29. Are "ring" or "daisy chain" markets for forward contracts, such as the 15-day Brent market, primarily used for commercial merchandising, or do they serve other purposes such as price discovery or risk management? Please explain in detail.

30. Should contracts in nonfinancial commodities that may qualify as forward contracts be permitted to trade on registered trading platforms such as DCMs or swap execution facilities ("SEFs")? If so, are additional guidance

[91] *See* CEA section 1a(47)(B)(ii), 7 U.S.C. 1a(47)(B)(ii).

[92] *See* CEA sections 1a(47)(B)(v) and (vi), 7 U.S.C. 1a(47)(B)(v) and (vi).

[93] Task Force on Mortgage-Backed Securities Disclosure, "Staff Report: Enhancing Disclosure in the Mortgage-Backed Securities Markets," part II.E.2 (Jan. 2003).

[94] *Id.*

[95] *Id.*

[96] *See* CEA section 1a(47)(B)(ii), 7 U.S.C. 1a(47)(B)(ii).

[97] *See* CEA sections 1a(47)(B)(v) and (vi), 7 U.S.C. 1a(47)(B)(v) and (vi).

[98] 7 U.S.C. 1a(17).

or rules necessary to determine whether contracts traded on such platforms are excluded from the CEA definition of "future delivery" and/or the swap definition? If so, please describe in detail such markets and explain what further guidance or rules would be appropriate? Should conditions be imposed with respect to the nature of the market participants or the percentage of transactions that must result in delivery over a specified measurement period, or both? If so, what conditions would be appropriate?

31. Should the Commissions provide guidance regarding the scope of the term "nonfinancial commodity" in the forward contract exclusion from the swap definition? If so, how and where should the Commissions draw the line between financial and nonfinancial commodities?

32. Should the forward contract exclusion from the swap definition apply to environmental commodities such as emissions allowances, carbon offsets/credits, or renewable energy certificates? If so, please describe these commodities, and explain how transactions can be physically settled where the commodity lacks a physical existence (or lacks a physical existence other than on paper)? Would application of the forward contract exclusion to such environmental commodities permit transactions that should be subject to the swap regulatory regime to fall outside the Dodd-Frank Act?

33. Are there other factors that should be considered in determining how to characterize forward contracts with embedded options with respect to nonfinancial commodities? If so, what factors should be considered? Do provisions in forward contracts with respect to nonfinancial commodities other than delivery and price contain embedded optionality? How do such provisions operate? Please provide a detailed analysis regarding how such provisions should be analyzed under the Dodd-Frank Act.

34. Is the analysis of forward contracts with embedded options in the 1985 Interpretation and the CFTC's *Wright* decision appropriately applied to transactions entered into after the effective date of the Dodd-Frank Act? Why or why not? If not, how should the analysis be modified?

35. How would the proposed interpretive guidance set forth in this section affect full requirements contracts, capacity contracts, reserve sharing agreements, tolling agreements, energy management agreements, and ancillary services? Do these agreements, contracts, or transactions have optionality as to delivery? If so, should they—or any other agreement, contract, or transaction in a nonfinancial commodity that has optionality as to delivery—be excluded from the swap definition? If so, please provide a detailed analysis of such agreements, contracts, or transactions and how they can be distinguished from options that are to be regulated as swaps pursuant to the Dodd-Frank Act. To what extent are any such agreements, contracts, or transactions in the electric industry regulated by the Federal Energy Regulatory Commission ("FERC"), State regulatory authorities, regional transmission organizations ("RTOs"), independent system operators ("ISOs") or market monitoring units associated with RTOs or ISOs?

36. Is there any issue with respect to the treatment of commodity options that the Commissions have not addressed and that should be addressed as a definitional matter in this rulemaking?

37. Should the Commissions provide more detailed guidance regarding what constitutes a security forward? For instance, should the Commissions provide more guidance on what it means for a security forward to be "intended to be physically settled"? If so, what further guidance would be appropriate?

38. Should the Commissions provide more guidance regarding when forward sales of MBS in the TBA market would fall within the exclusion for sales of securities on a deferred settlement or delivery basis? Is there any more guidance the Commissions should provide regarding types of transactions that occur in the TBA market?

3. Consumer and Commercial Agreements, Contracts, and Transactions

Commenters on the ANPR pointed out a number of areas in which a broad reading of the swap and security-based swap definitions could cover certain consumer and commercial arrangements that historically have not been considered swaps or security-based swaps. Examples of such instruments cited by commenters include evidences of indebtedness with a variable rate of interest;[99] commercial contracts containing acceleration, escalation, or indexation clauses;[100] agreements to acquire personal property or real property, or to obtain mortgages;[101] employment, lease, and service agreements, including those that contain contingent payment arrangements;[102] and consumer mortgage and utility rate caps.[103]

Consumers enter into various types of agreements, contracts, and transactions as part of their household and personal lives that may have attributes that could be viewed as falling within the swap or security-based swap definition. Similarly, businesses and other entities, whether or not for profit, also enter into agreements, contracts, and transactions as part of their operations relating to, among other things, acquisitions or sales of property (tangible and intangible), provisions of services, employment of individuals, and other matters that could be viewed as falling within the definitions.

The Commissions do not believe that Congress intended to include these types of customary consumer and commercial agreements, contracts, or transactions in the swap or security-based swap definition, to limit the types of persons that can enter into or engage in them, or to otherwise to subject these agreements, contracts, or transactions to the regulatory scheme for swaps and security-based swaps. The Commissions, therefore, are proposing the following interpretive guidance to assist consumers and businesses in understanding whether certain agreements, contracts, or transactions that they enter into would be regulated as swaps or security-based swaps.

With respect to consumers, the Commissions believe that the types of agreements, contracts, or transactions that should not be considered swaps or security-based swaps when entered into by consumers (natural persons or their agents) as principals primarily for personal, family, or household purposes, include:

- Agreements, contracts, or transactions to acquire or lease real or personal property, to obtain a mortgage, to provide personal services, or to sell or assign rights owned by such consumer (such as intellectual property rights);
- Agreements, contracts, or transactions to purchase products or services at a fixed price or a capped or collared price, at a future date or over a certain time period (such as agreements to purchase home heating fuel);[104]

[99] *See* Cleary Letter; Letter from Kenneth E. Auer, President and CEO, The Farm Credit Council, Sept. 20, 2010 ("Farm Credit Council Letter").

[100] *See* Cleary Letter; White & Case Letter.

[101] *See* White & Case Letter; Fannie Mae Letter.

[102] *See* BlackRock Letter.

[103] *See* White & Case Letter; Deutsche Bank Letter.

[104] These agreements, contracts, or transactions involve physical delivery which is deferred for convenience or necessity and thus can be viewed as being akin to forward purchase agreements (sometimes with embedded options, in the case of those with price caps), which were discussed above

• Agreements, contracts, or transactions that provide for an interest rate cap or lock on a consumer loan or mortgage, where the benefit of the rate cap or lock is realized only if the loan or mortgage is made to the consumer; and

• Consumer loans or mortgages with variable rates of interest or embedded interest rate options, including such loans with provisions for the rates to change upon certain events related to the consumer, such as a higher rate of interest following a default.

The types of commercial agreements, contracts, or transactions that involve customary business arrangements (whether or not involving a for-profit entity) and would not be considered swaps or security-based swaps under this proposed interpretive guidance include:

• Employment contracts and retirement benefit arrangements;

• Sales, servicing, or distribution arrangements;

• Agreements, contracts, or transactions for the purpose of effecting a business combination transaction; [105]

• The purchase, sale, lease, or transfer of real property, intellectual property, equipment, or inventory;

• Warehouse lending arrangements in connection with building an inventory of assets in anticipation of a securitization of such assets (such as in a securitization of mortgages, student loans, or receivables); [106]

• Mortgage or mortgage purchase commitments, or sales of installment loan agreements or contracts or receivables;

• Fixed or variable interest rate commercial loans entered into by non-banks [107]; and

• Commercial agreements, contracts, and transactions (including, but not limited to, leases, service contracts, and employment agreements) containing escalation clauses linked to an underlying commodity such as an interest rate or consumer price index.

The Commissions intend this proposed interpretive guidance to allow consumers to engage in customary transactions relating to their households and personal or family activities without concern that such arrangements would be considered swaps or security-based swaps. Similarly, applying this guidance to customary commercial arrangements should allow commercial and non-profit entities to continue to operate their businesses and operations without significant disruption and ensure that the swap and security-based swap definitions are not read to include commercial and non-profit operations that historically have not been considered to involve swaps or security-based swaps.

The types of agreements, contracts, and transactions discussed above are not intended to be exhaustive of the customary consumer or commercial arrangements that should not be considered to be swaps or security-based swaps. There may be other, similar types of agreements, contracts, and transactions that also should not be considered to be swaps or security-based swaps. In determining whether similar types of agreements, contracts, and transactions entered into by consumers or commercial entities are swaps or security-based swaps, the Commissions intend to consider the characteristics and factors that are common to the consumer and commercial transactions listed above:

• They do not contain payment obligations, whether or not contingent, that are severable from the agreement, contract, or transaction;

• They are not traded on an organized market or over-the-counter; and

• In the case of consumer arrangements, they:

—Involve an asset of which the consumer is the owner or beneficiary, or that the consumer is purchasing, or they involve a service provided, or to be provided, by or to the consumer, or

• In the case of commercial arrangements, they are entered into:

—By commercial or non-profit entities as principals (or by their agents) to serve an independent commercial, business, or non-profit purpose, and

—Other than for speculative, hedging, or investment purposes.

Two of the key components reflected in these characteristics that distinguish these agreements, contracts, and transactions from swaps and security-based swaps are that: (i) The payment provisions of the arrangements are not severable; and (ii) the agreement, contract, or transaction is not traded on an organized market or over-the-counter—so that such arrangements would not involve risk-shifting arrangements with financial entities, as would be the case for swaps and security-based swaps.[108]

This proposed interpretive guidance is not intended to be the exclusive means for consumers and commercial or non-profit entities to determine whether their agreements, contracts, or transactions fall within the swap or security-based swap definition. If there is a type of agreement, contract, or transaction that is not enumerated above, or does not have all the characteristics and factors that are listed above (including new types of arrangements that may be developed in the future), but that a party to the agreement, contract, or transaction believes is not a swap or security-based swap, the Commissions invite such party to seek an interpretation from the Commissions as to whether the agreement, contract, or transaction is a swap or security-based swap.

Request for Comment

39. Is interpretive guidance of the type proposed in this section necessary with respect to the application of the swap and security-based swap definitions to certain consumer and commercial agreements, contracts, or transactions?

40. Is the interpretive guidance proposed in this section useful,

in the context of the exclusion from the swap definition for forward contracts in nonfinancial commodities. While the CFTC traditionally has viewed forward contracts in nonfinancial commodities as limited to commercial merchandising transactions, the Commissions view consumer agreements, contracts, and transactions involving periodic or future purchases of consumer products and services, such as agreements to purchase energy commodities to heat or cool consumers' homes, as transactions that are not swaps.

[105] These business combination transactions include, for example, a reclassification, merger, consolidation, or transfer of assets as defined under the Federal securities laws or any tender offer subject to section 13(e) and/or section 14(d) or (e) of the Exchange Act, 15 U.S.C. 78m(e) and/or 78n(d) or (e). These business combination agreements, contracts, or transactions can be contingent on the continued validity of representations and warranties and can contain earn-out provisions and contingent value rights.

[106] The Commissions believe that such lending arrangements included in this category are traditional borrower/lender arrangements documented using, for example, a loan agreement or indenture, as opposed to a synthetic lending arrangement documented in the form of, for example, a TRS. The Commissions also note that securitization transaction agreements also may contain contingent obligations if the representations and warranties about the underlying assets are not satisfied.

[107] *See infra* note 115 regarding identified banking products.

[108] There also are alternative regulatory regimes that have been enacted as part of the Dodd-Frank Act specifically to provide enhanced protections to consumers relating to various consumer transactions. *See, e.g.,* the Consumer Financial Protection Act of 2010, Public Law 111–203, title X, 124 Stat. 1376 (July 21, 2010) (establishing the Bureau of Consumer Financial Protection to regulate a broad category of consumer products and amending certain laws under the jurisdiction of the Federal Trade Commission); the Mortgage Reform and Anti-Predatory Lending Act, Public Law 111–203, title XIV, 124 Stat. 1376 (July 21, 2010) (amending existing laws, and adding new provisions, related to certain mortgages). Some of these agreements, contracts, or transactions are subject to regulation by the Federal Trade Commission and other Federal financial regulators and state regulators.

appropriate, and sufficient for persons to consider when evaluating whether agreements, contracts, or transactions of the types described in this section fall within the swap or security-based swap definition?

41. In particular, are the listed characteristics and factors for consumer transactions and for commercial transactions appropriate for purposes of evaluating whether agreements, contracts, or transactions fall within the swap or security-based swap definition? If not, what characteristics or factors should be included or excluded, and why? Are any of the characteristics or factors too narrow or too broad? If so, how should the listed characteristics and factors be modified, and why?

42. Is a joint interpretation as provided for in section 712(d)(4) of the Dodd-Frank Act, pursuant to the proposed process discussed in part VI below, an appropriate means of addressing any further interpretive questions?

43. Does the interpretive guidance proposed in this section sufficiently enumerate the types of consumer and commercial agreements, contracts, or transactions that should not be considered swaps or security-based swaps? If not, please provide details of other types of such agreements, contracts, or transactions and an explanation of the reasons why the definitions should not apply to them.

44. Is the treatment of consumer or commercial contracts containing payment arrangements sufficiently clear? For example, should the interpretive guidance expressly address any other specific types of contracts, such as installment sales contracts, financings used in normal business operations (such as receivables financings), pensions and other post-retirement benefits, contracts relating to the performance of a service, standby liquidity agreements, indemnification agreements, reimbursement agreements, or affiliate guarantees? Why or why not?

45. Is the treatment of purchases, sales, leases, or transfers of equipment and inventory sufficiently flexible to not interfere with ordinary business operations? As an alternative, should the guidance expressly cover the purchase, sale, lease, or transfer of assets (excluding financial assets) that are anticipated to be owned, leased, licensed, produced, manufactured, processed, or merchandized by one of the parties or an affiliate? Why or why not?

4. Loan Participations

Two commenters inquired whether loan participations fall within the scope of the swap and security-based swap definitions.[109] According to these commenters, loan participations arise when a lender transfers the economic risks and benefits of all or a portion of a loan it has entered into with a borrower to another party as an alternative or precursor to assigning to such person the loan or an interest in the loan.[110] Two types of loan participations are offered in the market today according to these commenters: LSTA-style participations and LMA-style participations.[111] An LSTA-style participation "specifically provides that the participation is intended by the parties to be treated as a sale by the grantor and a purchase by the participant" and "is intended to effect a 'true sale' of the loan from the grantor to the participant and put the participant's beneficial ownership interest in the loan beyond the reach of the grantor's bankruptcy estate." [112] By contrast, an LMA-style participation, while not effecting a sale, "creates a current debtor-creditor relationship between the grantor and the participant under which a future ownership interest is conveyed." [113] Neither type of loan participation is a "synthetic" transaction according to the March LSTA letter because "they are merely transfers of cash loan positions" and "[t]he ratio of underlying loan to participation is always one-to-one."

Depending on the facts and circumstances, a loan participation may be a security under the Federal securities laws and, as such, the loan participation would be excluded from the definition of swap as the purchase and sale of a security on a fixed or contingent basis.[114] In addition, depending on the facts and circumstances, a loan participation may be an identified banking product and, as such, would be excluded from CFTC jurisdiction and from the "security-based swap" and "security-based swap agreement" definitions.[115]

The Commissions do not interpret the swap and security-based swap definitions to include loan participations in which the purchaser is acquiring a current or future direct or indirect ownership interest in the related loan and the loan participations are "true participations" (the participant acquires a beneficial ownership interest in the underlying loans).[116]

Request for Comment

46. Should any of the enumerated agreements, contracts, or transactions be considered swaps or security-based swaps whether in general or in certain narrow circumstances? If so, which ones and why? In particular, how are loan participations similar to and different from loan TRS? Does the proposed guidance adequately distinguish between loan participations similar to and different from loan TRS?

47. Does the Commissions' proposed interpretive guidance regarding loan participations exclude from the swap or security-based swap definitions agreements, contracts, or transactions

[109] *See* Letter from R. Bram Smith, Executive Director, The Loan Syndications and Trading Association, Jan. 25, 2011 ("January LSTA Letter") and letter from Elliot Ganz, General Counsel, The Loan Syndications and Trading Association, Mar. 1, 2011 ("March LSTA Letter, and collectively with the January LSTA Letter, "LSTA Letters"); Letter from Clare Dawson, Managing Director, Loan Market Association, Feb. 23, 2011.

[110] *See* Loan Market Association, "Guide to Syndicated Loans," section 6.2.5 ("Risk participation may be provided by a new lender as an interim measure before it takes full transfer of a loan."), available at *http://www.lma.eu.com/uploads/files/Introductory_Guides/Guide_to_Par_Syndicated_Loans.pdf.*

[111] The LSTA is The Loan Syndications and Trading Association. The LMA is the Loan Market Association.

[112] *See* January LSTA Letter (citation omitted).

[113] *See* LSTA Letters. *But see* Jon Kibbe, Julia Lu and Carl Winkworth, Richards Kibbe & Orbe, LLP, "Dodd-Frank Crosses the Pond: Unintended Consequences for LMA–Style Loan Participations?," 3 (Nov. 12, 2010) ("The grantor of an LMA-style participation does not grant an ownership interest in the loan to the participant.") ("LMA–Style LP Memo"), available at *http://www.rkollp.com/assets/attachments/Dodd-Frank%20Crosses%20the%20Pond%20-%20Unintended%20Consequences%20for%20LMA–Style%20Loan%20Participations.pdf.*

[114] *See* CEA sections 1a(47)(B)(v) and (vi), 7 U.S.C. 1a(47)(b)(v) and (vi), as amended by section 721(a)(21) of the Dodd-Frank Act (excluding purchases and sales of a security on a fixed or contingent basis, respectively from the swap definition).

[115] *See* section 403(a) of the Legal Certainty for Bank Products Act of 2000, 7 U.S.C. 27a(a), as amended by section 725(g)(2) of the Dodd-Frank Act (providing that, under certain circumstances, the CEA shall not apply to, and the CFTC shall not exercise regulatory authority over, identified banking products, and the definitions of the terms "security-based swap" and "security-based swap agreement" shall not include identified banking products).

[116] *See generally* Richard M. Gray and Suhrud Mehta, Milbank Tweed Hadley & McCloy LLP, "US and UK compared Fundamental differences remain between the markets. But is it worth considering using a New York participation agreement in an English deal?," International Financial Law Review (Oct. 1, 2009) (discussing differences between New York and English participation markets and features distinguishing true participations from financings), available at *http://www.milbank.com/NR/rdonlyres/B95C06AD–C3CA–44C9–8433–B6021C4455C9/0/102009_IFLR_USandUKcompared_RGray_SMehta.pdf;* Cleary, Gottlieb, Steen & Hamilton, *Memorandum for the Financial Accounting Standards Board,* Re: Participations (June 14, 2004) (discussing, among other things, what a "good" or "true" participation is under the Uniform Commercial Code, the Bankruptcy Code, case law, and other authority), available at *http://www.fasb.org/cs/BlobServer?blobcol=urldata&blobtable=MungoBlobs&blobkey=id&blobwhere=1175817895286&blobheader=application%2Fpdf.*

that are swaps or security-based swaps? If so, please describe such agreements, contracts, or transactions and suggested adjustments to the proposed guidance to capture such agreements, contracts, or transactions as swaps or security-based swaps.

48. Is the Commissions' proposed interpretive guidance regarding loan participations as not falling within the swap and security-based swap definitions appropriate? Why or why not? Should the Commissions provide further guidance on what constitutes an "ownership interest" in the loan underlying a loan participation? If so, what should such guidance provide?

49. Do all loan participations convey a current or future direct or indirect ownership interest from the grantor to the participant or sub-participant? If so, what indicia of ownership are conveyed and when, particularly in LMA-style loan participations? Do loan participations use leverage? If so, how?

50. Are any swaps or security-based swaps partly or fully defeased?

51. Should the Commissions provide further guidance regarding the scope of "true participation?" If so, how should the Commissions delineate the scope thereof?

C. Proposed Rules and Interpretive Guidance Regarding Certain Transactions Within the Scope of the Definitions of the Terms "Swap" and "Security-Based Swap"

1. In General

In light of provisions in the Dodd-Frank Act that specifically address certain foreign exchange products, the Commissions are proposing rules to clarify the status of products such as foreign exchange forwards, foreign exchange swaps, foreign exchange options, non-deliverable forwards involving foreign exchange ("NDFs"), and cross-currency swaps. The Commissions also are proposing a rule to clarify the status of FRAs and providing interpretive guidance regarding: (i) Combinations and permutations of, or options on, swaps or security-based swaps; and (ii) contracts for differences ("CFDs").

Proposed rule 1.3(xxx)(2) under the CEA and proposed rule 3a69–2 under the Exchange Act would explicitly define the term "swap" to include certain foreign exchange-related products and FRAs unless such products would be excluded by the list of exclusions in subparagraph (B) of the swap definition.[117] In proposing these rules, the Commissions do not mean to suggest that any other agreement, contract, or transaction not mentioned in the proposed rules or specifically enumerated in the statutory definition would not be covered by the swap or security-based swap definitions in the Dodd-Frank Act.

2. Foreign Exchange Products

(a) Foreign Exchange Products Subject to the Secretary's Swap Determination: Foreign Exchange Forwards and Foreign Exchange Swaps

The Dodd-Frank Act provides that "foreign exchange forwards" and "foreign exchange swaps" shall be considered swaps under the swap definition unless the Secretary of the Treasury ("Secretary") issues a written determination that either foreign exchange swaps, foreign exchange forwards, or both: (i) Should not be regulated as swaps; and (ii) are not structured to evade the Dodd-Frank Act in violation of any rule promulgated by the CFTC pursuant to section 721(c) of the Dodd-Frank Act.[118] A foreign exchange forward is defined as "a transaction that solely involves the exchange of 2 different currencies on a specific future date at a fixed rate agreed upon on the inception of the contract covering the exchange."[119] A foreign exchange swap, in turn, is defined as "a transaction that solely involves—(A) An exchange of 2 different currencies on a specific date at a fixed rate that is agreed upon on the inception of the contract covering the exchange; and (B) a reverse exchange of the 2 currencies described in subparagraph (A) at a later date and at a fixed rate that is agreed upon on the inception of the contract covering the exchange."[120]

Under the Dodd-Frank Act, if foreign exchange forwards or foreign exchange swaps are no longer considered swaps due to a determination by the Secretary, nevertheless, certain provisions of the CEA added by the Dodd-Frank Act would continue to apply to such transactions. Specifically, those transactions still would be subject to certain requirements for reporting swaps, and swap dealers and major swap participants engaging in such transactions still would be subject to certain business conduct standards.[121]

The Commissions are proposing to provide greater clarity by explicitly defining by rule the term "swap" to include foreign exchange forwards and foreign exchange swaps (as those terms are defined in the CEA).[122] The proposed rules would incorporate the provision of the Dodd-Frank Act that, if the Secretary issues the written determination described above, foreign exchange forwards and foreign exchange swaps would no longer be considered swaps. The proposed rules also would reflect the continuing applicability of certain reporting requirements and business conduct standards in the event that the Secretary makes such a determination.[123]

(b) Foreign Exchange Products Not Subject to the Secretary's Swap Determination

The Commissions also are proposing rules to provide clarity that a determination by the Secretary that foreign exchange forwards or foreign exchange swaps, or both, should not be regulated as swaps would not affect other products involving foreign currency, such as foreign currency options, NDFs, and cross-currency swaps. The Commissions are proposing rules to explicitly define the term "swap" to include such products, irrespective of whether the Secretary makes a determination to exempt foreign exchange forwards or foreign exchange swaps.[124]

(i) Foreign Currency Options[125]

As discussed above, the statutory swap definition includes options, and it expressly enumerates foreign currency options. It encompasses any agreement, contract, or transaction: " (i) that is a

[117] *See* CEA section 1a(47)(B), 7 U.S.C. 1a(47)(B).

[118] *See* CEA section 1a(47)(E)(i), 7 U.S.C. 1a(47)(E)(i). The Secretary has issued a request for comment about whether an exclusion from the swap definition for foreign exchange swaps, foreign exchange forwards, or both, is warranted, and on the application of the statutory factors that the Secretary must consider in making a determination regarding whether to exclude these products. *See* Determinations of Foreign Exchange Swaps and Forwards, 75 FR 66829, Oct. 29, 2010.

[119] *See* CEA section 1a(24), 7 U.S.C. 1a(24).

[120] *See* CEA section 1a(25), 7 U.S.C. 1a(25).

[121] *See, e.g.,* CEA sections 1a(47)(E)(iii) and (iv), 7 U.S.C. 1a(47)(E)(iii) and (iv) (reporting and business conduct standards, respectively).

[122] As noted above, the proposed rules provide that foreign exchange forwards and forward exchange swaps would not be swaps if they fall within one of the exclusions set forth in subparagraph (B) of the swap definition.

[123] The exclusion of foreign exchange forwards and foreign exchange swaps would become effective upon the Secretary's submission of the determination to the appropriate Congressional Committees. *See* CEA section 1a(47)(E)(ii), 7 U.S.C. 1a(46)(E)(ii).

[124] As discussed above, however, the proposed rules provide that none of the products discussed in this section (b) would be swaps if they fall within one of the exclusions set forth in subparagraph (B) of the swap definition.

[125] This discussion is not intended to address, and has no bearing on, the CFTC's jurisdiction over foreign currency options in other contexts. *See, e.g.,* CEA sections 2(c)(2)(A)(iii) and 2(c)(2)(B)–(C), 7 U.S.C. 2(c)(2)(A)(iii) and 2(c)(2)(B)–(C) (off-exchange options in foreign currency offered or entered into with retail customers).

put, call, cap, floor, collar, or similar option of any kind that is for the purchase or sale, or based on the value, of 1 or more interest *or other rates, currencies,* commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind." [126]

Foreign exchange options traded on a national securities exchange ("NSE"), however, are securities under the Federal securities laws and not swaps or security-based swaps.[127]

Any determination by the Secretary, discussed above, that foreign exchange forwards or foreign exchange swaps should not be regulated as swaps would not impact foreign currency options because a foreign currency option is neither a foreign exchange swap nor a foreign exchange forward, as those terms are defined in the CEA. Consequently, the Commissions are proposing rules to provide clarity by explicitly defining the term "swap" to include foreign currency options (other than foreign currency options traded on an NSE).[128] The proposed rules also would clarify that foreign currency options are not foreign exchange forwards or foreign exchange swaps under the CEA.

(ii) Non-Deliverable Forward Contracts Involving Foreign Exchange

An NDF generally is similar to a forward foreign exchange contract,[129] except that at maturity, the NDF does not require physical delivery of currencies and is typically settled in U.S. dollars. The other currency, usually an emerging market currency subject to capital controls, is therefore said to be "nondeliverable." [130] If the spot market exchange rate on the settlement date is greater (in foreign currency per dollar terms) than the previously agreed forward exchange rate, the party to the contract that is long the emerging market currency must pay its counterparty the difference between the contracted forward price and the spot market rate, multiplied by the notional amount.[131]

NDFs are not expressly enumerated in the swap definition, but they satisfy clause (A)(iii) of the definition because they provide for a future (executory) payment based on an exchange rate, which is an "interest or other rate[]" within the meaning of clause (A)(iii) of the swap definition.[132] Each party to an NDF transfers to its counterparty the risk of the exchange rate moving against the counterparty, thus satisfying the requirement that there be a transfer of financial risk associated with a future change in rate. This financial risk transfer in the context of an NDF is not accompanied by a transfer of an ownership interest in any asset or liability. Thus, an NDF is a swap under clause (A)(iii) of the swap definition.[133]

As discussed above, the Secretary may determine that foreign exchange swaps or foreign exchange forwards should not be regulated as swaps. The outcome of the Secretary's determination would not impact NDFs, however, because NDFs (like foreign currency options) do not meet the definitions of the terms foreign exchange forward or foreign exchange swap set forth in the CEA. NDFs do not involve an "exchange" of two different currencies (an element of the definition of both a foreign exchange forward and a foreign exchange swap); instead, they are settled by payment in one currency (usually U.S. dollars).

Notwithstanding their "forward" label, NDFs do not fall within the forward contract exclusion of the swap definition. Currency is outside the scope of the forward contract exclusion for nonfinancial commodities. Nor have NDFs traditionally been considered commercial merchandising transactions. Rather, the NDF markets appear to be driven in large part by speculation [134] and hedging,[135] which features are more characteristic of swap markets than forward markets.

Based on the foregoing considerations, the Commissions are proposing to provide greater clarity by explicitly defining the term "swap" to include NDFs. The proposed rules also would clarify that NDFs are not foreign exchange forwards or foreign exchange swaps as those terms are defined in the CEA.

(iii) Currency Swaps and Cross-Currency Swaps

A currency swap [136] and a cross-currency swap [137] each generally can be

[126] *See* CEA section 1a(47)(A)(i), 7 U.S.C. 1a(47)(A)(i) (emphasis added).

[127] *See* CEA section 1a(47)(B)(iv), 7 U.S.C. 1a(47)(B)(iv).

[128] The proposed rules would treat the terms foreign currency options, currency options, foreign exchange options, and foreign exchange rate options as synonymous. Moreover, for purposes of the proposed rules, foreign currency options include options to enter into or terminate, or that otherwise operate on, a foreign exchange swap or foreign exchange forward or on the terms thereof. As discussed above, foreign exchange options traded on an NSE are securities and therefore not addressed in the proposed rules.

[129] A deliverable forward foreign exchange contract is an obligation to buy or sell a specific currency on a future settlement date at a fixed price set on the trade date. *See* Laura Lipscomb, "Federal Reserve Bank of New York, An Overview of Non-Deliverable Foreign Exchange Forward Markets," 1 (May 2005) (citation omitted) ("Fed NDF Overview").

[130] *See id.* at 1–2 (citation omitted).

[131] *See id.* at 2. Being long the emerging market currency means that the holder of the NDF contract is the "buyer" of the emerging market currency and the "seller" of dollars. Conversely, if the emerging market currency appreciates relative to the previously agreed forward rate, the holder of the contract that is short the emerging market currency must pay its counterparty the difference between the spot market rate and the contracted forward price, multiplied by the notional amount. *See id.* at 2, n.4.

[132] *See* CEA section 1a(47)(A)(iii), 7 U.S.C. 1a(47)(A)(iii) (providing that a swap is an agreement, contract, or transaction "that provides on an executory basis for the exchange, on a fixed or contingent basis, of 1 or more payments based on the value or level of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind, or any interest therein or based on the value thereof, and that transfers, as between the parties to the transaction, in whole or in part, the financial risk associated with a future change in any such value or level without also conveying a current or future direct or indirect ownership interest in an asset (including any enterprise or investment pool) or liability that incorporates the financial risk so transferred * * *.").

[133] It appears that at least some market participants view NDFs as swaps today. *See, e.g.,* Credit Suisse, "Non-Deliverable Forwards," at 1 (characterizing NDFs as "a derivative instrument for hedging * * * exchange-rate risk" in the absence of a forwards market), available at *https://www.credit-suisse.com/ch/unternehmen/kmugrossunternehmen/doc/nondeliverable_forward_en.pdf;* Association of Corporate Treasurers, "Glossary of Terms" (defining an NDF as "[a] foreign currency financial derivative contract"), available at *http://www.treasurers.org/glossary/N#Non-deliverableforward.* Thus, NDFs also may fall within clause (A)(iv) of the swap definition as "an agreement, contract, or transaction that is, or in the future becomes, commonly known to the trade as a swap." *See* CEA section 1a(47)(A)(iv), 7 U.S.C. 1a(47)(A)(iv). *Cf.* CFTC rule 35.1(b)(1)(i), 17 CFR 35.1(b)(1)(i) (providing that the definition of "swap agreement" includes a "forward foreign exchange agreement," without reference to convertibility or delivery).

[134] *See* "Fed NDF Overview," *supra* note 129, at 5 ("[E]stimates vary but many major market participants estimate as much as 60 to 80 percent of NDF volume is generated by speculative interest, noting growing participation from international hedge funds.") and 4 ("[D]ealers note that much of the volume in Chinese *yuan* NDFs is generated by speculative positioning based on expectations for an alteration in China's current, basically fixed exchange rate.") (italics in original).

[135] *See id.* at 4 (noting that "[much of the] Korean *won* NDF volume[,] * * * estimated to be the largest of any currency, * * * is estimated to originate with international investment portfolio managers hedging the currency risk associated with their onshore investments").

[136] A swap that exchanges a fixed rate against a fixed rate is known as a currency swap. *See* Federal Reserve System, "Trading and Capital-Markets Activities Manual," section 4335.1 (Jan. 2009).

[137] Cross-currency swaps with a fixed leg based on one rate and a floating leg based on another rate, where the two rates are denominated in different currencies, are generally referred to as cross-currency coupon swaps, while those with a floating leg based on one rate and another floating leg based on a different rate are known as cross-currency basis swaps. *Id.* Cross-currency swaps also include annuity swaps and amortizing swaps. In cross-

described as a swap in which the fixed legs or floating legs based on various interest rates are exchanged in different currencies. Such swaps can be used to reduce borrowing costs, to hedge currency exposure, and to create synthetic assets [138] and are viewed as an important tool, given that they can be used to hedge currency and interest rate risk in a single transaction.

Currency swaps and cross-currency swaps are not foreign exchange swaps as defined in the CEA because, although they may involve an exchange of foreign currencies, they also require contingent or variable payments in different currencies. Because the CEA defines a foreign exchange swap as a swap that "solely" involves an initial exchange of currencies and a reversal thereof at a later date, subject to certain parameters, currency swaps and cross-currency swaps would not be foreign exchange swaps. Similarly, currency swaps and cross-currency swaps are not foreign exchange forwards because foreign exchange forwards "solely" involve an initial exchange of currencies, subject to certain parameters, while currency swaps and cross-currency swaps contain additional elements, as discussed above.

Currency swaps are expressly enumerated in the statutory definition of the term "swap." [139] Cross-currency swaps, however, are not.[140] Accordingly, based on the foregoing considerations, the Commissions are proposing rules to provide greater clarity by explicitly defining the term "swap" to include cross-currency swaps. The proposed rules also would clarify that neither currency swaps nor cross-currency swaps are foreign exchange forwards or foreign exchange swaps as those terms are defined in the CEA.

Request for Comment

52. Should the proposed rules explicitly define the term "swap" to include foreign exchange forwards and foreign exchange swaps, unless the Secretary determines to exempt them? Should the proposed rules clarify that, if the Secretary determines to exempt foreign exchange swaps or foreign exchange forwards, those transactions remain subject to certain reporting requirements, and swap dealers and major swap participants entering into such transactions remain subject to certain business conduct standards, imposed by Title VII and CFTC regulations promulgated thereunder? Why or why not?

53. Should the proposed rules explicitly define the term "swap" to include foreign currency options and clarify that foreign currency options are not foreign exchange forwards or foreign exchange swaps? Why or why not? Should the terms foreign currency options, currency options, foreign exchange options, and foreign exchange rate options be interpreted as synonymous? Why or why not?

54. Should the proposed rules explicitly define the term "swap" to include NDFs and clarify that NDFs are not foreign exchange forwards or foreign exchange swaps? Why or why not?

55. Should the proposed rules explicitly define the term "swap" to include cross-currency swaps as swaps and clarify that currency swaps and cross-currency swaps are not foreign exchange forwards or foreign exchange swaps? Why or why not? Should the terms cross-currency swap and cross-currency rate swap be interpreted as synonymous? Why or why not?

56. Is additional detail needed within the proposed rules regarding foreign exchange-related products to provide greater clarity regarding the specific products listed in the proposed rules? If so, what additional detail would be necessary?

3. Forward Rate Agreements

In general, the Commissions understand an FRA to be an over-the-counter contract for a single cash payment, due on the settlement date of a trade, based on a spot rate (determined pursuant to a method agreed upon by the parties) and a prespecified forward rate. The single cash payment is equal to the product of the present value (discounted from a specified future date to the settlement date of the trade) of the difference between the forward rate and the spot rate on the settlement date multiplied by the notional amount. The notional amount itself is not exchanged.[141]

An FRA provides for the future (executory) payment based on the transfer of interest rate risk between the parties as opposed to transferring an ownership interest in any asset or liability.[142] Thus, the Commissions believe that an FRA satisfies clause (A)(iii) of the swap definition.[143]

Notwithstanding their "forward" label, FRAs do not fall within the forward contract exclusion from the swap definition. FRAs do not involve nonfinancial commodities and thus are outside the scope of the forward contract exclusion. Nor is an FRA a commercial merchandising transaction, as there is no physical product to be delivered in an FRA.[144] Accordingly,

currency annuity swaps, level cash flows in different currencies are exchanged with no exchange of principal; annuity swaps are priced such that the level payment cash flows in each currency have the same net present value at the inception of the transaction. An amortizing cross-currency swap is structured with a declining principal schedule, usually designed to match that of an amortizing asset or liability. *Id. See also* Derivatives ONE, "Cross Currency Swap Valuation" ("A cross currency swap is swap of an interest rate in one currency for an interest rate payment in another currency. * * * This could be considered an interest rate swap with a currency component."), available at *http://www.derivativesone.com/cross-currency-swap-valuation/;* Financial Accounting Standards Board, "Examples Illustrating Application of FASB Statement No. 138," Accounting for Certain Derivative Instruments and Certain Hedging Activities, section 2, Example 1, at 3 ("The company designates the cross-currency swap as a fair value hedge of the changes in the fair value of the loan due to both interest and exchange rates."), available at *http://www.fasb.org/derivatives/examples.pdf.*

[138] BMO Capital Markets, "Cross Currency Swaps," available at *http://www.bmocm.com/products/marketrisk/intrderiv/cross/default.aspx.*

[139] *See* CEA section 1a(47)(A)(iii)(VII), 7 U.S.C. 1a(47)(A)(iii)(VII).

[140] Clause (A)(iii) of the swap definition expressly refers to a cross-currency rate swap. *See* CEA section 1a(47)(A)(iii)(V), 7 U.S.C. 1a(47)(A)(iii)(V). Although the swap industry appears to use the term "cross-currency swap," rather than "cross-currency rate swap" (the term used in CEA section 1a(47)(A)(iii)(V)), the Commissions interpret these terms as synonymous.

[141] *See generally* "Trading and Capital-Markets Activities Manual," *supra* note 136, section 4315.1 ("For example, in a six-against-nine-month (6x9) FRA, the parties agree to a three-month rate that is to be netted in six months' time against the prevailing three-month reference rate, typically LIBOR. At settlement (after six months), the present value of the net interest rate (the difference between the spot and the contracted rate) is multiplied by the notional principal amount to determine the amount of the cash exchanged between the parties * * *. If the spot rate is higher than the contracted rate, the seller agrees to pay the buyer the differences between the prespecified forward rate and the spot rate prevailing at maturity, multiplied by a notional principal amount. If the spot rate is lower than the forward rate, the buyer pays the seller.").

[142] It appears that at least some in the trade view FRAs as swaps today. *See, e.g.,* The Globecon Group, Ltd., "Derivatives Engineering: A Guide to Structuring, Pricing and Marketing Derivatives," 45 (McGraw-Hill 1995) ("An FRA is simply a one-period interest-rate swap."); DerivActiv, Glossary of Financial Derivatives Terms ("A swap is * * * a strip of FRAs."), available at *http://www.derivactiv.com/definitions.aspx?search=forward+rate+agreements. Cf.* Don M. Chance, *et. al,* "Derivatives in Portfolio Management," 29 (AIMR 1998) ("[An FRA] involves one specific payment and is basically a one-date swap (in the sense that a swap is a combination of FRAs[,] with some variations)."). Thus, FRAs also may fall within clause (A)(iv) of the swap definition, as "an agreement, contract, or transaction that is, or in the future becomes, commonly known to the trade as a swap." *See* CEA section 1a(47)(a)(iv), 7 U.S.C. 1a(47)(a)(iv).

[143] *See* CEA section 1a(47)(A)(iii); 7 U.S.C. 1a(47)(A)(iii). CFTC regulations have defined FRAs as swap agreements. *See* CFTC rule 35.1(b)(1)(i), 17 CFR 35.1(b)(1)(i); Exemption for Certain Swap Agreements, 58 FR 5587, Jan. 22, 1993. The CFTC recently has proposed to repeal that rule in light of the enactment of Title VII of the Dodd-Frank Act. *See* Commodity Options and Agricultural Swaps, *supra* note 78.

[144] *See* Regulation of Hybrid and Related Instruments, 52 FR 47022, 47028, Dec. 11, 1987

Continued

the Commissions believe that the forward contract exclusion from the swap definition for nonfinancial commodities does not apply to FRAs.[145]

Based on the foregoing considerations, the Commissions are proposing rules to provide greater clarity by explicitly defining the term "swap" to include FRAs. As with the foreign exchange-related products discussed above, the proposed rules provide that FRAs would not be swaps if they fall within one of the exclusions set forth in subparagraph (B) of the swap definition.

Request for Comment

57. Is the description of FRAs accurate? If not, please provide a detailed description of FRAs. Are there various types of FRAs? If so, please provide an explanation of their characteristics and how they differ.

58. What types of market participants use FRAs, and for what purposes? What market (spot) and fixed rates are used in FRAs, and how are those rates determined, or on what are those rates based?

59. Should the proposed rules explicitly define the term "swap" to include FRAs? Why or why not?

60. Should the proposed rules provide a more detailed description of what FRAs are? Why or why not? If so, please explain what additional language regarding FRAs should be included in the proposed rules.

4. Combinations and Permutations of, or Options on, Swaps and Security-Based Swaps

Clause (A)(vi) of the swap definition provides that "any combination or permutation of, or option on, any agreement, contract, or transaction described in any of clauses (i) through (v)" of the definition is a swap or security-based swap.[146] As a result, clause (A)(vi) means, for example, that an option on a swap or security-based swap (commonly known as a "swaption") would itself be a swap or security-based swap, respectively. The Commissions also interpret clause (A)(vi) to mean that a "forward swap" would itself be a swap or security-based swap, respectively.[147]

Request for Comment

61. Is additional guidance regarding swaptions, necessary? Why or why not? If so, please provide a detailed explanation of what additional guidance would be necessary.

62. Is the Commissions' description of forward swaps accurate? Why or why not? If not, please provide a detailed explanation of why the description is inaccurate. Is additional guidance regarding forward swaps necessary? Why or why not? If so, please provide a detailed explanation of what additional guidance would be necessary.

63. Is additional guidance regarding other combinations or permutations of swaps or security-based swaps necessary? Why or why not? If so, please provide a detailed description of any particular agreement, contract, or transaction, including the purposes for which it is used and the market participants that use it, and what additional guidance would be necessary.

5. Contracts for Differences

The Commissions have received inquiries over the years regarding the treatment of CFDs under the CEA and the Federal securities laws. A CFD generally is an agreement to exchange the difference in value of an underlying asset between the time at which a CFD position is established and the time at which it is terminated.[148] If the value increases, the seller pays the buyer the difference; if the value decreases, the buyer pays the seller the difference. CFDs can be traded on a number of products, including treasuries, foreign exchange rates, commodities, equities, and stock indexes. Equity CFDs closely mimic the purchase of actual shares. The buyer of an equity CFD receives cash dividends and participates in stock splits.[149] In the case of a long position, a dividend adjustment is credited to the client's account. In the case of a short position, a dividend adjustment is debited from the client's account. CFDs generally are traded over-the-counter (though they also are traded on the Australian Securities Exchange) in a number of countries outside the United States.

CFDs, unless otherwise excluded, may fall within the scope of the swap and security-based swap definitions.[150] Whether a CFD is a swap or security-based swap will depend on the underlying product of that particular CFD transaction. Because CFDs are highly variable and a CFD can contain a variety of elements that would affect its characterization, the Commissions believe that market participants will need to analyze the characteristics of any particular CFD in order to determine whether it is a swap or a security-based swap. Therefore, the Commissions are not proposing rules or additional interpretive guidance at this time regarding CFDs.

Request for Comment

64. Should the Commissions provide additional guidance regarding CFDs? Why or why not? If so, please provide a detailed description of any particular CFD and what additional guidance would be necessary.

(stating "[FRAs] do not possess all of the characteristics of forward contracts heretofore delineated by the [CFTC]").

[145] Current European Union law includes FRAs in the definition of "financial instruments." *See* Markets in Financial Instruments Directive (MiFID), "Directive 2004/39/EC of the European Parliament and of the Council," Annex I(C), 4, 5, 10 (Apr. 21, 2004), available at *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2004L0039:20070921:EN:PDF.* A European Commission legislative proposal on derivatives, central clearing, and trade repositories applies to FRAs that are traded over-the-counter and, thus, would subject such transactions to mandatory clearing, reporting and other regulatory requirements. *See Proposal for a Regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories,* title I, art. 1(1), COM(2010) 484/5 (Sept. 15, 2010), available at *http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/20100915_proposal_en.pdf.*

[146] *See* CEA section 1a(47)(vi), 7 U.S.C. 1a(47)(vi).

[147] Forward swaps are also commonly known as forward start swaps, or deferred or delayed start swaps. A forward swap can involve two offsetting swaps that both start immediately, but one of which ends on the deferred start date of the forward swap itself. For example, if a counterparty wants to hedge its risk for four years, starting one year from today, it could enter into a one-year swap and a five-year swap, which would partially offset to create a four-year swap, starting one year forward. A forward swap also can involve a contract to enter into a swap or security-based swap at a future date or with a deferred start date. A forward swap is not a nonfinancial commodity forward contract or security forward, both of which are excluded from the swap definition and discussed elsewhere in this release.

[148] *See* Ontario Securities Commission, Staff Notice 91–702, "Offerings of Contracts for Difference and Foreign Exchange Contracts to Investors in Ontario," at part IV.1 (defining a CFD as "a derivative product that allows an investor to obtain economic exposure (for speculative, investment or hedging purposes) to an underlying asset * * * such as a share, index, market sector, currency or commodity, without acquiring ownership of the underlying asset"), available at *http://www.osc.gov.on.ca/documents/en/Securities-Category9/sn_20091030_91–702_cdf.pdf* (Oct. 30, 2009); Financial Services Authority, Consultation Paper 7/20, "Disclosure of Contracts for Difference—Consultation and draft Handbook text," at part 2.2 (defining a CFD on a share as "a derivative product that gives the holder an economic exposure, which can be long or short, to the change in price of a specific share over the life of the contract"), available at *http://www.fsa.gov.uk/pubs/cp/cp07_20.pdf* (Nov. 2007).

[149] *See, e.g.,* Int'l Swaps and Derivatives Ass'n, "2002 ISDA Equity Derivatives Definitions," art. 10 (Dividends) and 11 (Adjustments and Modifications Affecting Indices, Shares and Transactions).

[150] In some cases, depending on the facts and circumstances, the SEC may determine that a particular CFD on an equity security, for example, should be characterized as constituting a purchase or sale of the underlying equity security and, therefore, be subject to the requirements of the Federal securities laws applicable to such purchases or sales.

D. Certain Interpretive Issues

1. Agreements, Contracts, or Transactions That May Be Called, or Documented Using Form Contracts Typically Used for, Swaps or Security-Based Swaps

The Commissions are aware that individuals and companies may generally use the term "swap" to refer to certain of their agreements, contracts, or transactions. For example, the term "swap" may be used to refer to an agreement to exchange real or personal property between the parties. Or, two companies that produce fungible products may use the term "swap" to refer to an agreement to perform each other's delivery obligations—for example, if one company must deliver the product in California and the other must deliver the same product in New York, they may use the term "swap" to refer to an agreement that each company will perform the other's delivery obligation.

The name or label that the parties use to refer to a particular agreement, contract, or transaction is not determinative of whether it is a swap or security-based swap.[151] Also, it may not be relevant whether the agreement, contract, or transaction is documented using an industry standard form agreement that is typically used for swaps and security-based swaps.[152] Instead, the relevant question is whether the agreement, contract, or transaction falls within the definition of the terms "swap" or "security-based swap" (as further interpreted pursuant to the guidance proposed herein) based on its terms and other characteristics. Even if one effect of an agreement is to reduce the risk faced by the parties (*e.g.,* the "swap" of physical delivery obligations described above may reduce the risk of non-delivery), the agreement is not a swap or security-based swap unless it otherwise meets one of the statutory definitions, as further defined by the Commissions. Similarly, the fact that the parties use another name to refer to a swap or security-based swap would not be relevant in determining whether the agreement, contract, or transaction is a swap or security-based swap as those terms are defined in the CEA and the Exchange Act and the rules and regulations thereunder.

Request for Comment

65. What agreements, contracts, or transactions that are not swaps or security-based swaps are documented using industry standard form agreements that are typically used for swaps and security-based swaps? Please provide examples of such agreements, contracts, or transactions and details regarding their documentation, including why industry standard form agreements typically used for swaps and security-based swaps are used.

2. Transactions in Regional Transmission Organizations and Independent System Operators

The Commissions received a comment letter in response to the ANPR requesting clarification regarding the status of transactions in RTOs and ISOs, including financial transmission rights ("FTRs"), under the swap and security-based swap definitions.[153] Section 722 of the Dodd-Frank Act, though, specifically addresses how the CFTC should approach products regulated by FERC that also may be subject to CFTC jurisdiction. Section 722 of the Dodd-Frank Act amended CEA section 4(c) [154] to provide that, if the CFTC determines that an exemption for FERC-regulated instruments or other specified electricity transactions would be in accordance with the public interest, then it shall exempt such instruments or transactions from the requirements of the CEA. Given this specific provision regarding these FERC-related products, the CFTC believes the treatment of these products should be considered under the standards and procedures specified in section 722 of the Dodd-Frank Act for a public interest waiver, rather than through this joint rulemaking to further define the terms "swap" and "security-based swap."

Consequently, the Commissions are not addressing FTRs or other transactions in RTOs or ISOs within this joint definitional rulemaking. Instead, persons with concerns about whether FERC-regulated products may be considered swaps (or futures) should request an exemption pursuant to section 722 of the Dodd Frank Act.[155]

III. The Relationship Between the Swap Definition and the Security-Based Swap Definition

A. Introduction

Title VII of the Dodd-Frank Act defines the term "swap" under the CEA,[156] and also defines the term "security-based swap" under the Exchange Act.[157] Pursuant to the regulatory framework established in Title VII, the CFTC has regulatory authority over swaps and the SEC has regulatory authority over security-based swaps. The Commissions are proposing to further define the terms "swap" and "security-based swap" to clarify whether particular agreements, contracts, or transactions are swaps or security-based swaps based on characteristics including the specific terms and conditions of the instrument and the nature of, among other things, the prices, rates, securities, indexes, or commodities upon which the instrument is based.

Because the discussion below is focused on whether particular agreements, contracts, or transactions are swaps or security-based swaps, the Commissions use the term "Title VII instrument" in this release to refer to any agreement, contract, or transaction that is included in either the definition of the term "swap" or the definition of the term "security-based swap." Thus, the term "Title VII instrument" is synonymous with "swap or security-based swap." [158]

The determination of whether a Title VII instrument is a swap or security-

[151] *See, e.g., Haekel* v. *Refco,* 2000 WL 1460078, at * 4 (CFTC Sept. 29, 2000) ("[T]he labels that parties apply to their transactions are not necessarily controlling"); *Reves* v. *Ernst & Young,* 494 U.S. 56, 61 (1990) (stating that the purpose of the securities laws is "to regulate *investments,* in whatever form they are made and by whatever name they are called") (emphasis in original).

[152] The CFTC consistently has found that the form of a transaction is not dispositive in determining its nature. *See, e.g., Grain Land, supra* note 61, at *16 (CFTC Nov. 25, 2003) (holding that contract substance is entitled to at least as much weight as form); *In the Matter of First Nat'l Monetary Corp.,* [1984–1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,698 at 30,974 (CFTC Aug. 7, 1985) ("When instruments have been determined to constitute the functional equivalent of futures contracts neither we nor the courts have hesitated to look behind whatever self-serving labels the instruments might bear."); *Stovall, supra* note 63 (holding that the CFTC "will not hesitate to look behind whatever label the parties may give to the instrument"). Likewise, the form of a transaction is not dispositive in determining whether an agreement, contract, or transaction falls within the regulatory regime for securities. *See SEC* v. *Merch. Capital, LLC,* 483 F.3d 747, 755 (11th Cir. 2007) ("The Supreme Court has repeatedly emphasized that economic reality is to govern over form and that the definitions of the various types of securities should not hinge on exact and literal tests.") (*quoting Williamson* v. *Tucker,* 645 F.2d 404, 418 (5th Cir. 1981)); *Robinson* v. *Glynn,* 349 F.3d 166, 170 (4th Cir. 2003) ("What matters more than the form of an investment scheme is the 'economic reality' that it represents * * * .") (internal citation omitted); *Caiola* v. *Citibank, N.A., New York,* 295 F.3d 312, 325 (2d Cir. 2002) (*quoting United Housing Foundation* v. *Foreman,* 421 U.S. 837, 848 (1975) ("In searching for the meaning and scope of the word 'security' * * * the emphasis should be on economic reality")).

[153] *See* WGCEF Letter.

[154] 7 U.S.C. 6(c).

[155] This approach, however, should not be taken to suggest any findings by the Commissions as to whether or not FTRs or any other FERC-regulated products are swaps (or futures contracts).

[156] *See* CEA section 1a(47), 7 U.S.C. 1a(47).

[157] *See* section 3(a)(68) of the Exchange Act, 15 U.S.C. 78c(a)(68).

[158] In some cases, the Title VII instrument may be a mixed swap. Mixed swaps are discussed further in part IV below.

based swap should be made based on the facts and circumstances relating to the Title VII instrument at the time that the parties enter into it. If the Title VII instrument itself is not amended, modified, or otherwise adjusted during its term by the parties, its characterization as a swap or security-based swap should not change during its duration because of any changes that may occur to the factors affecting its character as a swap or security-based swap.[159]

Classifying a Title VII instrument as a swap or security-based swap is straightforward for most instruments. The Commissions, however, are proposing guidance to clarify the classification of swaps and security-based swaps in certain areas and to provide guidance regarding the use of certain terms and conditions in Title VII instruments.

B. Title VII Instruments Based on Interest Rates, Other Monetary Rates, and Yields

Parties frequently use Title VII instruments to manage risks related to, or to speculate on, changes in interest rates, other monetary rates or amounts, or the return on various types of assets. Broadly speaking, Title VII instruments based on interest or other monetary rates would be swaps, whereas Title VII instruments based on the yield or value of a single security, loan, or narrow-based security index would be security-based swaps. However, market participants and financial professionals sometimes use the terms "rate" and "yield" in different ways. The Commissions are proposing guidance regarding whether Title VII instruments that are based on interest rates, other monetary rates, or yields would be swaps or security-based swaps and requesting comment as to whether additional clarification in this area would be appropriate.[160]

1. Title VII Instruments Based on Interest Rates or Other Monetary Rates That Are Swaps

The Commissions believe that when payments exchanged under a Title VII instrument are based solely on the levels of certain interest rates or other monetary rates that are not themselves based on one or more securities, the instrument would be a swap and not a security-based swap.[161] Often swaps on interest rates or other monetary rates require the parties to make payments based on the comparison of a specified floating rate (such as the London Interbank Offered Rate ("LIBOR")) to a fixed rate of interest agreed upon by the parties. A rate swap also may require payments based on the differences between two floating rates, or it may require that the parties make such payments when any agreed-upon events with respect to interest rates or other monetary rates occur (such as when a specified interest rate crosses a threshold, or when the spread between two such rates reaches a certain point). The rates referenced for the parties' obligations are varied, and examples of such rates include the following:

- *Interbank Offered Rates:* An average of rates charged by a group of banks for lending money to each other or other banks over various periods of time, and other similar interbank rates,[162] including, but not limited to, LIBOR (regardless of currency);[163] the Euro Interbank Offered Rate ("Euribor"); the Canadian Dealer Offered Rate ("CDOR"); and the Tokyo Interbank Offered Rate ("TIBOR");[164]
- *Money Market Rates:* A rate established or determined based on actual lending or money market transactions, including, but not limited to, the Federal Funds Effective Rate; the Euro Overnight Index Average ("EONIA" or "EURONIA") (which is the weighted average of overnight unsecured lending transactions in the Euro-area interbank market); the EONIA Swap Index; the Australian dollar RBA 30 Interbank Overnight Cash Rate; the Canadian Overnight Repo Rate Average ("CORRA"); the Mexican interbank equilibrium interest rate ("TIIE"); the NZD Official Cash Rate; the Sterling Overnight Interbank Average Rate ("SONIA") (which is the weighted average of unsecured overnight cash transactions brokered in London by the Wholesale Markets Brokers' Association); the Swiss Average Rate Overnight ("SARON"); and the Tokyo Overnight Average Rate ("TONAR") (which is based on uncollateralized overnight average call rates for interbank lending);
- *Government Target Rates:* A rate established or determined based on guidance established by a central bank including, but not limited to, the Federal Reserve discount rate, the Bank of England base rate and policy rate, the Canada Bank rate, and the Bank of Japan policy rate (also known as the Mutan rate);
- *General Lending Rates:* A general rate used for lending money, including, but not limited to, a prime rate, rate in the commercial paper market, or any similar rate provided that it is not based on any security, loan, or group or index of securities;
- *Indexes:* A rate derived from an index of any of the foregoing or following rates, averages, or indexes, including but not limited to a constant maturity rate (U.S. Treasury and certain other rates),[165] the interest rate swap rates published by the Federal Reserve in its "H.15 Selected Interest Rates" publication, the ISDAFIX rates, the ICAP Fixings, a constant maturity swap, or a rate generated as an average (geometric, arithmetic, or otherwise) of any of the foregoing, such as overnight index swaps ("OIS")—provided that such rates are not based on a specific

[159] *See* discussion *infra* part III.G.3(a) regarding Title VII instruments based on indexes.

[160] Commenters did not address these instruments specifically. A number of commenters urged clarification that various transactions or obligations, such as commercial loans, are not Title VII instruments solely because they reference an interest rate. *See* BlackRock Letter; Cleary Letter; Farm Credit Council Letter; White & Case Letter. The Commissions have proposed guidance to address such customary commercial transactions in part II.B.3 above.

[161] *See* discussion *supra* part III.F regarding the use of certain terms and conditions.

[162] Interbank lending rates are measured by surveys of the loan rates that banks offer other banks, or by other mechanisms. The periods of time for such loans may range from overnight to 12 months or longer.

The interbank offered rates listed here are frequently called either a "reference rate," the rate of "reference banks," or by a designation that is specific to the service that quotes the rate. For some of the interbank offered rates listed here, there is a similar rate that is stated as an interbank bid rate, which is the average rate at which a group of banks bid to borrow money from other banks. For example, the bid rate similar to LIBOR is called LIBID.

[163] Today, LIBOR is used as a rate of reference for the following currencies: Australian Dollar, Canadian Dollar, Danish Krone, Euro, Japanese Yen, New Zealand Dollar, Pound Sterling, Swedish Krona, Swiss Franc, and U.S. Dollar.

[164] Other interbank offered rates include the following (with the country or city component of the acronym listed in parentheses): AIDIBOR (Abu Dhabi); BAIBOR (Buenos Aires); BKIBOR (Bangkok); BRAZIBOR (Brazil); BRIBOR/BRIBID (Bratislava); BUBOR (Budapest); CHIBOR (China); CHILIBOR (Chile); CIBOR (Copenhagen); COLIBOR (Colombia); HIBOR (Hong Kong); JIBAR (Johannesburg); JIBOR (Jakarta); KAIBOR (Kazakhstan); KIBOR (Karachi); KLIBOR (Kuala Lumpur); KORIBOR ((South) Korea); MEXIBOR (Mexico); MIBOR (Mumbai); MOSIBOR (Moscow); NIBOR (Norway); PHIBOR (Philippines); PRIBOR (Prague); REIBOR/REIBID (Reykjavik); RIGIBOR/RIGIBID (Riga); SHIBOR (Shanghai); SIBOR (Singapore); SOFIBOR (Sofia); STIBOR (Stockholm); TAIBOR (Taiwan); TELBOR (Tel Aviv); TRLIBOR and TURKIBOR (Turkey); VILIBOR (Vilnius); VNIBOR (Vietnam); and WIBOR (Warsaw).

[165] A Title VII instrument based solely on the level of a constant maturity U.S. Treasury rate would be a swap because U.S. Treasuries are exempted securities that are excluded from the security-based swap definition. Conversely, a Title VII instrument based solely on the level of a constant maturity rate on a narrow-based index of non-exempted securities under the security-based swap definition would be a security-based swap.

security, loan, or narrow-based group or index of securities;

• *Other Monetary Rates:* A monetary rate including, but not limited to, the Consumer Price Index ("CPI"), the rate of change in the money supply, or an economic rate such as a payroll index; and

• *Other:* The volatility, variance, rate of change of (or the spread, correlation or difference between), or index based on any of the foregoing rates or averages of such rates, such as forward spread agreements, references used to calculate the variable payments in index amortizing swaps (whereby the notional principal amount of the agreement is amortized according to the movement of an underlying rate), or correlation swaps and basis swaps, including but not limited to, the "TED spread" [166] and the spread or correlation between LIBOR and an OIS.

As discussed above, the Commissions believe that when payments under a Title VII instrument are based solely on any of the foregoing, such Title VII instrument would be a swap.

Request for Comment

66. The Commissions request comment generally on the foregoing proposed guidance regarding Title VII instruments where the underlying reference is an interest rate or other monetary rate.

67. Does the proposed guidance in this section accurately describe the types of interest rates and other monetary rates that are used as an underlying reference of a Title VII instrument, and that should cause the instrument to be considered a swap? Are any of the rates identified in this list not used in this manner? Are there any significant interest or monetary rates that should be added to this list in order to provide additional guidance?

68. As discussed above, a Title VII instrument would be considered a security-based swap if the instrument is based on constant maturity rates that are derived from the market prices and yields of a non-exempted debt security or a narrow-based security index of debt securities (depending on the other terms of the Title VII instrument, such instrument may be a mixed swap). The Commissions request comment on this guidance. Are there certain constant maturity rates that should not be considered to be security-based, such that a Title VII instrument based on those rates would instead be a swap and not a security-based swap or mixed swap? If so, are there objective criteria to distinguish between different types of constant maturity rates in the determination of whether a Title VII instrument is a swap or security-based swap? If so, please describe any such criteria in detail.

2. Title VII Instruments Based on Yields

The Commissions also propose guidance to clarify the status of Title VII instruments in which one of the underlying references of the instrument is a "yield." In cases when a "yield" is calculated based on the price or changes in price of a debt security, loan, or narrow-based security index, it is another way of expressing the price or value of a debt security, loan, or narrow-based security index. For example, debt securities often are quoted and traded on a yield basis rather than on a dollar price, where the yield relates to a specific date, such as the date of maturity of the debt security (*i.e.,* yield to maturity) or the date upon which the debt security may be redeemed or called by the issuer (*e.g.,* yield to first whole issue call).[167]

Except in the case of certain exempted securities, when one of the underlying references of the Title VII instrument is the "yield" of a debt security, loan, or narrow-based security index in the sense where the term "yield" is used as a proxy for the price or value of the debt security loan, or narrow-based security index, the Title VII instrument would be a security-based swap. And, as a result, in cases where the underlying reference is a point on a "yield curve" generated from the different "yields" on debt securities in a narrow-based security index (*e.g.,* a constant maturity yield or rate), the Title VII instrument would be a security-based swap. In either case, however, where certain exempted securities, such as U.S. Treasury securities, are the only underlying reference of a Title VII instrument involving securities, the Title VII instrument would be a swap. Title VII instruments based on exempted securities are discussed further below.

The above interpretation would not apply in cases where the "yield" referenced in a Title VII instrument is not based on a debt security, loan, or narrow-based security index of debt securities but rather is being used to reference an interest rate or monetary rate as outlined above in subsection one of this section. In these cases, this "yield" reference would be considered equivalent to a reference to an interest rate or monetary rate and the Title VII instrument would be, under the guidance in this section, a swap (or mixed swap depending on other references in the instrument).

Request for Comment

69. The Commissions request comment generally on the foregoing proposed guidance regarding Title VII instruments where the underlying reference is a "yield." Please provide a detailed explanation of any uncertainty regarding the Commissions' proposed use of the terms "yield" and "yield curve" and what additional guidance would be necessary.

70. Does the proposed guidance in this section appropriately describe instruments based on the "yield" of a debt security that should be considered security-based swaps? Is additional guidance necessary regarding when the term "yield" is used as a proxy for price or value? If so, please provide a detailed explanation of any uncertainty regarding how the term "yield" is used and what additional guidance would be necessary.

71. Are there instruments where the underlying reference is a "yield" of a debt security that should be considered a swap as opposed to a security-based swap? If so, what are they, and how often are they traded? How are such instruments distinguished from instruments based on "yield" that should be considered security-based swaps?

3. Title VII Instruments Based on Government Debt Obligations

The Commissions also are providing guidance regarding instances in which the underlying reference of the Title VII instrument is a government debt obligation. The security-based swap definition specifically excludes any agreement, contract, or transaction that meets the definition of a security-based swap only because it "references, is based upon, or settles through the transfer, delivery, or receipt of an exempted security under [section 3(a)(12) of the Exchange Act], as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in [section 3(a)(29) of the Exchange Act] * * *), unless such agreement, contract, or transaction is of the character of, or

[166] The TED spread is the difference between the interest rates on interbank loans and short-term U.S. government debt (Treasury bills or "T-bills"). The latter are exempted securities that are excluded from the statutory definition of the term "security-based swap." Thus, neither any aspect of U.S. Treasuries nor interest rates on interbank loans, can form the basis of a security-based swap. For this reason, a Title VII instrument on a spread between interbank loan rates and T-bill rates also would not be a security-based swap.

[167] *See, e.g.,* Securities Confirmations, 47 FR 37920, Aug. 27, 1982.

is commonly known in the trade as, a put, call, or other option." [168]

As a result of this exclusion in the security-based swap definition for "exempted securities," [169] if the only underlying reference of a Title VII instrument involving securities is, for example, the price of a U.S. Treasury security and does not have any other underlying reference involving securities, then the instrument would be a swap. Similarly, if the Title VII instrument is based on the "yield" of a U.S. Treasury security and does not have any other underlying reference involving securities, then the instrument also would be a swap, regardless of whether the term "yield" is a proxy for the price of the security.

Foreign government securities, by contrast, were not "exempted securities" as of the date of enactment of the Futures Trading Act of 1982 [170] and thus do not explicitly fall within this exclusion from the security-based swap definition. Therefore, if the underlying reference of the Title VII instrument is the price, value, or "yield" (where "yield" is a proxy for price or value) of a foreign government security, or a point on a yield curve derived from a narrow-based security index composed of foreign government securities, then the instrument would be a security-based swap.

Request for Comment

72. The Commissions request comment generally on the foregoing proposed guidance regarding the treatment of Title VII instruments in which the underlying reference is a government debt obligation.

General Request for Comment: In addition to the particular requests for comment set forth on the issues discussed above, the Commissions also request comment generally on the following:

73. Does the proposed guidance in this part III.B accurately describe market practices and terminology? Will the proposed guidance be useful in determining whether Title VII instruments are swaps or security-based swaps?

C. Total Return Swaps

A TRS is a Title VII instrument in which one counterparty, the seller of the TRS, makes a payment that is based on the price appreciation and income from an underlying security or security index.[171] The other counterparty, the buyer of the TRS, makes a financing payment that is often based on a variable interest rate, such as LIBOR (or other interbank offered rate or money market rate, as described above), as well as a payment based on the price depreciation of the underlying reference. The "total return" consists of the price appreciation or depreciation, plus any interest or income payments.[172] Accordingly, where a TRS is based on a single security or loan, or a narrow-based security index, the TRS would be a security-based swap.[173]

Generally, the use of a variable interest rate in the TRS buyer's payment obligations to the seller is incidental to the purpose of, and the risk that the counterparties assume in, entering into the TRS. These payments are a form of financing that reflects the security-based swap dealer's cost of financing the position or a related hedge, allowing the TRS buyer to receive payments based on the price appreciation and income of a security or security index without purchasing the security or security index. The Commissions believe that when such interest rate payments act merely as a financing component in a TRS, or in any other security-based swap, the inclusion of such interest rate terms would not cause the security-based swap to be characterized as a mixed swap.[174] Financing terms may also involve adding or subtracting a spread to or from the financing rate,[175] or calculating the financing rate in a currency other than that of the underlying reference security or security index.[176] However, the Commissions note that where such payments incorporate additional elements that create additional interest rate or currency exposures that are unrelated to the financing of the security-based swap, or otherwise shift or limit risks that are related to the financing of the security-based swap, those additional elements may cause the security-based swap to be a mixed swap.

For example, where the counterparties embed interest-rate optionality (*e.g.,* a cap, collar, call, or put) into the terms of a security-based swap in a manner designed to shift or limit interest rate exposure, the inclusion of these terms would cause

[168] Section 3(a)(68)(C) of the Exchange Act, 15 U.S.C. 76c(a)(68)(C).

[169] As of January 11, 1983, the date of enactment of the Futures Trading Act of 1982, Public Law 97–444, 96 Stat. 2294, section 3(a)(12) of the Exchange Act, 15 U.S.C. 78c(a)(12), provided that, among other securities, "exempted securities" include: (i) "securities which are direct obligations of, or obligations guaranteed as to principal or interest by, the United States;" (ii) certain securities issued or guaranteed by corporations in which the United States has a direct or indirect interest as designated by the Secretary of the Treasury; and (iii) certain other securities as designated by the SEC in rules and regulations.

[170] Public Law 97–444, 96 Stat. 2294 (1983).

[171] Where the underlying security is an equity, a TRS is also known as an "equity swap."

[172] If the total return is negative, the seller receives this amount from the buyer. TRS can be used to synthetically reproduce the payoffs of a position. For example, two counterparties may enter into a 3-year TRS where the buyer of the TRS receives the positive total return on XYZ security, if any, and the seller of the TRS receives LIBOR plus 30 basis points and the absolute value of the negative total return on XYZ security, if any.

[173] If the underlying reference of the TRS is a broad-based equity security index, however, the Commissions believe that it would be a swap (and an SBSA) and not a security-based swap. In addition, a TRS on an exempted security, such as a U.S. Treasury, under section 3(a)(12) of the Exchange Act, 15 U.S.C. 78c(a)(12), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Exchange Act, 15 U.S.C. 78c(a)(29), as in effect on the date of enactment of the Futures Trading Act of 1982) would be a swap (and an SBSA) and not a security-based swap.

[174] Several commenters noted that such instruments should not be characterized as mixed swaps. *See* Cleary Letter (expressing the view that such Title VII instruments should not be characterized as mixed swaps because "the floating rate payment obligation is not the principal driver of the security-based swap and, in that sense, the security-based swap is not 'based on' the level of an interest rate within the meaning of [the Dodd-Frank Act]"); Deutsche Bank Letter (explaining that such Title VII instruments in which the party that is "synthetically short" the underlying security makes payments based on the value of the underlying security to the party that is "synthetically long," and the synthetically long party pays the synthetically short party an amount that may be based on LIBOR or another interest rate, should not be treated as mixed swaps because the payments to the synthetically short party are generally intended only for financing costs incurred in establishing or maintaining the transaction or its hedge); ISDA Letter (noting that variable interest rate-based payments in connection with a typical Title VII instrument of this type are "incidental to what is essentially a security-based transaction and should not yield mixed swap status"); Morgan Stanley Letter (noting that the interest rate-based payments in such Title VII instruments "reflect compensation for the financing costs associated" with the instrument and "are not at the core of what is being 'swapped' under the contract"); Letter from Timothy W. Cameron, Esq., Managing Director, Asset Management Group, Securities Industry and Financial Markets Association, Sept. 20, 2010 (expressing the view that such a financing component is incidental to the Title VII instrument and should not cause it to be viewed as a mixed swap).

[175] *See, e.g.,* Moorad Chowdry, "Total Return Swaps: Credit Derivatives and Synthetic Funding Instruments," at 3–4 (noting that the spread to the TRS financing rate is a function of: the credit rating of the counterparty paying the financing rate; the amount, value, and credit quality of the reference asset; the dealer's funding costs; a profit margin; and the capital charge associated with the TRS), available at *http://www.yieldcurve.com/Mktresearch/LearningCurve/TRS.pdf.*

[176] For example, a security-based swap on an equity security priced in U.S. dollars in which payments are made in Euros based on the U.S. dollar/Euro spot rate at the time the payment is made would not be a mixed swap. Under these circumstances, the currency is merely referenced in connection with the method of payment, and the counterparties are not hedging the risk of changes in currency exchange rates during the term of the security-based swap.

the TRS to be both be a swap and a security-based swap (*i.e.,* a mixed swap). Similarly, if a TRS is also based on non-security-based components (such as the price of oil, or a currency), the security-based swap would also be a swap.[177]

Request for Comment

74. Is the proposed guidance regarding TRS and other security-based swaps for which the use of a variable interest rate in a counterparty's payment obligations is incidental to the risk that counterparties assume in entering into a TRS or other security-based swap appropriate? Why or why not? If not, please provide a detailed explanation of what guidance would be appropriate.

75. How often do market participants use rates, other than interbank offered rates or money market rates, in TRS to recoup their financing costs? If so, which rates and what portion of the market (broken down by product, country, counterparty type, and/or whatever data are available to commenters), in percentage and/or dollar terms do TRS with such financing rates constitute? What factors influence the financing rates that market participants incorporate into their security-based swaps?

76. Do market participants embed optionality, such a cap, collar, put, or call, into the payment component of a TRS? If so, how frequently and for what purpose?

77. Do market participants embed nonfinancial commodity components into the payment component that directly affect the payments on a TRS rather than operating as a mere financing component? If so, how frequently and for what purpose?

78. Do market participants embed foreign currency swaps into a foreign currency payment component of a TRS? If so, how frequently and for what purpose?

79. Are there other circumstances under which a TRS should be treated as a mixed swap rather than a security-based swap or swap? If so, please provide a detailed description of such circumstances and explain why.

D. Security-Based Swaps Based on a Single Security or Loan and Single-Name Credit Default Swaps

The second prong of the security-based swap definition includes a swap that is based on "a single security or loan, including any interest therein or on the value thereof."[178] The Commissions believe that, under this prong of the definition of security-based swap, a single-name CDS that is based on a single reference obligation would be a security-based swap because it would be based on a single security or loan (or any interest therein or on the value thereof).

In addition, the third prong of the security-based swap definition includes a swap that is based on the occurrence of an event relating to a "single issuer of a security," provided that such event "directly affects the financial statements, financial condition, or financial obligations of the issuer."[179] This provision applies generally to event-triggered swap contracts. With respect to a CDS, such events could include the bankruptcy of an issuer, a default on one of an issuer's debt securities, or the default on a non-security loan of an issuer.[180] Therefore, the Commissions believe that if the payout on a CDS on a single issuer of a security is triggered by the occurrence of an event relating to that issuer, the CDS would be a security-based swap under the third prong.[181]

In this regard, the Commissions note that each transaction under an ISDA Master Agreement would need to be analyzed to determine whether it is a swap or security-based swap. For example, the Commissions believe that a number of single-name CDS that are executed at the same time and that are documented under one ISDA Master Agreement, but in which a separate confirmation is sent for each CDS, should be treated as an aggregation of security-based swaps. As a practical and economic matter, the Commissions believe that each such CDS would be a separate and independent transaction. Thus, such an aggregation of single-name CDS would not constitute a "group or index" under the security-based swap definition but instead would constitute multiple single-name CDS.

E. Title VII Instruments Based on Futures Contracts

A Title VII instrument that is based on a futures contract will either be a swap or a security-based swap, or both (*i.e.,* a mixed swap), depending on the nature of the futures contract, including the underlying reference of the futures contract. The Commissions believe that a Title VII instrument where the underlying reference is a security future would be a security-based swap.[182] The Commissions believe that, except with respect to certain futures on foreign government debt securities discussed below, a Title VII instrument where the underlying reference is a futures contract that is not a security future would be a swap.[183]

Title VII instruments involving futures contracts on foreign government debt securities present a unique circumstance. Rule 3a12–8 under the Exchange Act exempts certain foreign government debt securities, for purposes only of the offer, sale, or confirmation of sale of futures contracts on such foreign government debt securities, from all provisions of the Exchange Act which by their terms do not apply to an "exempted security," subject to certain conditions.[184] To date, the SEC has

[177] *See* Mixed Swaps, *infra* part IV.

[178] Section 3(a)(68)(A)(ii)(II) of the Exchange Act, 15 U.S.C. 78c(a)(68)(A)(ii)(II). The first prong of the security-based swap definition is discussed below.

[179] Section 3(a)(68)(A)(ii)(III) of the Exchange Act, 15 U.S.C. 78c(a)(68)(A)(ii)(III).

[180] The Commissions understand that in the context of credit derivatives on asset-backed securities or MBS, the events include principal writedowns, failure to pay principal and interest shortfalls.

[181] The Commissions understand that some single-name CDS now trade with fixed coupon payments expressed as a percentage of the notional amount of the transaction and payable on a periodic basis during the term of the transaction. *See* Markit, "The CDS Big Bang: Understanding the Changes to the Global CDS Contract and North American Conventions," 3, available at *http://www.markit.com/cds/announcements/resource/cds_big_bang.pdf.* The Commissions believe the existence of such single-name CDS does not change their interpretation.

[182] A security future is specifically defined in both the CEA and the Exchange Act as a futures contract on a single security or a narrow-based security index, including any interest therein or based on the value thereof, except an exempted security under section 3(a)(12) of the Exchange Act, 15 U.S.C. 78c(a)(12), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Exchange Act, 15 U.S.C. 78c(a)(29), as in effect on the date of enactment of the Futures Trading Act of 1982).

The term security future does not include any agreement, contract, or transaction excluded from the CEA under CEA sections 2(c), 2(d), 2(f), or 2(g), 7 U.S.C. 2(c), 2(d), 2(f), or 2(g), (as in effect on the date of enactment of the Commodity Futures Modernization Act of 2000 ("CFMA") or Title IV of the CFMA). *See* CEA section 1a(44), 7 U.S.C. 1a(44); section 3(a)(55) of the Exchange Act, 15 U.S.C. 78c(a)(55).

[183] Depending on the underlying reference of the futures contract, though, such swaps could be security-based swap agreements. For example, a swap on a future on the S&P 500 index would be a security-based swap agreement.

[184] Specifically, rule 3a12–8 under the Exchange Act requires as a condition to the exemption that the foreign government debt securities not be registered under the Securities Act (or the subject of any American depositary receipt registered under the Securities Act) and that futures contracts on such foreign government debt securities "require delivery outside the United States, [and] any of its possessions or territories, and are traded on or through a board of trade, as defined in [CEA section 2, 7 U.S.C. 2]." *See* rules 3a12–8(b), 3a12–8(a)(2) under the Exchange Act, 17 CFR 240.3a12–8(b) and 240.3a12–8(a)(2).These conditions were "designed to minimize the impact of the exemption on securities distribution and trading in the United States . . . ." *See* Exemption for Certain Foreign

Continued

enumerated within rule 3a12–8 debt securities of 21 identified foreign governments solely for purposes of futures trading.[185]

The Commissions are evaluating the appropriate characterization of Title VII instruments based on futures on such foreign government debt securities that are traded in reliance on rule 3a12–8. The Commissions recognize that as a result of the rule 3a12–8 exemption, futures on foreign government debt securities of 21 foreign countries trade pursuant to the CFTC's exclusive jurisdiction and without the futures being considered security futures. Because futures contracts on the 21 foreign government debt securities designated in rule 3a12–8 are not security futures, applying the above interpretive guidance to a Title VII instrument on a futures contract on these foreign government debt securities would mean that such Title VII instrument would be a swap.[186] The Commissions note, however, that the conditions in the rule 3a12–8 exemption were established specifically for trading futures contracts on these foreign sovereign debt obligations, not Title VII instruments based on futures contracts on foreign government debt securities. Furthermore, the Commissions note that the Dodd-Frank Act did not exclude debt securities of foreign governments from the definition of security-based swap. Therefore, a Title VII instrument based on such debt securities would be a security-based swap. Relying on rule 3a12–8 for the treatment of Title VII instruments on such futures would therefore result in different treatments depending on whether the Title VII instrument is based on a foreign government debt security or on a future that is in turn based on a foreign government debt security.[187] On the other hand, to do otherwise would create different regulators for a future and Title VII instruments based on that future.

The SEC believes that the characterization of a Title VII instrument involving a foreign government debt security may affect Federal securities law provisions relating to the distribution of the underlying foreign debt security. Specifically, the Dodd-Frank Act included provisions that would not permit issuers, affiliates of issuers, or underwriters to use security-based swaps to offer or sell the issuers' securities underlying a security-based swap without complying with the requirements of the Securities Act.[188] In addition, the Dodd-Frank Act provided that any offer and sale of security-based swaps to non-ECPs would have to be registered under the Securities Act.[189] Thus, for example, if a Title VII instrument on a future on foreign government debt security is characterized as a swap, and not a security-based swap, then the provisions of the Dodd-Frank Act enacted to ensure that there could not be offers and sales of securities made without compliance with the Securities Act, either by issuers, their affiliates, or underwriters or to non-ECPs, would not apply to such swap transactions.

On the other hand, the CFTC believes that characterizing Title VII instruments based on a future on a foreign government debt security designated in rule 3a12–8 as security-based swaps could undermine the regulatory scheme that Congress established in the CEA. As noted above, the Commissions generally would treat Title VII instruments based on futures that are not security futures as swaps. Many of the futures on the 21 foreign government debt securities designated in rule 3a12–8 trade with substantial volume. Section 753 of the Dodd-Frank Act provided the CFTC with additional antifraud and anti-manipulation authorities patterned on those provided to the SEC in the Federal securities laws. The CFTC believes that treating Title VII instruments based on these futures as security-based swaps, while the underlying futures come under the CEA, may undermine those authorities.

In sum, depending on how a Title VII instrument on such a future on a foreign government debt security is characterized, there is potential for such an instrument: (i) to be used to avoid the application of the Federal securities laws, including the Dodd-Frank Act provisions, that otherwise would apply if the Title VII instrument was instead based on the foreign government debt security directly; or (ii) to be used to avoid the application of the CEA, including the Dodd-Frank Act provisions, that otherwise would apply if the Title VII instrument was instead based on any other futures contract that is not a security future. Accordingly, the Commissions also are evaluating whether a Title VII instrument on such a futures contract on a foreign government debt security should be characterized as a mixed swap.

Request for Comment

80. The Commissions request comment generally on the foregoing discussion regarding Title VII instruments based on futures contracts and security futures.

81. What types of such products are traded in the market today? How often, and where are such products traded?

82. The Commissions are requesting comment on how to characterize a Title VII instrument where the underlying reference is a futures contract on one of the 21 foreign government debt securities that have been designated as "exempted securities" under rule 3a12–8 only for the offer, sale, or confirmation of sale of futures contracts on such securities and only where the conditions of such exemption are satisfied. When should a Title VII instrument on a futures contract on a foreign government debt security being traded in reliance on the exemption under rule 3a12–8 be treated as a swap, a security-based swap or a mixed swap? Is there any economic reason why the treatment of a Title VII instrument on a future on a foreign government debt security should be different than the treatment of a Title VII instrument on the foreign government debt security directly? Is there any economic reason why the treatment of a Title VII instrument on a future on a designated foreign government debt security should be different than the treatment of a Title VII instrument on any other futures contract that is not a security future? If the answer to either of the two preceding questions is yes, please explain and provide empirical analysis. If the Title VII instrument is able to be entered into by the issuer, affiliate of the issuer, or an underwriter, or if the Title VII instrument is being offered and sold to non-ECPs, should the Title VII instrument be viewed as a security-based swap or a mixed swap so that market participants cannot chose

Government Securities for Purposes of Futures Trading, 49 FR 8595, 8596–97, Mar. 8, 1984 (*citing* Futures Trading Act of 1982).

[185] *See* rule 3a12–8(a)(1) under the Exchange Act (designating the debt securities of the governments of the United Kingdom, Canada, Japan, Australia, France, New Zealand, Austria, Denmark, Finland, the Netherlands, Switzerland, Germany, Ireland, Italy, Spain, Mexico, Brazil, Argentina, Venezuela, Belgium, and Sweden).

[186] The Commissions note, by contrast, that a Title VII instrument that is based on the price or value of, or settlement into, a futures contract on one of the 21 foreign government debt securities designated in rule 3a12–8 and that is also based on the price or value of, or had the potential to settle directly into, the foreign debt security, would be a security-based swap and, depending on other features of the Title VII instrument, possibly a mixed swap.

[187] This is the case today (*i.e.,* different treatments) with respect to, for example, options on broad-based security indexes and options on futures on broad-based security indexes.

[188] *See* section 2(a)(3) of the Securities Act as amended by the Dodd-Frank Act, 15 U.S.C. 77b(a)(3). This provision applies regardless of whether the Title VII instrument allows the parties to physically settle any such security-based swap.

[189] *See* section 5 of the Securities Act as amended by the Dodd-Frank Act. 15 U.S.C. 77e.

whether to comply with the registration requirements of the Securities Act with respect to the foreign government debt securities? Should such an instrument be viewed as a swap or a mixed swap so that market participants cannot choose whether to comply with the requirements of the Dodd-Frank Act concerning clearing, trade execution, reporting, and standards applicable to dealers and major participants that apply to Title VII instruments on futures contracts that are not security futures? Are there other suggested approaches to the treatment of Title VII instruments on futures on foreign government debt securities that would preserve the application of the Securities Act as contemplated by the Dodd-Frank Act to Title VII instruments involving foreign government debt securities? Are there other suggested approaches to the treatment of Title VII instruments on futures on foreign government debt securities that would preserve the application of the CEA as contemplated by the Dodd-Frank Act to Title VII instruments involving futures contracts that are not security futures? If the answer to either of the two preceding questions is yes, please provide detail and analysis.

F. Use of Certain Terms and Conditions in Title VII Instruments

The Commissions are aware that market participants' setting of certain fixed terms or conditions of Title VII instruments may be informed by the value or level of a security, rate, or other commodity at the time of the execution of the instrument. The Commissions believe that, in evaluating whether such a Title VII instrument is a swap or security-based swap, the nature of the security, rate, or other commodity that informed the setting of such fixed term or condition should not itself impact the determination of whether the Title VII instrument is a swap or a security-based swap, provided that the fixed term or condition is set at the time of execution of the Title VII instrument and the value or level of that fixed term or condition may not vary over the life of the Title VII instrument.

For example, a Title VII instrument, such as an interest rate swap, in which floating payments based on 3-month LIBOR are exchanged for fixed rate payments of 5% would be a swap, and not a security-based swap, even if the 5% fixed rate was informed by, or quoted based on, the yield of a security, provided that the 5% fixed rate was set at the time of execution and may not vary over the life of the Title VII instrument.[190] Another example would be where a private sector or government borrower that issues a 5-year, amortizing $100 million debt security with a semi-annual coupon of LIBOR plus 250 basis points also, at the same time, chooses to enter into a 5-year interest rate swap on $100 million notional in which this same borrower, using the same amortization schedule as the debt security, receives semi-annual payments of LIBOR plus 250 basis points in exchange for 5% fixed rate payments. The fact that the specific terms of the interest rate swap (*e.g.,* 5-year, LIBOR plus 250 basis point, $100 million notional, fixed amortization schedule) were set at the time of execution to match related terms of a debt security does not cause the interest rate swap to become a security-based swap. However, if the interest rate swap contained additional terms that were in fact contingent on a characteristic of the debt security that may change in the future, such as an adjustment to future interest rate swap payments based on the future price or yield of the debt security, then this Title VII instrument would be a security-based swap that would be a mixed swap.

Request for Comment

83. Is the guidance provided by the Commissions regarding the relevance of the nature of a security, rate, or other commodity that informs the determination of a fixed term or condition of a Title VII instrument appropriate? Why or why not? If not, what guidance would be appropriate?

84. The Commissions are aware that quoting conventions are used in the context of setting the fixed terms of certain Title VII instruments, such as interest rate swaps that exchange LIBOR for a fixed rate that is set at the time of execution by reference to U.S. Treasury securities.[191] Are there other Title VII instruments that use such quoting conventions? If so, please provide a detailed explanation of such Title VII instruments and the references they use.

G. The Term "Narrow-Based Security Index" in the Security-Based Swap Definition

1. Introduction[192]

As noted above, a Title VII instrument in which the underlying reference of the instrument is a "narrow-based security index" is considered a security-based swap subject to regulation by the SEC, whereas a Title VII instrument in which the underlying reference of the instrument is a security index that is not a narrow-based security index (*i.e.,* the index is broad-based), the instrument is considered a swap subject to regulation by the CFTC. In this section, the Commissions propose rules and guidance regarding several issues regarding the term "narrow-based security index" in the security-based swap definition, including: (i) The existing criteria for determining whether a security index is a narrow-based security index and the applicability of past guidance of the Commissions regarding those criteria to Title VII instruments; (ii) new criteria for determining whether a CDS where the underlying reference is a group or index of entities or obligations of entities (typically referred to as an "index CDS") is based on an index that is a narrow-based security index; (iii) the meaning of the term "index"; (iv) a rule governing the tolerance period for Title VII instruments on security indexes traded on DCMs, SEFs, foreign boards of trade ("FBOTs"), security-based SEFs, or NSEs, where the security index temporarily moves from broad-based to narrow-based or from narrow-based to broad-based; and (v) a rule governing the grace period for Title VII instruments on security indexes traded on DCMs, SEFs, FBOTs, security-based SEFs, or NSEs, where the security index moves from broad-based to narrow-based or from narrow-based to broad-based and the move is not temporary.

2. Applicability of the Statutory Narrow-Based Security Index Definition and Past Guidance of the Commissions to Title VII Instruments

As defined in the CEA and Exchange Act,[193] an index is a "narrow-based

[190] However, to the extent the fixed term or condition is set at a future date or at a future value or level of a security, rate, or other commodity rather than the value or level of such security, rate, or other commodity at the time of execution of the Title VII instrument, the discussion above would not apply, and the nature of the security, rate, or other commodity used in determining the terms or conditions would be considered in evaluating whether the Title VII instrument is a swap or security-based swap.

[191] The Commissions note that such Title VII instruments would be swaps in any event because U.S. Treasury securities are exempted securities that are excluded from the security-based swap definition in Title VII but understand that such swaps use the reference or quoting convention described above in setting the terms or conditions of the Title VII instrument at the time of execution.

[192] Four commenters referred to the definition of the term "narrow-based security index," each in the context of CDS. *See infra* notes 209 and 211.

[193] Sections 3(a)(55)(B) and (C) of the Exchange Act, 15 U.S.C. 78c(a)(55)(B) and (C), include a definition of "narrow-based security index" in the same paragraph as the definition of security future. *See also* CEA sections 1a(35)(A) and (B), 7 U.S.C. 1a(35)(A) and (B). A security future is a contract for

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security index" if, among other things, it meets any one of the following four criteria:

- It has nine or fewer component securities;
- A component security comprises more than 30% of the index's weighting;
- The five highest weighted component securities in the aggregate comprise more than 60% of the index's weighting; or
- The lowest weighted component securities comprising, in aggregate, 25% of the index's weighting have an aggregate dollar value of average daily trading volume of less than $50,000,000 (or in the case of an index with more than 15 component securities, $30,000,000), except that if there are two or more securities with equal weighting that could be included in the calculation of the lowest weighted component securities comprising, in the aggregate, 25 percent of the index's weighting, such securities shall be ranked from lowest to highest dollar value of average daily trading volume and shall be included in the calculation based on their ranking starting with the lowest ranked security.[194]

The first three criteria apply to the number and concentration of the "component securities" in the index; the fourth criterion applies to the average daily trading volume of an index's "component securities."[195]

This statutory narrow-based security index definition focuses on indexes composed of equity securities and certain aspects of the definition, in particular the evaluation of average daily trading volume, are designed to take into account the trading patterns of individual stocks.[196] However, the Commissions, pursuant to authority granted in the CEA and the Exchange Act, previously have extended the definition to other categories of indexes but modified the definition to take into account the characteristics of those other categories.[197] Specifically, the Commissions have provided guidance regarding the application of the narrow-based security index definition to futures contracts on volatility indexes[198] and debt security indexes.[199] Today, then, there exists additional guidance for determining what constitutes a narrow-based security index.

Volatility indexes are indexes composed of index options. The Commissions issued a joint order in 2004 to define when a volatility index is not a narrow-based security index. Under this joint order, a volatility index is not a narrow-based security index if the index meets all of the following criteria:

- The index measures the magnitude of changes (as calculated in accordance with the order) in the level of an underlying index that is not a narrow-based security index pursuant to the statutory criteria for equity indexes discussed above;
- The index has more than nine component securities, all of which are options on the underlying index;
- No component security of the index comprises more than 30 percent of the index's weighting;
- The five highest weighted component securities of the index in the aggregate do not comprise more than 60 percent of the index's weighting;
- The average daily trading volume of the lowest weighted component securities in the underlying index (those comprising, in the aggregate, 25 percent of the underlying index's weighting) have a dollar value of more than $50,000,000 (or $30,000,000 in the case of an underlying index with 15 or more component securities), except if there are 2 or more securities with equal weighting that could be included in the calculation of the lowest weighted component securities comprising, in the aggregate, 25 percent of the underlying index's weighting, such securities shall be ranked from lowest to highest dollar value of average daily trading volume and shall be included in the calculation based on their ranking starting with the lowest ranked security;
- Options on the underlying index are listed and traded on an NSE registered under section 6(a) of the Exchange Act;[200] and
- The aggregate average daily trading volume in options on the underlying index is at least 10,000 contracts calculated as of the preceding 6 full calendar months.[201]

With regard to debt security indexes, the Commissions issued joint rules in 2006 ("July 2006 Rules") to define when an index of debt securities[202] is not a narrow-based security index. The first three criteria of that definition were similar to the statutory definition for equities and the order regarding volatility indexes in that a debt security index would not be narrow based if: (i) It had more than 9 debt securities issued by more than 9 non-affiliated issuers; (ii) the securities of any issuer included in the index did not comprise more than 30 percent of the index's weighting; and (iii) the securities of any five non-affiliated issuers in the index did not comprise more than 60 percent of the index's weighting.

In the July 2006 Rules, instead of the statutory average daily trading volume test, however, the Commissions adopted a public information availability requirement. Under this requirement, assuming the aforementioned number and concentration limits were satisfied, a debt security index would not be a narrow-based security index if the debt securities or the issuers of debt securities in the index met any one of the following criteria:

- The issuer of the debt security is required to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934;[203]
- The issuer of the debt security has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more;
- The issuer of the debt security has outstanding securities that are notes, bonds, debentures, or evidence of indebtedness having a total remaining principal amount of at least $1 billion;

future delivery on a single security or narrow-based security index (including any interest therein or based on the value thereof). *See* section 3(a)(55) of the Exchange Act, 15 U.S.C. 78c(a)(55), and CEA section 1a(44), 7 U.S.C. 1a(44).

[194] *See* section 3(a)(55)(B) of the Exchange Act, 15 U.S.C. 78c(a)(55)(B). *See also* CEA sections 1a(35)(A) and (B), 7 U.S.C. 1a(35)(A) and (B).

[195] The narrow-based security index definition in the CEA and Exchange Act also excludes from its scope security indexes that satisfy certain specified criteria. *See* sections 3(a)(55)(C)(i)—(vi) of the Exchange Act, 15 U.S.C. 78c(a)(55)(C)(i)—(vi), and CEA sections 1a(35)(B)(i)—(vi), 7 U.S.C. 1a(35)(B)(i)—(vi).

[196] *See* Joint Order Excluding Indexes Comprised of Certain Index Options From the Definition of Narrow-Based Security Index, 69 FR 16900, Mar. 31, 2004 ("March 2004 Joint Order").

[197] *See* CEA section 1a(35)(B)(vi), 7 U.S.C. 1a(35)(B)(vi), and section 3(a)(55)(C)(vi) of the Exchange Act, 15 U.S.C. 78c(a)(55)(C)(vi).

[198] *See* March 2004 Joint Order, *supra* note 196.

[199] *See* Joint Final Rules: Application of the Definition of Narrow-Based Security Index to Debt Securities Indexes and Security Futures on Debt Securities, 71 FR 39434, July 13, 2006 ("July 2006 Rules").

[200] 15 U.S.C. 78f(a).

[201] *See* March 2004 Joint Order, *supra* note 196. In 2009, the Commissions issued a joint order that provided that, instead of the index options having to be listed on an NSE, the index options must be listed on an exchange and pricing information for the index options, and the underlying index, must be computed and disseminated in real time through major market data vendors. *See* Joint Order To Exclude Indexes Composed of Certain Index Options From the Definition of Narrow-Based Security Index, 74 FR 61116, Nov. 23, 2009 (expanding the criteria necessary for exclusion under the March 2004 Joint Order to apply to volatility indexes for which pricing information for the underlying broad-based security index, and the options that compose such index, is current, accurate, and publicly available).

[202] Under the rules, debt securities include notes, bonds, debentures or evidence of indebtedness. *See* CFTC rule 41.15(a)(1)(i), 17 CFR 41.15(a)(1)(i) and rule 3a55–4(a)(1)(i) under the Exchange Act, 17 CFR 240.3a55–4(a)(1)(i).

[203] 15 U.S.C. 78m or 78o(d).

• The security is an exempted security as defined in section 3(a)(12) of the Securities Exchange Act of 1934 [204] and the rules promulgated thereunder; or

• The issuer of the security is a government of a foreign country or a political subdivision of a foreign country.[205]

The statutory definition of the term "narrow-based security index" for equities, and the Commissions' subsequent guidance as to what constitutes a narrow-based security index with respect to volatility and debt indexes, is applicable in the context of distinguishing between futures contracts and security futures products. In the Dodd-Frank Act, Congress included the term "narrow-based security index" in the security-based swap definition, and thus the statutory definition of the term "narrow-based security index" also applies in distinguishing swaps (on security indexes that are not narrow-based, also known as "broad-based") and security-based swaps (on narrow-based security indexes). Further, the Commissions believe that their prior guidance with respect to what constitutes a narrow-based security index in the context of volatility and debt security indexes should apply in determining whether a Title VII instrument is a swap or a security-based swap.

To clarify that the Commissions are applying the prior guidance and rules to Title VII instruments, the Commissions are proposing rules to further define the term "narrow-based security index" in the security-based swap definition. Under paragraph (1) of proposed rule 1.3(yyy) under the CEA and paragraph (a) of proposed rule 3a68–3 under the Exchange Act, for purposes of the security-based swap definition, the term "narrow-based security index" would have the same meaning as the statutory definition set forth in section 1a(35) of the CEA and section 3(a)(55) of the Exchange Act,[206] and the rules, regulations, and orders issued by the Commissions relating to such definition. As a result, except as the new rules the Commissions are proposing provide for other treatment, market participants generally will be able to use the Commissions' past guidance in determining whether certain Title VII instruments based on a security index are swaps or security-based swaps.

However, the Commissions are proposing interpretive guidance and additional rules regarding Title VII instruments based on a security index. The additional rules and interpretive guidance set forth new narrow-based security index criteria with respect to indexes composed of securities, loans, or issuers of securities referenced by an index CDS. The proposed interpretive guidance and rules also address the definition of an "index" and the treatment of broad-based security indexes that become narrow-based and narrow-based indexes that become broad-based, including rule provisions regarding tolerance and grace periods for swaps on security indexes that are traded on CFTC-regulated trading platforms and security-based swaps on security indexes that are traded on SEC-regulated trading platforms. These rules and interpretive guidance are discussed in turn below.

3. Narrow-Based Security Index Criteria for Index Credit Default Swaps

(a) In General

A CDS is a Title VII instrument in which the "protection buyer" makes a series of payments to the "protection seller" and, in return, the "protection seller" is obligated to make a payment to the "protection buyer" if an obligation or obligations (typically bonds, but in some cases loans) of an entity or entities referenced in the contract, or the entity or entities themselves, experience a "credit event." [207] While the Commissions understand that the underlying reference for most cleared CDS is a single entity or an index of entities rather than a single security or an index of securities, the underlying reference for CDS also could be a single security or an index of securities.[208] A CDS where the underlying reference is a single entity (*i.e.*, a single-name CDS), a single obligation of a single entity (*e.g.*, a CDS on a specific bond, loan, or asset-backed security, or any tranche or series of any bond, loan, or asset-backed security), or an index CDS where the underlying reference is a narrow-based security index or the issuers of securities in a narrow-based security index would be a security-based swap.[209] An index CDS where the underlying reference is not a narrow-based security index or the issuers of securities in a narrow-based security index (*i.e.*, a broad-based index) would be a swap.[210]

The statutory definition of the term "narrow-based security index," as explained above, was designed with the U.S. equity markets in mind. Thus, the statutory definition is not appropriate for determining whether an index underlying an index CDS is broad or narrow-based. Nor is the further guidance that the Commissions have previously issued with respect to the narrow-based security index definition discussed above necessarily appropriate, because that guidance was designed to address and was uniquely tailored to the characteristics of volatility indexes and debt security indexes in the context of futures. Accordingly, the Commissions are proposing rules that would adopt criteria for determining whether an index is a narrow-based security index within the context of index CDS.[211]

[204] 15 U.S.C. 78c(a)(12).

[205] The July 2006 Rules also provided that debt securities in the index must satisfy certain minimum outstanding principal balance criteria, established certain exceptions to these criteria and the public information availability requirement, and provided for the treatment of indexes that include exempted securities (other than municipal securities).

[206] 7 U.S.C. 1a(35) and 15 U.S.C. 78c(a)(55).

[207] *See supra* note 180 and accompanying text.

[208] *See, e.g.*, Markit, "Markit CDX" (describing the Markit CDX indexes and the number of "names" included in each index), available at *http://www.markit.com/en/products/data/indices/credit-and-loan-indices/cdx/cdx.page?;* Markit, "Markit iTraxx Indices," (stating that the "Markit iTraxx indices are comprised of the most liquid *names* in the European and Asian markets") (emphasis added), available at *http://www.markit.com/en/products/data/indices/credit-and-loan-indices/itraxx/itraxx.page?*]. Examples of indexes based on securities include the Markit ABX.HE and CMBX indexes. *See* Markit, "Markit ABX.HE," (describing the Markit ABX.HE index as "a synthetic tradeable index referencing a basket of 20 subprime mortgage-backed securities"), available at *http://www.markit.com/en/products/data/indices/structured-finance-indices/abx/abx.page;* Markit, "Markit CMBX," (describing the Markit CMBX index as "a synthetic tradeable index referencing a basket of 25 commercial mortgage-backed securities"), available at *http://www.markit.com/en/products/data/indices/structured-finance-indices/cmbx/cmbx.page.*

[209] Two commenters made suggestions relating to the effect of the jurisdictional consequences of the definition of the term "narrow-based security index," but neither commented on the meaning of the term itself. One of the two commenters, recognizing that a jurisdictional line would exist for CDS, stressed the need for "substantially identical" regulations applicable to CDS. *See* Deutsche Bank Letter. The other commenter also noted that a line for CDS would exist and urged the Commissions to adopt a regulation stating that a derivatives clearing organization ("DCO") may be a clearing agency and a clearing agency may be a DCO, in order to facilitate portfolio margining and cross-margining. *See* White & Case Letter. The Commissions are sensitive to the requirement in section 712(a)(7) of the Dodd-Frank Act to treat functionally or economically similar products or entities in a similar manner.

[210] Similarly, an option to enter into a single-name CDS or a CDS referencing a narrow-based security index as described above would be a security-based swap, while an option to enter into a CDS on a broad-based security index or the issuers of securities in a broad-based security index would be a swap. Index CDS where the underlying reference is a broad-based security index would be SBSAs. The SEC has enforcement authority with respect to swaps that are SBSAs, as discussed further in part V below.

[211] Two commenters urged clarification of the definition of the term "narrow-based security index"

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The Commissions are further defining the term "security-based swap," and the use of the term "narrow-based security index" within that definition to modify the criteria applied in the context of index CDS in assessing whether the index is a narrow-based security index. The third prong of the security-based swap definition includes a Title VII instrument based on the occurrence of an event relating to the "issuers of securities in a narrow-based security index," provided that such event directly affects the "financial statements, financial condition, or financial obligations of the issuer." [212] The first prong of the security-based swap definition includes a Title VII instrument that is based on a "narrow-based security-index." [213] Because the third prong of the security-based swap definition relates to issuers of securities, while the first prong of such definition relates to securities, the Commissions are proposing to further define both the term "narrow-based security index" and the term "issuers of securities in a narrow-based security index" in the context of the definition of security-based swap as applied to index CDS. The Commissions believe it is important to further define both terms in order to ensure consistent analysis of index CDS.[214] While the wording of the two proposed definitions differs slightly, the Commissions expect that they would yield the same substantive results in distinguishing narrow-based and broad-based index CDS.

(b) Proposed Rules Regarding the Definitions of "Issuers of Securities in a Narrow-Based Security Index" and "Narrow-Based Security Index" for Index Credit Default Swaps

The Commissions are considering how to further define the terms "issuers of securities in a narrow-based security index" and "narrow-based security index" in order to provide for appropriate criteria for determining whether an index composed of issuers of securities referenced by an index CDS and an index composed of securities referenced by an index CDS are narrow-based security indexes. In formulating these criteria, and consistent with the guidance and rules the Commissions have previously issued and adopted regarding narrow-based security indexes in the context of security futures, the Commissions believe that there should be public information available about a predominant percentage of the reference entities underlying the index, or, in the case of an index CDS, on an index of securities, about the issuers of the securities or the securities underlying the index, in order to reduce the likelihood that non-narrow-based indexes referenced in index CDS or the component securities or issuers of securities in that index would be readily susceptible to manipulation, as well as to help prevent the misuse of material non-public information through the use of CDS based on such indexes.

To satisfy these objectives, the Commissions intend to use the criteria developed for debt indexes discussed above [215] but tailor the criteria specifically to address index CDS.[216] These criteria would be used solely for the purpose of defining the terms "narrow-based security index" and "issuers of securities in a narrow-based security index" in the first and third prongs of the security-based swap definition with respect to index CDS and would not be interpreted to affect any other interpretation or use of the term "narrow-based security index" or any other provision of the Dodd-Frank Act, CEA, or Exchange Act.

(i) Number and Concentration Percentages of Reference Entities or Securities

The Commissions believe that the first three criteria of the debt security index test discussed above (*i.e.,* the number and concentration weighting requirements) are appropriate to apply to index CDS, whether CDS on indexes of securities or indexes of issuers of securities.

Accordingly, proposed rules 1.3(zzz) under the CEA and proposed rule 3a68–1a under the Exchange Act would provide that, for purposes of determining whether an index CDS is a security-based swap under section 3(a)(68)(A)(ii)(III) of the Exchange Act,[217] the term "issuers of securities in a narrow-based security index" would include issuers of securities identified in an index in which:

- *Number:* There are 9 or fewer non-affiliated issuers of securities that are reference entities [218] in the index, provided that an issuer of securities shall not be deemed a reference entity in the index unless (i) a credit event with respect to such reference entity would result in a payment by the credit protection seller to the credit protection buyer under the CDS based on the related notional amount allocated to such reference entity, or (ii) the fact of such credit event or the calculation in accordance with clause (i) above of the amount owed with respect to such credit event is taken into account in determining whether to make any future payments under the CDS with respect to any future credit events;
- *Single Component Concentration:* The effective notional amount allocated to any reference entity included in the index comprises more than 30 percent of the index's weighting; or
- *Largest Five Component Concentration:* The effective notional amount allocated to any 5 non-affiliated reference entities included in the index comprises more than 60 percent of the index's weighting.[219]

in the context of CDS to ensure that it reflects "the letter and the spirit" of the existing definition. *See* Letter from Thomas W. Jasper, Chief Executive Officer, Primus Guaranty Ltd., and Gene Park, Chief Executive Officer, Quadrant Structured Investment Advisers, LLC, Sept. 20, 2010 ("Primus and Quadrant Letter").

[212] Section 3(a)(68)(A)(ii)(III) of the Exchange Act, 15 U.S.C. 78c(a)(68)(A)(ii)(III).

[213] Section 3(a)(68)(A)(ii)(I) of the Exchange Act, 15 U.S.C. 78c(a)(68)(A)(ii)(I).

[214] Because it applies only with respect to index CDS, the proposed definitions of "issuers of securities in a narrow-based security index" and "narrow-based security index" would not apply with respect to other types of event contracts, whether analyzed under the first or third prong.

[215] *See* discussion of July 2006 Rules, *supra* note 199.

[216] The Commissions note that the language of the proposed rules is intended, in general, to track the criteria developed for debt indexes discussed above. Certain changes from the criteria developed for debt indexes are necessary to address differences between futures on debt indexes and index CDS. Certain other changes are necessary because the rules for debt indexes define under what conditions an index is *not* a narrow-based security index, whereas the proposed rules define what *is* a narrow-based security index. For example, an index is not a narrow-based security index under the rule for debt indexes if it is not a narrow-based security index under *either* subparagraph (a)(1) *or* paragraph (a)(2) of the rule. Under the proposed rules for index CDS, however, an index *is* a narrow-based security index if it meets the requirements of *both* of the counterpart paragraphs in the proposed rules regarding index CDS (paragraphs (1)(i) and (1)(ii) of proposed rules 1.3(xxx) and 1.3(aaaa) under the CEA and paragraphs (a)(1) and paragraph (a)(2) of proposed rules 3a68–1a and 3a68–1b under the Exchange Act), even though the criteria in the debt index rules and the proposed rules for index CDS include generally the same criteria and structure.

[217] 15 U.S.C. 78c(a)(68)(A)(ii)(III).

[218] For purposes of proposed rules 1.3(zzz) and 3a68–1a: (i) A reference entity would be affiliated with another entity if it controls, is controlled by, or is under common control with, that entity; (ii) control would mean ownership of 20 percent or more of an entity's equity, or the ability to direct the voting of 20 percent or more of the entity's voting equity; and (iii) the term "reference entity" would include an issuer of securities, an issuing entity of asset-backed securities, and a single reference entity or group of affiliated entities; provided that an issuing entity of an asset-backed security shall not be affiliated with any other issuing entity or issuer under this proposed definition.

[219] These proposed rules refer to the "effective notional amount" allocated to reference entities or securities in order to address potential situations in which the means of calculating payout across the reference entities or securities is not uniform. Thus, if one or more payouts is leveraged or enhanced by the structure of the transaction (*i.e.,* 2x recovery rate), that amount would be the "effective notional amount" for purposes of the 30% and 60% tests in

Similarly, proposed rules 1.3(aaaa) under the CEA and proposed rule 3a68–1b under the Exchange Act would provide that, for purposes of determining whether an index CDS is a security-based swap under section 3(a)(68)(A)(ii)(I) of the Exchange Act,[220] the term "narrow-based security index" would include an index in which essentially the same criteria apply, substituting securities for issuers. Under these proposed criteria, the term "narrow-based security index" would mean an index in which:

- *Number:* There are 9 or fewer securities, or securities that are issued by 9 or fewer non-affiliated issuers,[221] in the index, provided that a security shall not be deemed a component of the index unless (i) a credit event with respect to the issuer of such security or a credit event with respect to such security would result in a payment by the credit protection seller to the credit protection buyer under the CDS based on the related notional amount allocated to such security, or (ii) the fact of such credit event or the calculation in accordance with clause (i) above of the amount owed with respect to such credit event is taken into account in determining whether to make any future payments under the CDS with respect to any future credit events;
- *Single Component Concentration:* The effective notional amount allocated to the securities of any issuer included in the index comprises more than 30 percent of the index's weighting; or
- *Largest Five Component Concentration:* The effective notional amount allocated to the securities of any 5 non-affiliated issuers included in the index comprises more than 60 percent of the index's weighting.

Thus, the applicability of the proposed rules would depend on conditions relating to the number of non-affiliated reference entities, issuers of securities, or securities, as applicable, included in an index and the weighting of notional amounts allocated to the reference entities or securities in the index, as applicable. These first three criteria of the proposed rules would evaluate the number and concentration of the issuers or securities in the index, as applicable, and ensure that an index with a small number of issuers or securities or concentrated in only a few issuers or securities would be narrow-based, and thus where such index is the underlying reference of an index CDS, the index CDS would be a security-based swap.

Specifically, the proposed rules would provide that an index meeting any one of certain identified conditions would be a narrow-based security index. The first condition in paragraph (1)(i)(A) of proposed rule 1.3(zzz) under the CEA and paragraph (a)(1)(i) of proposed rule 3a68–1a under the Exchange Act is that there are 9 or fewer non-affiliated issuers of securities that are reference entities in the index. An issuer of securities would count toward this total only if a credit event with respect to such entity would result in a payment by the credit protection seller to the credit protection buyer under the CDS based on the notional amount allocated to such entity, or if the fact of such a credit event or the calculation of the payment with respect to such credit event is taken into account when determining whether to make any future payments under the CDS with respect to any future credit events.

Similarly, the first condition in paragraph (1)(i)(A) of proposed rules 1.3(aaaa) under the CEA and paragraph (a)(1)(i) of proposed rule 3a68–1b under the Exchange Act would provide that a security would count toward the total number of securities in the index only if a credit event with respect to such security, or the issuer of such security, would result in a payment by the credit protection seller to the credit protection buyer under the CDS based on the notional amount allocated to such security, or if the fact of such a credit event or the calculation of the payment with respect to such credit event is taken into account when determining whether to make any future payments under the CDS with respect to any future credit events. These provisions are intended to ensure that an index concentrated in a few reference entities or securities, or a few reference entities that are affiliated or a few securities issued by a few issuers that are affiliated, are within the "narrow-based" definition and that an entity is not counted as a reference entity in the index, and a security is not counted as a security in the index, unless a credit event with respect to the entity, issuer, or security affects payout under a CDS on the index.[222]

In addition, the proposed rules would provide that a reference entity or issuer of a security in an index and any of that reference entity's or issuer's affiliated entities are deemed to be a single reference entity or issuer in the index.[223] For purposes of the narrow-based security index definition for index CDS under the third prong and first prong, a reference entity or issuer would be affiliated with another entity if it controls, is controlled by, or is under common control with, that other entity or issuer. The proposed rules would define control, solely for purposes of this provision, to mean ownership of 20% or more of an entity's or issuer's equity or the ability to direct the voting of 20% or more of an entity's or issuer's voting equity.[224] This definition of control is designed to provide a clear standard for determining affiliation for purposes of the narrow-based security index criteria with respect to index CDS. Determining whether a reference entity or issuer is affiliated with another entity or issuer is important in assessing whether an index meets the criteria in the proposed rules because the notional amounts allocated to all affiliated reference entities, or all securities issued by affiliated issuers, included in an index must be aggregated in order to prevent a concentration of the index in reference entities or securities issued by issuers that are affiliated and because a reference entity's and issuer's affiliates must be considered when determining whether the reference entity or security meets the public information availability test discussed below. In addition, in order to ensure application of the criteria regarding index CDS to indexes of

paragraphs (1)(i)(B) and (1)(i)(C) of proposed rules 1.3(zzz) and 1.3(aaaa) and paragraphs (a)(1)(ii) and (a)(1)(iii) of proposed rules 3a68–1a and 3a68–1b. Similarly, if the aggregate notional amount under a CDS is not uniformly allocated to each reference entity or security, then the portion of the notional amount allocated to each reference entity or security (which may be by reference to the product of the aggregate notional amount and an applicable percentage) would be the "effective notional amount."

[220] 15 U.S.C. 78c(a)(68)(A)(ii)(I).

[221] This language is intended to be consistent with the language in the rule for debt indexes but the specific language is different to deal with the differences in structure between the rule for debt indexes and proposed rules 1.3(aaaa) and 3a68–1b. *See* discussion *supra* note 216.

For purposes of proposed rules 1.3(aaaa) and 3a68–1b: (i) An issuer would be affiliated with another issuer if it controls, is controlled by, or is under common control with, that issuer; (ii) control would mean ownership of 20 percent or more of an issuer's equity, or the ability to direct the voting of 20 percent or more of the issuer's voting equity; and (iii) the term "issuer" would include an issuer of securities, an issuing entity of asset-backed securities, and a single issuer or group of affiliated issuers; provided that an issuing entity of an asset-backed security shall not be deemed affiliated with any other issuing entity or issuer under this proposed definition.

[222] This requirement is generally consistent with the definition of "narrow-based security index" in CEA section 1a(35)(A), 7 U.S.C. 1a(35)(A), and section 3(a)(55)(B) of the Exchange Act, 15 U.S.C. 78c(a)(55)(B), and the July 2006 Rules, *supra* note 199.

[223] *See* proposed rule 1.3(zzz)(4) under the CEA and proposed rule 3a68–1a(d) under the Exchange Act.

[224] The affiliate issue under the Federal securities laws is generally a facts and circumstances determination based on the definition of the term "affiliate" contained in such laws. *See, e.g.,* rule 405 under the Securities Act, 17 CFR 230.405; rule 12b–2 under the Exchange Act, 17 CFR 240.12b–2.

reference entities that have issued asset-backed securities as defined in section 3(a)(77) of the Exchange Act,[225] as well as indexes of such asset-backed securities, the term reference entity and the term issuer under the proposed rules includes issuing entities of asset-backed securities. The proposed rules also would provide that each issuing entity of an asset-backed security is considered a separate reference entity or issuer, as applicable.

The second condition, in paragraphs (1)(i)(B) of proposed rules 1.3(zzz) and 1.3(aaaa) under the CEA and paragraphs (a)(1)(ii) of proposed rules 3a68–1a and 3a68–1b under the Exchange Act, is that the effective notional amount allocated to any reference entity or security included in the index comprises more than 30 percent of the index's weighting.

The third condition, in paragraphs (1)(i)(C) of proposed rules 1.3(zzz) and 1.3(aaaa) under the CEA and paragraphs (a)(1)(iii) of proposed rules 3a68–1a and 3a68–1b under the Exchange Act, is that the effective notional amount allocated to any 5 non-affiliated reference entities, or to the securities of any 5 non-affiliated issuers, included in the index that are the underlying reference entities or securities, respectively, comprises more than 60 percent of the index's weighting.

Given that Congress determined that these concentration percentages are appropriate to characterize an index as a narrow-based security index, and the Commissions have determined they are appropriate for debt security indexes in the security futures context, the Commissions believe that these concentration percentages are appropriate to apply to the notional amount allocated to reference entities and securities in order to apply similar standards to indexes that are the underlying references of index CDS. Moreover, with respect to both the numerical and concentration percentage criteria, the markets have had experience with these criteria with respect to futures on equity indexes, volatility indexes, and debt security indexes.

(ii) Public Information Availability Regarding Reference Entities and Securities

In addition to the numerical and concentration percentage criteria, the debt security index test also included, as discussed above, a public information availability test. This test was designed to reduce the likelihood that broad-based debt security indexes or the component securities or issuers of securities in that index would be readily susceptible to manipulation. The fourth condition in the proposed rules includes a similar public information availability test that is intended solely for purposes of determining whether an index underlying a CDS is narrow-based. Except as discussed below, under the proposed rules, an index CDS would be considered narrow-based if a reference entity or security included in the index does not meet any one of the following criteria:

- The reference entity or the issuer of the security is required to file reports pursuant to the Exchange Act or the regulations thereunder;
- The reference entity or the issuer of the security is eligible to rely on the exemption provided in rule 12g3–2(b) under the Exchange Act;[226]
- The reference entity or the issuer of the security has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more;[227]
- The reference entity or the issuer of the security (other than an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Exchange Act[228]) has outstanding securities that are notes, bonds, debentures, or evidences of indebtedness having a total remaining principal amount of at least $1 billion;
- The reference entity is an issuer of an exempted security, or the security is an exempted security, each as defined in section 3(a)(12) of the Exchange Act[229] and the rules promulgated thereunder (except a municipal security);
- The reference entity or the issuer of the security is a government of a foreign country or a political subdivision of a foreign country; or
- If the reference entity or the issuer of the security is an issuing entity of asset-backed securities as defined in section 3(a)(77) of the Exchange Act,[230] such asset-backed securities were issued in a transaction registered under the Securities Act and have publicly available distribution reports.

However, so long as the effective notional amounts allocated to reference entities or securities that satisfy the public information availability test comprise at least 80 percent of the index's weighting, failure by a reference entity or security included in the index to satisfy the public information availability test would be disregarded if the effective notional amounts allocated to that reference entity or security comprise less than 5 percent of the index's weighting.

These issuer eligibility criteria are intended to condition the characterization of an index as "narrow-based" on the likelihood that information about a predominant percentage of the reference entities or securities included in the index is publicly available.[231] For example, a reference entity or issuer of securities that is required to file reports pursuant to the Exchange Act or the regulations thereunder makes regular and public disclosure through those filings. Moreover, reference entities and issuers of securities that do not file reports with the SEC but that are eligible to rely on the exemption in rule 12g3–2(b) under the Exchange Act (*i.e.,* foreign private issuers) are required to make certain types of financial information publicly available in English on their Web sites or through an electronic information delivery system generally available to the public in their primary trading markets.[232] The Commissions believe that other reference entities or issuers of securities that do not file reports with the SEC, but that have worldwide equity market capitalization of $700 million, have $1 billion in outstanding debt (other than in the case of issuing entities of asset-backed securities), issue exempted securities (other than municipal securities), or are foreign

[225] 15 U.S.C. 78c(a)(77). The Commissions note that section 941 of the Dodd-Frank Act added the definition of the term "asset-backed security" as section 3(a)(77) of the Exchange Act, 15 U.S.C. 78c(a)(77). However, section 761(a)(6) of the Dodd-Frank Act also added the definition of the term "security-based swap execution facility" as section 3(a)(77) of the Exchange Act, 15 U.S.C. 78c(a)(77). References to the definition of the term "asset-backed security" in this release are to the definition added by section 941 of the Dodd-Frank Act.

[226] 17 CFR 240.12g3–2(b).

[227] *See* July 2006 Rules, *supra* note 199, at 39537 (noting that issuers having worldwide equity market capitalization of $700 million are likely to have public information available about them).

[228] 15 U.S.C. 78c(a)(77).

[229] 15 U.S.C. 78c(a)12.

[230] 15 U.S.C. 78c(a)(77).

[231] *See* discussion *supra* part III.G.3(b). Most of the thresholds in the public information availability test are similar to those the Commissions adopted in their joint rules regarding the application of the definition of the term "narrow-based security index" to debt security indexes and security futures on debt securities. *See* July 2006 Rules, *supra* note 199. The July 2006 Rules also included an additional requirement regarding the minimum principal amount outstanding for each security in the index. The Commissions have not included this requirement in proposed rule 1.3(zzz) under the CEA and proposed rule 3a68–1a under the Exchange Act. The numerical thresholds also are similar to those the SEC adopted in its securities offering reform rules, which were based on data analysis conducted by the SEC's Office of Economic Analysis. *See* Securities Offering Reform, 70 FR 44722, Aug. 3, 2005.

[232] 17 CFR 240.12g3–2(b).

sovereign entities either are required to or are otherwise sufficiently likely, solely for purposes of the proposed "narrow-based security-index" and "issuers of securities in a narrow-based security index" definitions, to have public information available about them.[233]

In the case of indexes including asset-backed securities, or reference entities that are issuing entities of asset-backed securities, information about the reference entity or issuing entity of the asset-backed security would not alone be sufficient and, consequently, the proposed rules provide that the public information availability test would be satisfied only if certain information also is available about the asset-backed securities. An issuing entity (whether or not a reference entity) of asset-backed securities may meet the public information availability test if such asset-backed securities were issued in a transaction registered under the Securities Act and distribution reports about such asset-backed securities are publicly available. In addition, because of the lack of public information regarding many asset-backed securities, despite the size of the outstanding amount of securities,[234] the proposed rules would not permit such reference entities and issuers to satisfy the public information availability test by having $1 billion in outstanding debt. Characterizing an index with reference entities or securities for which public information is not likely to be available as "narrow-based," and thus index CDS where the underlying references or securities are such indexes as security-based swaps, should help to ensure the transparency of the index components.

In sum, an index that is not narrow-based under the number and weighting requirements would be characterized as broad-based (and thus an index CDS, where the underlying reference is that index, would be characterized as a swap and not a security-based swap) unless one of the reference entities or securities in the index fails to meet one of the criteria in the public information availability test set forth in the proposed rules. Yet, even if one or more of the reference entities or securities included in the index fail the public information availability test, the proposed rules would provide that the terms "issuers of securities in a narrow-based security index" and "narrow-based security index" would not include such an index, so long as the applicable reference entity or security that failed the test represents less than 5 percent of the index's weighting, and so long as reference entities or securities comprising at least 80 percent of the index's weighting do satisfy the public information availability test.

An index that includes a very small proportion of reference entities or securities that do not satisfy this public information availability test should nevertheless be treated as a broad-based security index. This would be achieved where the index satisfies both of the requirements at the time the parties enter into the index CDS. The 5-percent weighting threshold is designed to provide that reference entities or securities not satisfying the public information availability test comprise only a very small portion of the index, and the 80-percent weighting threshold is designed to provide that a predominant percentage of the reference entities or securities in the index satisfy the public information availability test. As a result, these thresholds would provide market participants with flexibility in constructing an index. The Commissions believe that this provision is appropriate and that providing such flexibility is not likely to increase the likelihood that an index that satisfies these provisions would be readily susceptible to manipulation or the likelihood that the component securities or issuers of securities in that index also would be subject to manipulation or that there would be misuse of material non-public information about them through the use of CDS based on such indexes.

The Commissions also are proposing that, for index CDS entered into solely between ECPs, the public information availability test may instead be satisfied other than in the manner discussed above. Accordingly, solely for index CDS entered into between ECPs, an index would be considered narrow-based if a reference entity or security included in the index does not meet any one of the criteria enumerated above or any one of the following criteria:

- The reference entity or the issuer of the security (other than issuing entities of asset-backed securities) provides to the public or to such eligible contract participant information about such reference entity or issuer pursuant to rule 144A(d)(4) under the Securities Act;[235]
- Financial information about the reference entity (other than an issuing entity of asset-backed securities) is otherwise publicly available; or
- In the case of an asset-backed security, or a reference entity that is an issuing entity of asset-backed securities, information of the type and level included in public distribution reports for similar asset-backed securities is publicly available about both the reference entity or issuing entity as well as such asset-backed securities.

Reference entities or reference securities that meet alternative public information criteria currently may underlie CDS that are entered into by ECPs and that are cleared by central counterparties operating pursuant to exemptive orders granted by the SEC.[236] In addition, solely with respect to index CDS entered into by ECPs, so long as the effective notional amounts allocated to reference entities or securities that satisfy this expanded public information availability test comprise at least 80 percent of the index's weighting, a reference entity or security included in the index that fails to satisfy this expanded public information availability test would be disregarded if the effective notional amounts allocated to that reference entity or security comprise less than 5 percent of the index's weighting.

The Commissions are also seeking comment as to whether the public information availability test should apply to the extent that an index is compiled by an index provider that is not a party to an index CDS ("third-party index provider") and makes publicly available general information about the construction of the index, index rules, identity of components, and predetermined adjustments, and which index is referenced by an index CDS that is offered on or subject to the rules of a DCM or SEF, or by direct access in

[233] It is important to note that the public information availability test is designed solely for purposes of distinguishing between index CDS that are swaps and index CDS that are security-based swaps. The proposed criteria are not intended to provide any assurance that there is any particular level of information actually available regarding a particular reference entity or issuer of securities. Meeting one or more of the proposed criteria for the limited purpose here—defining the terms "narrow-based security index" and "issuers of securities in a narrow-based security index" in the first and third prongs of the security-based swap definition with respect to index CDS—would not substitute for or satisfy any other requirement for public disclosure of information or public availability of information for purposes of the Federal securities laws.

[234] *See generally* Asset-Backed Securities, 75 FR 23328, May 3, 2010.

[235] 17 CFR 230.144A(d)(4).

[236] *See, e.g.,* Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With Request of Chicago Mercantile Exchange Inc. and Citadel Investment Group, L.L.C. Related to Central Clearing of Credit Default Swaps, and Request for Comments, Exchange Act Release No. 34–59578 (Mar. 13, 2009). This order has been extended a number of times, most recently on November 29, 2010. *See* Order Extending Temporary Conditional Exemptions Under the Securities Exchange Act of 1934 in Connection With Request of Chicago Mercantile Exchange Inc. Related to Central Clearing of Credit Default Swaps and Request for Comment, Exchange Act Release No. 34–63388 (Nov. 29, 2010).

the U.S. from an FBOT that is registered with the CFTC.

The CFTC believes that the requirement that the index be compiled by a third-party index provider may help to ensure that information is publicly available because such index providers generally employ a variety of selection criteria for inclusion of reference entities or securities in the indexes for index CDS, including liquidity thresholds. The CFTC believes that requiring that such index providers make publicly available general information about the construction of the index, index rules, components, and predetermined adjustments may help ensure transparency regarding the index and its components. In addition, the CFTC believes that the requirement that the index be the underlying reference of an index CDS that is offered for trading on or subject to the rules of a DCM or SEF, or by direct access in the U.S. from a registered FBOT, helps to ensure that information about the index is publicly available and that the index is not readily susceptible to manipulation. The CEA prohibits DCMs and SEFs from offering for trading contracts that are readily susceptible to manipulation.[237] Similarly, under rules recently proposed by the CFTC, FBOTs only may offer contracts by direct access from the U.S. that are not readily susceptible to manipulation.[238] The CFTC believes that CFTC oversight of DCMs, SEFs and registered FBOTs for compliance with these requirements [239] will help ensure that information about an index that is the underlying reference of an index CDS traded on these platforms is publicly available and is not readily susceptible to manipulation.[240]

The SEC believes that a third-party index provider that simply provides general information about the construction of an index, index rules, components, and predetermined adjustments is not a substitute for the public availability of information about the issuers of the securities or the securities in the index; nor does such a third-party index provider indicate a likelihood that such public information is available, which the SEC believes, for purposes of index CDS, is important to market integrity and to investors in engaging in transactions based on such indexes. If a third-party index provider does not require, as a condition of inclusion in an index it compiles, that information likely is publicly available regarding the component issuers or securities in the index, the SEC does not believe investors will have adequate information regarding such component issuers or securities. In addition, the SEC notes that, absent specified standards regarding what persons constitute a third-party index provider for purposes of the proposed rules, any person that compiles an index at the behest of another person could constitute a "third-party index provider." Moreover, the SEC does not believe that requiring an index CDS to be offered on or subject to the rules of a DCM or SEF, or by an FBOT, addresses whether public information likely is available about the issuers of securities or securities in an index compiled by a third-party index provider. As a result, the SEC does not believe that an index compiled by a third-party index provider that makes publicly available general information about the construction of the index, index rules, components, and index adjustments, and that is referenced by an index CDS that is offered for trading on or subject to the rules of a DCM or SEF, or by direct access in the U.S. from a registered FBOT, should substitute for the public information availability test under the proposed rules for index CDS.

Accordingly, the Commissions seek comment as to whether the public information availability test should apply to indexes compiled by a third-party index provider that makes publicly available general information about the construction of the index, index rules, identity of components, and predetermined adjustments, and which index is referenced by an index CDS that is offered on or subject to the rules of a DCM or SEF, or by direct access in the U.S. from an FBOT that is registered with the CFTC.

(iii) Treatment of Indexes Including Reference Entities That Are Issuers of Exempted Securities or Including Exempted Securities

In addition, the proposed rules provide for alternative treatment of indexes that include exempted securities or reference entities that are issuers of exempted securities.[241] The Commissions believe such treatment is consistent with the objective and intent of the definition of the term "security-based swap," as well as the approach taken in the context of security futures.[242] Accordingly, paragraph (1)(ii) of proposed rules 1.3(zzz) and 1.3(aaaa) under the CEA and paragraph (a)(2) of proposed rules 3a68–1a and 3a68–1b under the Exchange Act would provide that, in the case of an index that includes exempted securities, or reference entities that are issuers of exempted securities, in each case as defined as of the date of enactment of the Futures Trading Act of 1982 (other than municipal securities), such securities or reference entities are excluded from the index when determining whether the securities or reference entities in the index constitute a "narrow-based security index" or "issuers of securities in a narrow-based security index" under the proposed rules.

Under paragraph (1)(ii) of proposed rules 1.3(zzz) and 1.3(aaaa) under the CEA and paragraph (a)(2) of proposed rules 3a68–1a and 3a68–1b under the Exchange Act, an index composed solely of securities that are, or reference entities that are issuers of, exempted securities (other than municipal securities) would not be a "narrow-based security index" or an index composed of "issuers of securities in a narrow-based security index." In the case of an index where some, but not all, of the securities or reference entities are exempted securities (other than municipal securities) or issuers of exempted securities (other than municipal securities), the index would be a "narrow-based security index" or an index composed of "issuers of securities in a narrow-based security index" only if the index is narrow-based when the securities that are, or reference entities that are issuers of, exempted securities (other than municipal securities) are

[237] *See* CEA sections 5(d)(3), 7 U.S.C. 7(d)(3) (a DCM "shall list on the contract market only contracts that are not readily susceptible to manipulation."); 5h(f)(3), 7 U.S.C. 7b–3(f)(3) (same requirement for SEFs).

[238] *See* Registration of Foreign Boards of Trade, 75 FR 70973, Nov. 19, 2010.

[239] CFTC oversight in evaluating compliance with the requirement that a swap not be readily susceptible to manipulation for cash settled contracts includes consideration of whether cash settlement is at a price reflecting the underlying cash market, will not be subject to manipulation or distortion, and is based on a cash price series that is reliable, acceptable, publicly available, and timely. *See* 17 CFR Part 40, Appendix A—Guideline No. 1.

[240] Such indexes also would be SBSAs, providing the SEC with antifraud and anti-manipulation authority.

[241] *See* proposed rules 1.3(zzz)(1)(i) and 1.3(aaaa)(1)(i) under the CEA and proposed rules 3a68–1a(a)(2) and 3a68–1b(a)(2) under the Exchange Act; July 2006 Rules, *supra* note 199.

[242] *See* section 3(a)(68)(C) of the Exchange Act, 15 U.S.C. 78c(a)(68)(C) (providing that "[t]he term 'security-based swap' does not include any agreement, contract, or transaction that meets the definition of a security-based swap only because such agreement, contract, or transaction references, is based upon, or settles through the transfer, delivery, or receipt of an exempted security under paragraph (12) [of the Exchange Act], as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in paragraph (29) [of the Exchange Act] as in effect on the date of enactment of the Futures Trading Act of 1982), unless such agreement, contract, or transaction is of the character of, or is commonly known in the trade as, a put, call, or other option").

disregarded. The Commissions believe this approach would result in consistent treatment for indexes regardless of whether they include securities that are, or issuers of securities that are, exempted securities (other than municipal securities) while ensuring that exempted securities (other than municipal securities) and issuers of exempted securities (other than municipal securities) are not included in an index merely to make the index either broad-based or narrow-based under the proposed rules.

Request for Comment

The Commissions request comment on all aspects of proposed rules 1.3(zzz) and 1.3(aaaa) under the CEA and proposed rules 3a68–1a and 3a68–1b under the Exchange Act, as applied to CDS, including the following:

85. Do the proposed criteria for identifying when an index of reference entities constitutes "issuers of securities in a narrow-based security index" and when an index of securities constitutes a "narrow-based security index" effectively encompass the key elements of a narrow-based security index as it pertains to paragraph (A)(ii)(III) (*i.e.,* the third prong) and paragraph (A)(ii)(I) (*i.e.,* the first prong) of the security-based swap definition? Why or why not?

86. Should an index with 9 or fewer non-affiliated issuers of securities or 9 or fewer securities be "narrow-based?" Why or why not?

87. Should an index in which the effective notional amounts allocated to any reference entity or security included in the index comprise more than 30 percent of the index's weighting be "narrow-based"? Why or why not?

88. Should an index in which the effective notional amounts allocated to any 5 non-affiliated reference entities or securities included in the index comprise more than 60 percent of the index's weighting be "narrow-based"? Why or why not?

89. Should an index in which publicly available information is not available for a predominant percentage of reference entities or securities included in the index be "narrow-based" for purposes of index CDS? Why or why not? The Commissions note that the criteria for the public information availability test do not necessarily ensure that there is in fact public information available regarding the relevant entities or securities, or that the criteria act in any way as a substitute for the actual availability of public information; instead, the criteria, taken as a whole, are intended to capture, for purposes of the definition of the term "narrow-based security index" for index CDS, those entities or securities, that on average, are likely to have public information available, and that the relevant index would therefore not be treated as "narrow-based." Do the proposed criteria appropriately achieve this objective? Are the criteria for the public information availability test under the proposed rules appropriate to result in a sufficient likelihood that public information about the component securities or issuers of securities in an index CDS would be available to properly address the regulatory interests of the Federal securities laws? Are the $700 million and $1 billion thresholds discussed above appropriate tests for the likelihood of publicly available information in this context? These thresholds are similar to those in the SEC securities offering reform rules used to determine, in part, whether a particular issuer was a "well-known seasoned issuer," in order to streamline registration requirements under the Securities Act.[243] Are there companies that have less than $700 million in worldwide equity capitalization, or less than $1 billion in outstanding debt (other than asset-backed securities), and that do not otherwise satisfy the public information availability test, that have public information available about them for purposes of determining whether an index CDS that includes such a company as a reference entity or such a security is broad or narrow-based? The Commissions request comment on the appropriate thresholds for determining whether there likely is public information available for purposes of the proposed definition of narrow-based security index and issuers of securities in a narrow-based security index for purposes of index CDS, in particular whether these thresholds should be modified higher or lower, and request empirical data to support the response.

90. Is it appropriate to treat an issuer eligible to rely on rule 12g3–2(b) under the Exchange Act as meeting the public information availability test under the proposed rules? Why or why not? Would such a provision include issuers that otherwise would not satisfy the information condition in the proposed rules? Why or why not? Please provide a detailed explanation and include empirical data to support any suggested modification.

91. With respect to asset-backed securities, is the proposed criterion for meeting the public information availability test, that the asset-backed securities were issued in a transaction registered under the Securities Act and have publicly available distribution reports, the correct approach? Why or why not? Should such a provision explicitly also apply to include asset-backed securities issued by Fannie Mae and Freddie Mac? Why or why not? Please provide a detailed explanation of whether and why such a condition is necessary and include empirical data to support any suggested modification.

92. Should the proposed rules exclude a reference entity or security in the index from the public information availability test, so long as the reference entity or security included in the index represents less than five percent of the index's weighting? Why or why not?

93. Should the proposed rules exclude a reference entity or security in the index from the public information availability test, so long as the reference entities or securities comprising at least 80 percent of the index's weighting satisfy the provisions of those paragraphs? Why or why not?

94. The Commissions are considering whether the public information availability test in proposed rules 1.3(zzz) and 1.3(aaaa) under the CEA and proposed rules 3a68–1a and 3a68–1b under the Exchange Act should apply to an index of issuers of securities or securities that is created and published by a third-party index provider that is not a party to an index CDS and makes publicly available general information about the construction of the index, index rules, components, and predetermined adjustments, and which index is referenced by an index CDS that is offered on or subject to the rules of a DCM or SEF, or by direct access in the U.S. from an FBOT that is registered with the CFTC. How are indexes created by such a third-party index provider and what type of compensation do they receive? What role do parties to a swap or security-based swap play in determining the constituents or index criteria? What type of information does a third-party index provider ensure is publicly available on an ongoing basis about each of the constituent issuers of securities or securities identified in the index and what actions does the third-party index provider take to ensure the accuracy of information about the issuers of securities or securities in any index compiled by such third-party index provider? How would a third-party index provider take steps to ensure that the indexes it creates are composed of issuers of securities or securities for which there likely is public information available? Please provide detailed examples.

95. If the Commissions determine to use, as an alternative to the public

[243] *See supra* note 231.

information availability test in the proposed rules relating to index CDS, the existence of a third-party index provider that is not a party to an index CDS and makes publicly available general information about the construction of the index, index rules, components, and predetermined adjustments, and which index is referenced by an index CDS that is offered on or subject to the rules of a DCM or SEF, or by direct access in the U.S. from an FBOT that is registered with the CFTC, what requirements, if any, should the Commissions impose on the DCM, SEF, or FBOT to ensure that public information likely will be available in this context regarding the issuers of securities or securities in the index? What specified standards, if any, should the Commissions require the DCM, SEF, or FBOT to meet for purposes of the proposed rules?

96. Should index CDS based on an index compiled by a third-party index provider as described in this section be considered a "mixed swap" rather than a swap in order to ensure that the protections of the Federal securities laws apply with respect to index constituents about which public information about the constituent issuers of securities or securities in the index (subject to the de minimis provisions of the proposed rules) may not be available?

97. Are there other criteria that the Commissions should adopt as alternative means of satisfying the public information availability test in the proposed rules? If so, please explain what they are and what requirements the Commissions should impose to ensure the public availability of information regarding issuers of securities or securities in index CDS.

98. Should the proposed rules provide, solely with respect to CDS that may be entered into only between eligible contract participants, that the information availability test could be satisfied if the reference entity or the issuer of the security (i) except in the case of issuing entities of asset-backed securities, provides information to the public or to such eligible contract participant pursuant to rule 144A(d)(4) of the Securities Act; (ii) except in the case of issuing entities of asset-backed securities, financial information is otherwise publicly available about the reference entity or the issuer of the security; or (iii) in the case of asset-backed securities and issuing entities of asset-backed securities, financial information of the type and level included in public distribution reports for similar asset-backed securities about both the issuing entity and such asset-backed securities is publicly available? Why or why not? Please provide a detailed explanation and empirical data, to the extent feasible.

99. Should the proposed rules include additional or other criteria to determine whether an index is "narrow-based" with respect to index CDS? If so, what criteria should be included, and why?

100. Does the proposed treatment of index CDS whereby a payment is contemplated based on the default of a particular entity in the index rather than solely on the value of the index adequately address the Federal regulatory interests under the Federal securities laws and the Commodity Exchange Act?

101. Does the definition of "control" for purposes of identifying whether a reference entity or issuer is affiliated with another entity (ownership of 20 percent or more of an entity's or issuer's equity, or the ability to direct the voting of 20 percent or more of the entity's or issuer's voting equity) appropriately identify when affiliates are in a control relationship for these purposes? Why or why not? Should these thresholds be higher or lower? Please provide supporting data and/or analysis. Should issuing entities of asset-backed securities be considered separate reference entities or issuers for purposes of the proposed criteria? If not, why not? Are there circumstances under which issuing entities of asset-backed securities should not be considered separate reference entities or issuers for purposes of the proposed criteria? Why or why not?

102. Are there other categories or types of CDS that proposed rules 1.3(zzz) and (aaaa) and proposed rules 3a68–1a and 3a68–1b do not address or that require additional clarification regarding their treatment under the Dodd-Frank Act? If so, please provide a detailed description of any such categories or types of CDS, as well as any analysis, supported by empirical data to the extent feasible, of what clarification is necessary.

103. Are there other categories of event-type contracts relating to issuers of securities that require additional clarification regarding their treatment under the Dodd-Frank Act? If so, please provide a detailed explanation of the types of contracts and why the proposed rules should apply to such other event-type contracts.

4. Security Indexes

The Dodd-Frank Act defines the term "index" as "an index or group of securities, including any interest therein or based on the value thereof."[244] The Commissions are proposing guidance as to how to determine when a portfolio of securities is a narrow-based or broad-based security index and the circumstances in which changes to the composition of a security index (including a portfolio of securities)[245] underlying a Title VII instrument would affect the characterization of such Title VII instrument.[246]

In most cases, a security index is designed to reflect the performance of a market or sector by reference to representative securities or interests in securities. There are a number of well-known security indexes established and maintained by recognized index providers currently in the market.[247] The Commissions understand, however, that instead of using these established indexes, market participants may enter into a Title VII instrument where the underlying reference of the Title VII instrument is a portfolio of securities selected by the counterparties or created by a third-party index provider at the behest of one or both counterparties. In some cases, the Title VII instrument may give one or both of the counterparties, either directly or indirectly (*e.g.,* through an investment adviser or through the third-party index provider), discretionary authority to change the composition of the security portfolio, including, for example, by adding or removing securities in the security portfolio on an "at-will" basis during the term of the Title VII instrument.[248] The Commissions believe that where the counterparties, either directly or indirectly (*e.g.,* through an investment adviser or through the third-party index provider), have this discretionary authority to change the

[244] *See* section 3(a)(68)(E) of the Exchange Act, 15 U.S.C. 78c(a)(68)(E).

[245] A "portfolio" of securities could be a group of securities and therefore an "index" for purposes of the Dodd-Frank Act. To the extent that changes are made to the securities underlying the Title VII instrument and each such change is individually confirmed, then those substituted securities would not be part of a security index as defined in the Dodd-Frank Act, and therefore a Title VII instrument on each of those substituted securities would be a security-based swap.

[246] Solely for purposes of the discussion in this section, the terms "security index" and "security portfolio" are intended to include either securities or the issuers of securities.

[247] For instance, the S&P 500® is an index that gauges the large cap U.S. equities market.

[248] Alternatively, counterparties may enter into Title VII instruments where a third-party investment manager selects an initial portfolio of securities and has discretionary authority to change the composition of the security portfolio in accordance with guidelines agreed upon with the counterparties. Such security portfolios would be treated as narrow-based security indexes with Title VII instruments on those security portfolios being security-based swaps.

composition or weighting of securities in a security portfolio, that security portfolio should be treated as a narrow-based security index, and that therefore a Title VII instrument on that security portfolio would be a security-based swap.[249]

The Commissions believe, however, that not all changes that occur to the composition or weighting of a security index underlying a Title VII instrument will always result in that security index being treated as a narrow-based security index. Many security indexes are constructed and maintained by an index provider pursuant to a published methodology.[250] For instance, the various Standard & Poor's security indexes are reconstituted and rebalanced as needed and on a periodic basis pursuant to published index criteria.[251]

In addition, counterparties to a Title VII instrument frequently agree to use as the underlying reference of a Title VII instrument a security index based on predetermined criteria where the security index composition or weighting may change as a result of the occurrence of certain events specified in the Title VII instrument at execution, such as "succession events." Counterparties to a Title VII instrument also may use a predetermined self-executing formula to make other changes to the composition or weighting of a security index underlying a Title VII instrument. In either of these situations, the composition of a security index may change pursuant to predetermined criteria or predetermined self-executing formulas without the Title VII instrument counterparties, their agents, or third-party index providers having any direct or indirect discretionary authority to change the security index.

In general, and by contrast to Title VII instruments in which the counterparties, either directly or indirectly (*e.g.,* through an investment adviser or through the third-party index provider), have the discretion to change the composition or weighting of the referenced security index, where there is an underlying security index for which there are predetermined criteria or a predetermined self-executing formula for adjusting the security index that are not subject to change or modification through the life of the Title VII instrument and that are set forth in the Title VII instrument at execution (regardless of who establishes the criteria or formula), a Title VII instrument on such underlying security index would be on a broad-based or narrow-based security index, depending on the composition and weighting of the underlying security index. Subject to the interpretation discussed below regarding security indexes that may shift from being a narrow-based security index or broad-based security index during the life of an existing Title VII instrument,[252] the characterization of a Title VII instrument based on a security index as either a swap or a security-based swap would depend on the characterization of the security index using the above interpretation.[253]

Request for Comment

104. The Commissions request comment on whether there are additional or other criteria that would be appropriate in determining whether a security index or security portfolio would constitute a narrow-based security index for purposes of the definitions of the terms "swap" and "security-based swap." Please discuss any criteria in detail and provide any supporting data where relevant.

105. What are the ways in which Title VII instruments involving security portfolios are structured, including changes in security portfolio composition?

106. Should "discretionary authority to change" by the counterparties, either directly or indirectly (*e.g.,* through an investment adviser or through the third-party index provider), be a determinative factor for whether a security portfolio should be treated as a narrow-based security index? Why or why not? Are there Title VII instruments where the underlying reference is a security portfolio where counterparties may directly or indirectly (*e.g.,* through an investment manager or the third-party provider) exercise discretionary authority to change the composition of the security portfolio that should not be considered security-based swaps? Why or why not? Please provide a detailed explanation of such Title VII instruments, the means by which, and why, the composition of the underlying security portfolio are established and subsequently changed, and for what purpose such Title VII instruments are used.

107. Should a security index, where changes to the composition are not subject to discretionary authority but instead may be made pursuant to predetermined criteria or a predetermined self-executing formula set forth in the Title VII instrument at execution, be considered either a broad-based security index or a narrow-based security index, depending on its constitution? Why or why not? Are changes pursuant to such predetermined criteria or formulas common? How frequently do such changes occur? What sorts of events trigger such changes? Please provide a detailed explanation and empirical data, to the extent feasible.

108. Are the terms "predetermined criteria" and "predetermined self-executing formula" clear? Why or why not? If not, what alternative or additional guidance should be provided to clarify under what circumstances changes to the composition of a security index underlying a Title VII instrument may be made without being considered "at will" or discretionary changes by the counterparties, either directly or indirectly (*e.g.,* through an investment adviser or through the third-party index provider), that would result in the security index being treated as a narrow-based security index and the Title VII instrument being a security-based swap? Are there specific additional criteria, restrictions, or parameters that should be considered? If so, please provide a detailed explanation regarding such criteria, restrictions, or parameters, including the types of changes that should or should not be permitted.

109. Are there specific methodologies or criteria, agreed to at or prior to the

[249] The Commissions understand that a security portfolio could be labeled as such or could just be an aggregate of individual Title VII instruments documented, for example, under a master agreement or by amending an annex of securities attached to a master trade confirmation. If the security portfolio were created by aggregating individual Title VII instruments, each Title VII instrument would need to be evaluated in accordance with the proposed guidance to determine whether it is a swap or a security-based swap. For the avoidance of doubt, if the counterparties to a Title VII instrument exchanged payments under that Title VII instrument based on a security index that was itself created by aggregating individual security-based swaps, such Title VII instrument would be a security-based swap. *See* discussion *supra* part III.D.

[250] *See, e.g.,* NASDAQ, "NASDAQ–100 Index" ("The NASDAQ–100 Index is calculated under a modified capitalization-weighted methodology. The methodology is expected to retain in general the economic attributes of capitalization-weighting while providing enhanced diversification. To accomplish this, NASDAQ will review the composition of the NASDAQ–100 Index on a quarterly basis and adjust the weightings of Index components using a proprietary algorithm, if certain pre-established weight distribution requirements are not met."), available at *http://dynamic.nasdaq.com/dynamic/nasdaq100_activity.stm*

[251] Information regarding security indexes and their related methodologies may be widely available to the general public or restricted to licensees in the case of proprietary or "private label" security indexes. Both public and private label security indexes are frequently subject to intellectual property protection.

[252] As discussed further below, the Commissions are concerned about the potential use of security indexes to game the narrow-based security index definition.

[253] *See supra* note 249 regarding the aggregation of separate trades.

execution of a Title VII instrument, for changing the composition of an underlying security index, that should be explicitly addressed by the Commissions in providing the proposed guidance regarding security indexes? If so, please provide a detailed explanation of those methodologies or criteria and what additional guidance is necessary.

110. Would restrictions on the frequency of changes to the composition of a security index underlying a Title VII instrument be useful in determining whether the underlying security index should be treated as a narrow-based security index? If so, please provide a detailed explanation of what restrictions should apply and why, as well as empirical data to the extent feasible.

5. Evaluation of Title VII Instruments on Security Indexes That Move From Broad-Based to Narrow-Based or Narrow-Based to Broad-Based

(a) In General

As discussed above, the determination of whether a Title VII instrument is a swap, a security-based swap, or both (*i.e.,* a mixed swap), is made at the execution of the Title VII instrument.[254] If the security index underlying a Title VII instrument migrates from being broad-based to being narrow-based, or vice versa, during the life of a Title VII instrument, the characterization of that Title VII instrument would not change from its initial characterization regardless of whether the Title VII instrument was entered into bilaterally or was executed through a trade on or subject to the rules of a DCM, SEF, FBOT, security-based SEF, or NSE. For example, if two counterparties enter into a swap based on a broad-based security index, and three months into the life of the swap the security index underlying that Title VII instrument migrates from being broad-based to being narrow-based, the Title VII instrument would remain a swap for the duration of its life and would not be recharacterized as a security-based swap.

If the material terms of a Title VII instrument are amended or modified during its life, the Commissions would view the amended or modified Title VII instrument as a new Title VII instrument.[255] As a result, the characteristics of the underlying security index must be reassessed at the time of such an amendment or modification to determine whether the security index has migrated from broad-based to narrow-based or vice versa. If the security index has migrated, then the characterization of the amended or modified Title VII instrument would be determined by evaluating the characterization of the underlying security index at the time the Title VII instrument is amended or modified. Similarly, if a security index has migrated from broad-based to narrow-based or vice versa, any new Title VII instrument based on that security index would be characterized pursuant to an evaluation of the underlying security index at the execution of that new Title VII instrument.

The Commissions are proposing guidance regarding circumstances in which the character of a security index on which a Title VII instrument is based changes according to predetermined criteria or a predetermined self-executing formula set forth in the Title VII instrument (or in a related or other agreement entered into by the counterparties or a third-party index provider to the Title VII instrument) at execution. Where at the time of execution such criteria or such formula would cause the underlying broad-based security index to become or assume the characteristics of a narrow-based security index or vice versa during the duration of the instrument,[256] then the characterization of the Title VII instrument based on such security index would be a mixed swap during the entire life of the Title VII instrument.[257] Although at certain points during the life of the Title VII instrument the underlying security index would be broad-based and at other points the underlying security index would be narrow-based, the Commissions believe that regulating such a Title VII instrument as a mixed swap from the execution of the Title VII instrument and throughout its life reflects the appropriate characterization of a Title VII instrument based on a security index that migrates pursuant to predetermined criteria or a predetermined self-executing formula.

The Commissions believe that this guidance regarding the use of predetermined criteria or a predetermined self-executing formula would prevent potential gaming of the Commissions' guidance regarding security indexes and prevent potential regulatory arbitrage based on the migration of a security index from broad-based to narrow-based or vice versa. In particular, the Commissions note that predetermined criteria and predetermined self-executing formulas can be constructed in ways that take into account the characteristics of a narrow-based security index and prevent a narrow-based security index from becoming broad-based and vice versa.

(b) Title VII Instruments on Security Indexes Traded on Designated Contract Markets, Swap Execution Facilities, Foreign Boards of Trade, Security-Based Swap Execution Facilities, and National Securities Exchanges

The Commissions recognize that security indexes underlying Title VII instruments that are traded on DCMs, SEFs, FBOTs, security-based SEFs, or NSEs raise particular issues if an underlying security index migrates from broad-based to narrow-based or vice versa. The characterization of an exchange-traded Title VII instrument at its execution, as explained above, would not change through the life of the Title VII instrument, regardless of whether the underlying security index migrates from broad-based to narrow-based or vice versa. Accordingly, a market participant who enters into a swap on a broad-based security index traded on or subject to the rules of a DCM, SEF or FBOT that migrates from broad-based to narrow-based may hold that position until the swap's expiration without any change in regulatory responsibilities, requirements, or obligations, and

[254] *See* discussion *supra* part III.A.

[255] For example, if, on its effective date, a Title VII instrument tracks the performance of an index of 12 securities but is amended during its term to track the performance of only 8 of those 12 securities, the Commissions would view the amended or modified Title VII instrument as a new Title VII instrument. Conversely, if, on its effective date, a Title VII instrument tracks the performance of an index of 12 securities but is amended during its term to reflect the replacement of a departing "key person" of a hedge fund that is a counterparty to the Title VII instrument with a new "key person," the Commissions would not view the amended or modified Title VII instrument as a new Title VII instrument because the amendment or modification is not to a material term of the Title VII instrument. Because it would be a new Title VII instrument, any regulatory requirements regarding new Title VII instruments would apply.

[256] Thus, for example, if a predetermined self-executing formula agreed to by the counterparties of a Title VII instrument at or prior to the execution of the Title VII instrument provided that the security index underlying the Title VII instrument would decrease from 20 to 5 securities after six months, such that the security index would become narrow-based as a result of the reduced number of securities, then the Title VII instrument would be a mixed swap at its execution. The characterization of the Title VII instrument as a mixed swap would not change during the life of the Title VII instrument.

[257] As discussed above in part III.G.4, to the extent a Title VII instrument permits "at will" substitution of an underlying security index, however, as opposed to the use of predetermined criteria or a predetermined self-executing formula, the Title VII instrument would be a security-based swap at its execution and throughout its life regardless of whether the underlying security index was narrow-based at the execution of the Title VII instrument.

similarly a market participant who enters into a security-based swap on a narrow-based security index traded on a security-based SEF or NSE may hold that position until the security-based swap's expiration without any change in regulatory responsibilities, requirements, or obligations.

However, in the absence of any action by the Commissions, if the market participant wants to offset the swap or enter into a new swap on the DCM, SEF or FBOT where the underlying security index has migrated from broad-based to narrow-based, or to offset the security-based swap or enter into a new security-based swap on a security-based SEF or NSE where the underlying security index has migrated from narrow-based to broad-based, the participant would be prohibited from doing so. That is because swaps may trade only on DCMs, SEFs, and FBOTs, and security-based swaps may trade only on registered NSEs and security-based SEFs.[258] The Commissions believe it is important to address how to treat Title VII instruments traded on trading platforms where the underlying security index migrates from broad-based to narrow-based or narrow-based to broad-based so that market participants will know where such Title VII instruments may be traded and can avoid potential disruption of their ability to offset or enter into new Title VII instruments on trading platforms when such migration occurs. The Commissions are proposing rules accordingly.[259]

Congress and the Commissions addressed a similar issue in the context of security futures, where the security index on which a future is based may migrate from broad-based to narrow-based or vice versa. Congress provided in the definition of "narrow-based security index" in both the CEA and the Exchange Act [260] for a tolerance period ensuring that, under certain conditions, a futures contract on a broad-based security index traded on a DCM may continue to trade, even when the index temporarily assumes characteristics that would render it a narrow-based security index under the statutory definition.[261] In general, an index is subject to this tolerance period, and therefore is not a narrow-based security index, if: (i) a futures contract on the index traded on a DCM for at least 30 days as a futures contract on a broad-based security index before the index assumed the characteristics of a narrow-based security index and (ii) the index does not retain the characteristics of a narrow-based security index for more than 45 business days over 3 consecutive calendar months. Pursuant to these statutory provisions, if the index becomes narrow-based for more than 45 business days over 3 consecutive calendar months, the index is excluded from the definition of the term "narrow-based security index" for the following 3 calendar months as a grace period.

The Commissions believe a similar tolerance period should apply to swaps traded on DCMs, SEFs, and FBOTs and security-based swaps traded on security-based SEFs and NSEs. Accordingly, the Commissions are proposing rules providing for tolerance periods for swaps that are traded on DCMs, SEFs, or FBOTs and for security-based swaps traded on security-based SEFs and NSEs.

Under paragraph (2)(i)(A) of proposed rule 1.3(yyy) under the CEA and paragraph (b)(1)(i) of proposed rule 3a68–3 under the Exchange Act, to be subject to the tolerance period, a security index underlying a swap executed on or subject to the rules of a DCM, SEF, or FBOT must not have been a narrow-based security index [262] during the first 30 days of trading.[263] If the index becomes narrow-based during the first 30 days of trading, paragraph (2)(i)(B) of proposed rule 1.3(yyy) under the CEA and paragraph (b)(1)(ii) of proposed rule 3a68–3 under the Exchange Act provide that the index must not have been a narrow-based security index during every trading day of the 6 full calendar months preceding a date no earlier than 30 days prior to the commencement of trading of a swap on such index.[264] If either of these alternatives are met, paragraph (2)(ii) of proposed rule 1.3(yyy) under the CEA and paragraph (b)(2) of proposed rule 3a68–3 under the Exchange Act provide that the index will not be a narrow-based security index if it has been a narrow-based security index for no more than 45 business days over 3 consecutive calendar months. Paragraph (2) of proposed rule 1.3(yyy) under the CEA and paragraph (b) of proposed rule 3a68–3 under the Exchange Act apply solely for purposes of swaps traded on or subject to the rules of a DCM, SEF, or FBOT.

Similarly, paragraph (3) of proposed rule 1.3(yyy) under the CEA and paragraph (c) of proposed rule 3a68–3 under the Exchange Act provide a tolerance period for security-based swaps traded on security-based SEFs or NSEs. Under paragraph (3)(i)(A) of proposed rule 1.3(yyy) under the CEA and paragraph (c)(1)(i) of proposed rule 3a68–3 under the Exchange Act, to be subject to the tolerance period, a security index underlying a security-based swap executed on a security-based SEF or NSE must have been a narrow-based security index during the first 30 days of trading. If the index becomes broad-based during the first 30 days of trading, paragraph (3)(i)(B) of proposed rule 1.3(yyy) under the CEA and paragraph (c)(1)(ii) of proposed rule 3a68–3 under the Exchange Act provide that the index must have been a non-narrow-based security index during every trading day of the 6 full calendar months preceding a date no earlier than 30 days prior to the commencement of trading of a security-based swap on such index. If either of these alternatives are met, paragraph (3)(ii) of proposed rule 1.3(yyy) under the CEA and paragraph (c)(2) of proposed rule 3a68–3 under the Exchange Act provide that the index will be a narrow-based security index if it has been a security index that is not narrow-based for no more than 45 business days over 3 consecutive

[258] If a swap were based on a security index that migrated from broad-based to narrow-based, a DCM, SEF, or FBOT could no longer offer the Title VII instrument because it would be a security-based swap. Similarly, if a security-based swap were based on a security index that migrated from narrow-based to broad-based, a security-based SEF or NSE could no longer offer the Title VII instrument because it would be a swap.

[259] The proposed rules apply only to the particular Title VII instrument that is traded on or subject to the rules of a DCM, SEF, FBOT, security-based SEF, or NSE. To the extent that a particular Title VII instrument is not traded on such a trading platform (even if another Title VII instrument of the same class or type is traded on such a trading platform) the proposed rules would not apply to that particular Title VII instrument.

[260] CEA section 1a(35)(B)(iii), 7 U.S.C. 1a(35)(B)(iii); section 3(a)(55)(C)(iii) of the Exchange Act, 15 U.S.C. 78c(a)(55)(C)(iii).

[261] By joint rules, the Commissions have provided that "[w]hen a contract of sale for future delivery on a security index is traded on or subject to the rules of a foreign board of trade, such index shall not be a narrow-based security index if it would not be a narrow-based security index if a futures contract on such index were traded on a designated contract market * * *." *See* CFTC rule 41.13, 17 CFR 41.13, and rule 3a55–3 under the Exchange Act, 17 CFR 240.3a55–3. Accordingly, the statutory tolerance period rules applicable to futures on security indexes traded on DCMs apply to futures traded on FBOTs as well.

[262] For purposes of the proposed rules, the term "narrow-based security index" shall also mean "issuers of securities in a narrow-based security index." *See supra* part III.G.3(b) (discussing the proposed rules defining "issuers of securities in a narrow-based security index").

[263] This provision is consistent with the provisions of the CEA and the Exchange Act applicable to futures contracts on security indexes. CEA section 1a(35)(B)(iii)(I), 7 U.S.C. 1a(35)(B)(iii)(I); section 3(a)(55)(C)(iii)(I) of the Exchange Act, 15 U.S.C. 78c(a)(55)(C)(iii)(I).

[264] This alternative test is the same as the alternative test applicable to futures contracts in CEA rule 41.12, 17 CFR 41.12 and rule 3a55–2 under the Exchange Act, 17 CFR 240.3a55–2.

calendar months.[265] Paragraph (3) of proposed rule 1.3(yyy) under the CEA and paragraph (c) of proposed rule 3a68–3 under the Exchange Act apply solely for purposes of security-based swaps traded on security-based SEFs or NSEs.

The Commissions are proposing that, once the tolerance period under the proposed rules has ended, there would be a grace period during which a Title VII instrument based on a security index that has migrated from broad-based to narrow-based or vice versa would be able to trade on the platform on which Title VII instruments based on such security index were trading before the security index migrated and can also, during such period, be cleared. Paragraph (4)(i) of proposed rule 1.3(yyy) under the CEA and paragraph (d)(1) of proposed rule3a68–3 under the Exchange Act would provide for an additional 3-month grace period applicable to a security index that becomes narrow-based for more than 45 business days over 3 consecutive calendar months, solely with respect to swaps that are traded on or subject to the rules of DCMs, SEFs, or FBOTs. During the grace period, such an index would not be considered a narrow-based security index. Paragraph (4)(ii) of proposed rule 1.3(yyy) under the CEA and paragraph (d)(2) of proposed rule3a68–3 under the Exchange Act would apply the same grace period to a security-based swap on a security index that becomes broad-based for more than 45 business days over 3 consecutive calendar months, solely with respect to security-based swaps that are traded on a security-based SEF or NSE. During the grace period, such an index would not be considered a broad-based security index.[266] As a result, this proposed rule would provide sufficient time for the migrated Title VII instrument to satisfy listing and clearing requirements applicable to swaps or security-based swaps, as appropriate.

There would be no overlap between the tolerance and the grace periods under the proposed rules and no "re-triggering" of the tolerance period. For example, if a security index becomes narrow-based for more than 45 business days over 3 consecutive calendar months, solely with respect to swaps that are traded on or subject to the rules of DCMs, SEFs, or FBOTs, but as a result of the proposed rules is not considered a narrow-based security index during the grace period, the tolerance period provisions would not apply, even if the security-index migrated temporarily during the grace period. After the grace period has ended, a security index would need to satisfy anew the requirements under the proposed rules regarding the tolerance period in order to trigger a new tolerance period.

The Commissions note that the proposed rules would not result in the recharacterization of any outstanding Title VII instruments. In addition, the proposed tolerance and grace periods would apply only to Title VII instruments that are traded on or subject to the rules of DCMs, SEFs, FBOTs, security-based SEFs, and NSEs.

Request for Comment

The Commissions request comment on all aspects of proposed rules 1.3(yyy) under the CEA and proposed rule 3a68–3 under the Exchange Act, including the following:

111. The Commissions request comment regarding whether the term "narrow-based security index" as defined in the CEA and the Exchange Act[267] requires further definition solely in the context of Title VII instruments.

112. Are there particular types of Title VII instruments that require additional guidance as to how the narrow-based security index definition applies? If so, which types of Title VII instruments? How should the definition apply to them? Please provide a detailed explanation of such Title VII instruments and the additional guidance that would be appropriate.

113. Does the proposed guidance effectively address security indexes that migrate from broad-based to narrow-based and vice versa? Why or why not? If not, what additional or alternative requirements would be appropriate, and why?

114. Will the proposed limitations regarding the use of predetermined criteria or predetermined self-executing formulas for Title VII instruments effectively prevent gaming of the proposed rules and potential regulatory arbitrage based on the migration of a security index or security portfolio from broad-based to narrow-based or vice versa? Why or why not? If not, please provide a detailed explanation of why not, and what additional or alternative limitations would do so.

115. Should the standard pursuant to which a Title VII instrument would be a mixed swap during the entire life of the Title VII instrument require instead that the predetermined criteria or predetermined self-executing formula be constructed in such a manner that a broad-based security index or security portfolio would be reasonably likely to become or assume the characteristics of a narrow-based security index or security portfolio, or vice versa? Why or why not? Are there additional or alternative standards that should be used in determining when a Title VII instrument would be a mixed swap during the entire life of the Title VII instrument? If so, please provide a detailed explanation of such standards and why they would be effective.

116. Do the proposed tolerance period rules appropriately address security indexes that temporarily change from broad-based to narrow-based, and from narrow-based to broad-based, in the context of Title VII instruments that are executed on or subject to the rules of a DCM, SEF, FBOT, security-based SEF, or NSE? Why or why not? If not, how should the proposed tolerance period rules be modified?

117. Should the "grace period" applicable to Title VII instruments executed on or subject to the rules of a DCM, SEF, FBOT, security-based SEF, or NSE regarding a security index that becomes narrow-based or broad-based, respectively, for more than 45 business days over 3 consecutive calendar months be modified? Why or why not? If so, what modifications should be made?

118. What would be the impact of the proposed rules on market participants with open swap or security-based swap positions if the security index underlying a swap were to become narrow-based or if the security index underlying a security-based swap were to become broad-based? Should market participants be allowed to liquidate their swaps or security-based swaps prior to expiration but after the grace period? If so, how would the listing market restrict trading for liquidation only?

H. Method of Settlement of Index CDS

The method that the parties have chosen or use to settle an index CDS following the occurrence of a credit event under such index CDS also can affect whether such index CDS would be a swap, a security-based swap, or both (*i.e.,* a mixed swap). The Commissions believe that if an index CDS that is not based on a narrow-based

[265] These provisions are consistent with the parallel provisions in the CEA and the Exchange Act applicable to futures contracts on security indexes traded on DCMs. CEA section 1a(35)(B)(iii)(II), 7 U.S.C. 1a(35)(B)(iii)(II); section 3(a)(55)(C)(iii)(II) of the Exchange Act, 15 U.S.C. 78c(a)(55)(C)(iii)(II).

[266] These provisions are consistent with the parallel provisions in the CEA and the Exchange Act applicable to futures contracts on security indexes traded on DCMs. *See* CEA section 1a(35)(D), 7 U.S.C. 1a(35)(D); section 3(a)(55)(E) of the Exchange Act, 15 U.S.C. 78c(a)(55)(E).

[267] CEA sections 1a(35)(A) and (B), 7 U.S.C. 1a(35)(A) and (B); section 3(a)(55)(B) and (C) of the Exchange Act, 15 U.S.C. 78c(a)(55)(B) and (C).

security index under the Commissions' proposed rules includes a mandatory physical settlement provision that would require the delivery of, and therefore the purchase and sale of, a non-exempted security [268] or a loan in the event of a credit event, such an index CDS would be a mixed swap.[269] Conversely, the Commissions believe that if an index CDS that is not based on a narrow-based security index under the Commissions' proposed rules includes a mandatory cash settlement [270] provision, such index CDS would be a swap, and not a security-based swap or a mixed swap, even if the cash settlement were based on the value of a non-exempted security or a loan.

The Commissions believe that an index CDS that is not based on a narrow-based security index under the Commissions' proposed rules and that provides for cash settlement in accordance with the 2009 ISDA Credit Derivatives Determinations Committees and Auction Settlement Supplement to the 2003 Definitions (the "Auction Supplement") or with the 2009 ISDA Credit Derivatives Determinations Committees and Auction Settlement CDS Protocol ("Big Bang Protocol") [271] would be a swap, and would not be considered a security-based swap or a mixed swap solely because the determination of the cash price to be paid is established through a securities or loan auction.[272] In 2009, auction settlement, rather than physical settlement, became the default method of settlement for, among other types of CDS, index CDS on corporate issuers of securities.[273] The amount of the cash settlement is determined through an auction triggered by the occurrence of a credit event.[274] The Auction Supplement "hard wired" the mechanics of credit event auctions into the 2003 Definitions.[275] The Commissions understand that the credit event auction process that is part of the ISDA terms works as follows:

Following the occurrence of a credit event under a CDS, a determinations committee ("DC") established by ISDA, following a request by any party to a credit derivatives transaction that is subject to the Big Bang Protocol or Auction Supplement, will determine, among other matters: (i) Whether and when a credit event occurred; (ii) whether or not to hold an auction to enable market participants to settle those of their credit derivatives transactions covered by the auction; (iii) the list of deliverable obligations of the relevant reference entity; and (iv) the necessary auction specific terms. The credit event auction takes place in two parts. In the first part of the auction, dealers submit physical settlement requests, which are requests to buy or sell any of the deliverable obligations (based on the dealer's needs and those of its counterparties), and an initial market midpoint price is created based on dealers' initial bids and offers. Following the establishment of the initial market midpoint, the physical settlement requests are then calculated to determine the amount of open interest.

The aggregate amount of open interest is the basis for the second part of the auction. In the second part of the auction, dealers and investors can determine whether to submit limit orders and the levels of such limit orders. The limit orders, which are irrevocable, have a firm price in addition to size and whether it is a buy or sell order. The auction is conducted as a "dutch" auction, in which the open buy interests and open sell interests are matched.[276] The final price of the auction is the last limit order used to match against the open interest. The final price in the auction is the cash price used for purposes of calculating the settlement payments in respect of the orders to buy and sell the deliverable obligations and it is also used to determine the cash settlement payment under the CDS.

I. Security-Based Swaps as Securities Under the Exchange Act and Securities Act

Pursuant to the Dodd-Frank Act, a security-based swap is defined as a "security" under the Exchange Act [277] and Securities Act.[278] As a result, security-based swaps are subject to the Exchange Act and the Securities Act and the rules and regulations promulgated thereunder.[279] To the

[268] The Commissions note that section 3(a)(68)(C) of the Exchange Act, 15 U.S.C. 78c(a)(68)(C), provides that "[t]he term "security-based swap" does not include any agreement, contract, or transaction that meets the definition of a security-based swap only because such agreement, contract, or transaction references, is based upon, or settles through the transfer, delivery, or receipt of an exempted security under paragraph (12) [of the Exchange Act], as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in paragraph (29) [of the Exchange Act] as in effect on the date of enactment of the Futures Trading Act of 1982), unless such agreement, contract, or transaction is of the character of, or is commonly known in the trade as, a put, call, or other option."

[269] The Commissions' views as to the legal basis for such a conclusion differ. The SEC also notes that there must either be an effective registration statement covering the transaction or an exemption under the Securities Act would need to be available for such physical delivery of securities and compliance issues under the Exchange Act would also need to be considered.

[270] The Commissions are aware that the 2003 Definitions *supra* note 35, include "Cash Settlement" as a defined term and that such "Settlement Method" (also a defined term in the 2003 Definitions) works differently than auction settlement pursuant to the "Big Bang Protocol" or "Auction Supplement" (each as defined below). The Commissions' use of the term "cash settlement" in this section includes "Cash Settlement," as defined in the 2003 Definitions, and auction settlement, as described in the "Big Bang Protocol" or "Auction Supplement."

[271] *See* Int'l Swaps and Derivatives Ass'n, Inc., "2009 ISDA Credit Derivatives Determinations Committees and Auction Settlement CDS Protocol," available at *http://www.isda.org/bigbangprot/docs/Big-Bang-Protocol.pdf.*

[272] The possibility that such index CDS may, in fact, be physically settled if an auction is not held or if the auction fails would not affect the characterization of the index CDS.

[273] The Commissions understand that the Big Bang Protocol is followed for index CDS involving corporate debt obligations but is not followed for index CDS based on asset-backed securities, loan-only CDS, and certain other types of CDS contracts. To the extent that such other index CDS contain auction procedures similar to the auction procedures for corporate debt to establish the cash price to be paid, the Commissions also would not consider such other index CDS that are not based on narrow-based security indexes under the Commissions' proposed rules to be mixed swaps.

[274] The Commissions understand that other conditions may need to be satisfied as well for an auction to be held.

[275] *See supra* note 35.

[276] The second part of the credit event auction process involves offers and sales of securities that must be made in compliance with the provisions of the Securities Act and the Exchange Act. First, the submission of a physical settlement request constitutes an offer by the counterparty to either buy or sell any one of the deliverable obligations in the auction. Second, the submission of the irrevocable limit orders by dealers or investors are sales or purchases by such persons at the time of submission of the irrevocable limit order. Through the auction mechanism, where the open interest (which represents physical settlement requests) is matched with limit orders, buyers and sellers are matched. Finally, following the auction and determination of the final price, the counterparty who has submitted the physical delivery request decides which of the deliverable obligations will be delivered to satisfy the limit order in exchange for the final price. The sale of the securities in the auction occurs at the time the limit order is submitted, even though the identification of the specific deliverable obligation does not occur until the auction is completed.

[277] *See* section 761(a)(2) of the Dodd-Frank Act (inserting the term "security-based swap" into the definition of "security" in section 3a(10) of the Exchange Act, 15 U.S.C. 78c(a)(10)).

[278] *See* section 768(a)(1) of the Dodd-Frank Act (inserting the term "security-based swap" into the definition of "security" in section 2(a)(1) of the Securities Act, 15 U.S.C. 77b(a)(1)).

[279] Sections 761(a)(3) and (4) of the Dodd-Frank Act amend sections 3(a)(13) and (14) of the Exchange Act, 15 U.S.C. 78c(a)(13) and (14), and section 768(a)(3) of the Dodd-Frank Act adds section 2(a)(18) to the Securities Act, 15 U.S.C. 77b(a)(18), to provide that the terms "purchase" and "sale" of a security-based swap shall mean the "the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap, as the context may require."

extent that security-based swaps differ from more traditional securities products, however, the SEC is soliciting comment on whether additional guidance may be necessary regarding the application of certain provisions of the Exchange Act and the Securities Act, and the rules and regulations promulgated thereunder, to security-based swaps.

Request for Comment

119. Are there Exchange Act or Securities Act provisions, or rules and regulations promulgated thereunder, that contemplate application to cash market securities products or other securities products for which additional guidance may be necessary when applied to security-based swaps? If so, which provisions, and why? Please provide detailed analysis and empirical data, to the extent feasible.

120. What additional guidance or modifications would be necessary to any such provisions in order to address the application of these provisions to security-based swaps while still achieving the regulatory purposes of those provisions?

IV. Mixed Swaps

A. Scope of the Category of Mixed Swap

The category of mixed swap is described, in both the definition of the term "security-based swap" in the Exchange Act and the definition of the term "swap" in the CEA, as a security-based swap that is also: based on the value of 1 or more interest or other rates, currencies, commodities, instruments of indebtedness, indices, quantitative measures, other financial or economic interest or property of any kind (other than a single security or a narrow-based security index), or the occurrence, non-occurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence (other than an event described in subparagraph (A)(ii)(III) [of section 3(a)(68) of the Exchange Act]).[280]

A mixed swap, therefore, is both a security-based swap and a swap.[281]

The Commissions believe that the scope of mixed swaps is, and is intended to be, narrow. Title VII establishes robust and largely parallel regulatory regimes for both swaps and security-based swaps and directs the Commissions to jointly prescribe such regulations regarding mixed swaps as may be necessary to carry out the purposes of the Dodd-Frank Act.[282] More generally, the Commissions believe the category of mixed swap was designed so that there would be no gaps in the regulation of swaps and security-based swaps. Therefore, in light of the statutory scheme created by the Dodd-Frank Act for swaps and security-based swaps, the Commissions believe the category of mixed swap covers only a small subset of Title VII instruments.[283]

For example, a Title VII instrument in which the underlying references are the value of an oil corporation stock and the price of oil would be a mixed swap. Similarly, a Title VII instrument in which the underlying reference is a portfolio of both securities (assuming the portfolio is not an index or, if it is an index, that the index is narrow-based) and commodities would be a mixed swap. Mixed swaps also would include certain Title VII instruments called "best of" or "out performance" swaps that require a payment based on the higher of the performance of a security and a commodity (other than a security).[284] As discussed elsewhere in this release, the Commissions also believe that certain Title VII instruments may be mixed swaps if they meet specified conditions.

The Commissions also believe that the use of certain market standard agreements in the documentation of Title VII instruments should not in and of itself transform a Title VII instrument into a mixed swap. For example, many instruments are documented by incorporating by reference market standard agreements. Such agreements typically set out the basis of establishing a trading relationship with another party but are not, taken separately, a swap or security-based swap. These agreements also include termination and default events relating to one or both of the counterparties; such counterparties may or may not be entities that issue securities.[285] The Commissions believe that the term "any agreement * * * based on * * * the occurrence of an event relating to a single issuer of a security," as provided in the definition of the term "security-based swap," was not intended to include such termination and default events relating to counterparties included in standard agreements that are incorporated by reference into a Title VII instrument.[286] Therefore, an instrument would not be simultaneously a swap and a security-based swap (and thus not a mixed swap) simply by virtue of having incorporated by reference a standard agreement, including default and termination events relating to counterparties to the Title VII instrument.

Request for Comment

The Commissions request comment on the following:

121. Are there other examples of Title VII instruments that should, or should not, be included within the mixed swap category?

122. How frequently, and for what purposes, do market participants use mixed swaps?

123. Can, and should, the economic goals of mixed swaps be accomplished using a combination of separate Title VII instruments, none of which would need to constitute a mixed swap? What problems, if any, would arise from the "disaggregation" of mixed swaps?

B. Regulation of Mixed Swaps

1. Introduction

Paragraph (a) of proposed rule 1.9 under the CEA and proposed rule 3a68–4 under the Exchange Act would define a "mixed swap" in the same manner as the term is defined in both the CEA and the Exchange Act. The Commissions are proposing two rules to address the regulation of mixed swaps. First, paragraph (b) of proposed rule 1.9 under the CEA and proposed rule 3a68–4 under the Exchange Act would provide a regulatory framework with which parties to bilateral uncleared mixed swaps (*i.e.,* mixed swaps that are neither executed on or subject to the rules of a DCM, NSE, SEF, security-based SEF, or FBOT nor cleared through a DCO or clearing agency), as to which at least

[280] Section 3(a)(68)(D) of the Exchange Act, 15 U.S.C. 78c(a)(68)(D); CEA section 1a(47)(D), 7 U.S.C. 1a(47)(D).

[281] *Id.* The exclusion from the definition of the term "swap" for security-based swaps does not include security-based swaps that are mixed swaps. *See* CEA section 1a(47)(B)(x), 7 U.S.C. 1a(47)(B)(x).

[282] *See* section 712(a)(8) of the Dodd-Frank Act.

[283] *See* Morgan Stanley Letter (expressing the view that "the universe of mixed swaps should be relatively small"); Letter from Timothy W. Cameron, Esq., Managing Director, Asset Management Group, Securities Industry and Financial Markets Association ("SIFMA Letter") (suggesting that the scope of products included in the mixed swap category should be limited to "avoid unnecessary and duplicative regulation").

[284] *See* Cleary Letter (providing as examples of mixed swaps, "a swap based on the out-performance of gold, oil or another commodity relative to a security or narrow-based security index," "a security-based swap with knock-out/knock-in events tied to the value of gold, oil or another commodity," and "[s]waps on indices or baskets that include narrow-based security index and physical commodity components"); Deutsche Bank Letter (indicating that "best-of" swaps should be treated as mixed swaps); Morgan Stanley Letter ("An example of a mixed swap might be a contract under which one party takes long exposure to the common stock of a U.S. corporation while simultaneously taking short exposure to the price of gold.").

[285] Those standard events include inter alia bankruptcy, breach of agreement, cross default to other indebtedness, and misrepresentations.

[286] *See* section 3(a)(68)(A)(ii)(III) of the Exchange Act, 15 U.S.C. 78c(a)(68)(A)(ii)(III).

one of the parties is dually registered with both Commissions, would need to comply. Second, paragraph (c) of the proposed rules would establish a process for persons to request that the Commissions issue a joint order permitting such persons (and any other person or persons that subsequently lists, trades, or clears that class of mixed swap) [287] to comply, as to parallel provisions [288] only, with specified parallel provisions of either the CEA or the Exchange Act, and related rules and regulations (collectively "specified parallel provisions"), instead of being required to comply with parallel provisions of both the CEA and the Exchange Act.

2. Bilateral Uncleared Mixed Swaps Entered Into by Dually-Registered Dealers or Major Participants

Swap dealers and major swap participants will be comprehensively regulated by the CFTC and security-based swap dealers and major security-based swap participants will be comprehensively regulated by the SEC.[289] The Commissions recognize that there may be differences in the requirements applicable to swap dealers and security-based swap dealers, or major swap participants and major security-based swap participants, such that dually-registered market participants may be subject to potentially conflicting or duplicative regulatory requirements when they engage in mixed swap transactions. In order to assist market participants in addressing such potentially conflicting or duplicative requirements, the Commissions are proposing rules that would permit dually-registered swap dealers and security-based swap dealers and dually-registered major swap participants and major security-based swap participants to comply with an alternative regulatory regime when they enter into certain mixed swaps under specified circumstances.

Accordingly, paragraph (b) of proposed rule 1.9 under the CEA and rule 3a68–4 under the Exchange Act would provide that a bilateral uncleared mixed swap,[290] where at least one party is dually-registered with the CFTC as a swap dealer or major swap participant and with the SEC as a security-based swap dealer or major security-based swap participant, would be subject to all applicable provisions of the Federal securities laws (and SEC rules and regulations promulgated thereunder). The proposed rules also would provide that such mixed swaps would be subject to only the following provisions of the CEA (and CFTC rules and regulations promulgated thereunder):

- Examinations and information sharing: CEA sections 4s(f) and 8; [291]
- Enforcement: CEA sections 2(a)(1)(B), 4(b), 4b, 4c, 6(c), 6(d), 6c, 6d, 9, 13(a), 13(b) and 23; [292]
- Reporting to an SDR: CEA section 4r; [293]
- Real-time reporting: CEA section 2(a)(13); [294]
- Capital: CEA section 4s(e); [295] and
- Position Limits: CEA section 4a.[296]

The Commissions believe that paragraph (b) of the proposed rules would address potentially conflicting or duplicative regulatory requirements for dually-registered dealers and major participants that are subject to regulation by both the CFTC and the SEC, while requiring dual registrants to comply with the regulatory requirements the Commissions believe are necessary to provide sufficient regulatory oversight for mixed swaps transactions entered into by such dual registrants. The CFTC also believes that paragraph (b) of the proposed rules would provide clarity to dually-registered dealers and major participants, who are subject to regulation by both the CFTC and the SEC, as to the requirements of each Commission that will apply to their bilateral uncleared mixed swaps.

Request for Comment

124. The Commissions request comment generally on the foregoing proposed rules regarding the regulation of mixed swaps entered into by dually-registered swap or security-based swap dealers and major swap or security-based swap participants.

125. Does paragraph (b) of proposed rule 1.9 under the CEA and proposed rule 3a68–4 under the Exchange Act provide effective regulatory treatment for bilateral uncleared mixed swaps entered into by persons that are dually registered both as swap dealers or major swap participants with the CFTC and security-based swap dealers or major security-based swap participants with the SEC? If not, how should the proposed regulatory treatment be modified?

126. Are the enumerated sections of the CEA (and the regulations promulgated thereunder) that are reserved in paragraph (b) appropriate? Are there sections that should be withdrawn? Why or why not? Are there sections that should be added? Why or why not?

3. Regulatory Treatment for Other Mixed Swaps

Because mixed swaps are both security-based swaps and swaps,[297] absent a joint rule or order by the Commissions permitting an alternative regulatory approach, persons who desire or intend to list, trade, or clear a mixed swap (or class thereof) would be required to comply with all the statutory provisions in the CEA and the Exchange Act (including all the rules and regulations thereunder) that were added or amended by Title VII with respect to swaps or security-based swaps.[298] Such dual regulation may not be appropriate in every instance and may result in potentially conflicting or duplicative regulatory requirements. However, before the Commissions can determine the appropriate regulatory treatment for mixed swaps (other than the treatment discussed above), the Commissions would need to understand better the nature of the mixed swaps that parties want to trade. Paragraph (c) of proposed rule 1.9 under the CEA and proposed

[287] All references to Title VII instruments in this part IV and in part VI shall include a class of such Title VII instruments as well. For example, a "class" of Title VII instrument would include instruments that are of similar character and provide substantially similar rights and privileges.

[288] For purposes of paragraph (c) of proposed rule 1.9 under the CEA and rule 3a68–4 under the Exchange Act, "parallel provisions" means comparable provisions of the CEA and the Exchange Act that were added or amended by Title VII with respect to security-based swaps and swaps, and the rules and regulations thereunder.

[289] Section 712(a)(7)(A) of the Dodd-Frank Act requires the Commissions to treat functionally or economically similar entities in a similar manner.

[290] For purposes of the proposed rules, a "bilateral uncleared mixed swap" would be a mixed swap that: (i) Is neither executed on nor subject to the rules of a DCM, NSE, SEF, security-based SEF, or FBOT; and (ii) will not be submitted to a DCO or registered or exempt clearing agency to be cleared. To the extent that a mixed swap is subject to the mandatory clearing requirement (*see* CEA section 2(h)(1)(A), 7 U.S.C. 2(h)(1)(A), and section 3C(a)(1) of the Exchange Act) (and where a counterparty is not eligible to rely on the end-user exclusion from mandatory clearing requirement (*see* CEA section 2(h)(7), 7 U.S.C. 2(h)(7), and section 3C(g) of the Exchange Act)), this alternative regulatory treatment would not be available.

[291] 7 U.S.C. 6s(f) and 12, respectively.

[292] 7 U.S.C. 2(a)(1)(B), 6(b), 6b, 6c, 9 and 15, 13b, 13a–1, 13a–2, 13, 13c(a), 13c(b), and 26, respectively.

[293] 7 U.S.C. 6r.

[294] 7 U.S.C. 2(a)(13).

[295] 7 U.S.C. 6s(e).

[296] 7 U.S.C. 6a.

[297] *See supra* note 10.

[298] Because security-based swaps are also securities, compliance with the Federal securities laws and rules and regulations thereunder (in addition to the provisions of the Dodd-Frank Act and the rules and regulations thereunder) would also be required. To the extent one of the Commissions has exemptive authority with respect to other provisions of the CEA or the Federal securities laws and the rules and regulations thereunder, persons may submit separate exemptive requests or rulemaking petitions regarding those provisions to the relevant Commission.

rule 3a68–4 under the Exchange Act would establish a process pursuant to which any person who desires or intends to list, trade, or clear a mixed swap (or class thereof) that is not subject to the provisions of paragraph (b) (*i.e.,* bilateral uncleared mixed swaps entered into by at least one dual registrant) may request the Commissions to publicly issue a joint order permitting such person (and any other person or persons that subsequently lists, trades, or clears that class of mixed swap) to comply, as to parallel provisions only, with the specified parallel provisions, instead of being required to comply with parallel provisions of both the CEA and the Exchange Act.[299]

Paragraph (c) of the proposed rules would further provide that a person submitting such a request to the Commissions must provide the Commissions with:

(i) All material information regarding the terms of the specified, or specified class of, mixed swap;

(ii) the economic characteristics and purpose of the specified, or specified class of, mixed swap;

(iii) the specified parallel provisions, and the reasons the person believes such specified parallel provisions would be appropriate for the mixed swap (or class thereof);

(iv) an analysis of (1) the nature and purposes of the parallel provisions that are the subject of the request; (2) the comparability of such parallel provisions; and (3) the extent of any conflicts or differences between such parallel provisions; and

(v) such other information as may be requested by either of the Commissions.

This provision is intended to provide the Commissions with sufficient information regarding the mixed swap (or class thereof) and the proposed regulatory approach to make an informed determination regarding the appropriate regulatory treatment of the mixed swap (or class thereof).

Paragraph (c) of the proposed rules also would allow a person to withdraw a request regarding the regulation of a mixed swap at any time prior to the issuance of a joint order by the Commissions. This provision is intended to permit persons to withdraw requests that they no longer need. This, in turn, would save the Commissions time and staff resources.

Paragraph (c) would further provide that in response to a request pursuant to the proposed rules, the Commissions may jointly issue an order, after public notice and opportunity for comment, permitting the requesting person (and any other person or persons that subsequently lists, trades, or clears that class of mixed swap) to comply, as to parallel provisions only, with the specified parallel provisions (or another subset of the parallel provisions that are the subject of the request, as the Commissions determine is appropriate), instead of being required to comply with parallel provisions of both the CEA and the Exchange Act. In determining the contents of such a joint order, the Commissions could consider, among other things, (i) the nature and purposes of the parallel provisions that are the subject of the request; (ii) the comparability of such parallel provisions; and (iii) the extent of any conflicts or differences between such parallel provisions.

Finally, paragraph (c) of the proposed rules would require the Commissions, if they determine to issue a joint order pursuant to these rules, to do so within 120 days of receipt of a complete request (with such 120-day period being tolled during the pendency of a request for public comment on the proposed interpretation). If the Commissions do not issue a joint order within the prescribed time period, the proposed rules require that each Commission publicly provide the reasons for not having done so. Paragraph (c) makes clear that nothing in the proposed rules requires either Commission to issue a requested joint order regarding the regulation of a particular mixed swap (or class thereof).

These provisions are intended to provide market participants with a prompt review of requests for a joint order regarding the regulation of a particular mixed swap (or class thereof). The proposed rules also would provide transparency and accountability by requiring that at the end of the review period, the Commissions issue the requested order or publicly state the reasons for not doing so.

Request for Comment

127. Is the proposed procedure set forth in paragraph (c) appropriate? Should paragraph (c) of the proposed rules include a more detailed process for persons to request that the Commissions issue a joint order permitting such persons to comply, as to parallel provisions only, with specified parallel provisions, instead of being required to comply with parallel provisions of both the CEA and the Exchange Act? If so, please provide a detailed explanation of what that process should include.

128. Is the information required by paragraph (c) in support of a request for a joint order appropriate? Are there specific economic characteristics that should be required? In particular, should requesting persons be required to provide the specified parallel provisions, and the reasons the person believes it would be appropriate to request that regulatory treatment, as well as an analysis of (i) the nature and purposes of the parallel provisions that are the subject of the request; (ii) the comparability of such parallel provisions; and (iii) the extent of any conflicts or differences between such parallel provisions? Why or why not? If not, please provide a detailed explanation, including what information requesting persons should be required to provide.

129. Is there additional or alternative information that the Commissions should require persons to submit in connection with a request regarding the regulation of particular mixed swaps (or class thereof)? If so, what additional or alternative information should be required?

130. Should persons be able to withdraw a request for a joint order regarding the regulation of a particular mixed swap (or class thereof)? Why or why not? Should there be additional requirements regarding such withdrawals? If so, what should they be?

131. Is the 120-day timeframe for issuance of a requested joint order provided for in paragraph (c) of proposed rule 1.9 under the CEA and proposed rule 3a68–4 under the Exchange Act appropriate? Is it too short or too long? Are the provisions for tolling this timeframe during a public comment period appropriate? Why or why not? Where the Commissions do not issue a joint order, is it appropriate that they each publicly provide the reasons for not doing so within the applicable timeframe? Why or why not?

V. Security-Based Swap Agreements

A. Introduction

SBSAs are swaps over which the CFTC has regulatory and enforcement authority but for which the SEC also has antifraud and certain other authority.[300]

[299] Other than with respect to the specified parallel provisions with which such persons may be permitted to comply instead of complying with parallel provisions of both the CEA and the Exchange Act, any other provision of either the CEA or the Federal securities laws that applies to swaps or security-based swaps will continue to apply.

[300] *See* section 3(a)(78) of the Exchange Act, 15 U.S.C. 78c(a)(78); CEA section 1a(47)(A)(v), 7 U.S.C. 1a(47)(A)(v). The Dodd-Frank Act provides that certain CFTC registrants, such as DCOs and SEFs, will keep records regarding SBSAs open to inspection and examination by the SEC upon request. *See, e.g.,* sections 725(e) and 733 of the Dodd-Frank Act. The Commissions are committed

The term "security-based swap agreement" is defined as a "swap agreement" (as defined in section 206A of the GLBA [301]) of which "a material term is based on the price, yield, value, or volatility of any security or any group or index of securities, including any interest therein" but does not include a security-based swap.[302] The Dodd-Frank Act amended the definition of "swap agreement" in section 206A of the GLBA [303] to eliminate the requirements that a swap agreement be between ECPs, as defined in 1a(12)(C) of the CEA,[304] and subject to individual negotiation.[305]

B. Swaps That Are Security-Based Swap Agreements

Although the Commissions believe it is not possible to provide a bright line test to define an SBSA, the Commissions believe that it is possible to clarify that certain types of swaps clearly fall within the definition of SBSA. For example, a swap based on an index of securities that is not a narrow-based security index (*i.e.,* a broad-based security index) would fall within the definition of an SBSA under the Dodd-Frank Act.[306] Similarly, an index CDS that is not based on a narrow-based security index or on the "issuers of securities in a narrow-based security index," as defined in proposed rule 1.3(zzz) under the CEA and proposed rule 3a68–1a under the Exchange Act, would be an SBSA. In addition, a swap based on a U.S. Treasury security or on certain other exempted securities other than municipal securities would fall within the definition of an SBSA under the Dodd-Frank Act.[307] The Commissions have received no comments regarding the definition of SBSA in the Dodd-Frank Act in response to the ANPR, and have not been made aware of any significant market confusion regarding what constitutes an SBSA since the definition of SBSA was enacted as part of the CFMA in 2000. Accordingly, the Commissions are not proposing to further define SBSA at this time beyond providing the examples above.[308]

Request for Comment

132. The Commissions request comment on whether further clarification of the definition of SBSA is necessary or appropriate. Commenters should provide a detailed analysis regarding what further guidance should be provided and how that guidance would affect what constitutes an SBSA.

133. The Commissions also request comment on whether there are other examples of swap transactions that the Commissions should clarify meet the definition of SBSA.

C. Books and Records Requirements for Security-Based Swap Agreements

The Dodd-Frank Act requires the Commissions to adopt rules regarding the books and records required to be kept for SBSAs. Specifically, section 712(d)(2)(B) of the Dodd-Frank Act requires the Commissions, in consultation with the Board, to jointly adopt rules governing books and records requirements for SBSAs by persons registered as SDRs under the CEA, including uniform rules that specify the data elements that shall be collected and maintained by each SDR. Similarly, section 712(d)(2)(C) of the Dodd-Frank Act requires the Commissions, in consultation with the Board, to jointly adopt rules governing books and records for SBSAs, including daily trading records, for swap dealers, major swap participants, security-based swap dealers, and major security-based swap participants.

As discussed above, SBSAs are swaps over which the CFTC has primary regulatory authority, but for which the SEC has antifraud, anti-manipulation, and certain other authority. The CFTC has proposed rules governing books and records for swaps, which would apply to swaps that also are SBSAs.[309] The Commissions believe that the proposed rules would provide sufficient books and records regarding SBSAs and do not believe that additional books and records requirements are necessary for SBSAs. The Commissions therefore are proposing rules to clarify that there would not be additional books and records requirements regarding SBSAs other than those proposed for swaps. Specifically, proposed rule 1.7 under the CEA and proposed rule 3a69–3 under the Exchange Act would not require persons registered as SDRs under the CEA and the rules and regulations thereunder to (i) keep and maintain additional books and records regarding SBSAs other than the books and records regarding swaps that SDRs would be required to keep and maintain pursuant to the CEA and rules and regulations thereunder; and (ii) collect and maintain additional data regarding SBSAs other than the data regarding swaps that SDRs would be required to collect and maintain pursuant to the CEA and rules and regulations thereunder.

to working cooperatively together regarding their dual enforcement authority over SBSAs.

[301] 15 U.S.C. 78c note.

[302] *See* section 3(a)(78) of the Exchange Act, 15 U.S.C. 78c(a)(78). The CFMA amended the Exchange Act and the Securities Act to exclude swap agreements from the definitions of security in those Acts but subjected "security-based swap agreements," as defined in section 206B of the GLBA, 15 U.S.C. 78c note, to the antifraud, anti-manipulation, and anti-insider trading provisions of the Exchange Act and Securities Act. *See* CFMA, *supra* note 182, title III.

The CEA does not contain a stand-alone definition of "security-based swap agreement" but includes the definition instead in subparagraph (A)(v) of the swap definition in CEA section 1a(47), 7 U.S.C. 1a(47). The only difference between these definitions is that the definition of SBSA in the Exchange Act specifically excludes security-based swaps (*see* section 3(a)(78)(B) of the Exchange Act, 15 U.S.C. 78c(a)(78)(B)), while the definition of SBSA in the CEA does not contain a similar exclusion. Instead, the exclusion for security-based swaps is placed in the general exclusions from the definition of swap in the CEA (*see* CEA section 1a(47)(B)(x), 7 U.S.C. 1a(47)(B)(x)).

[303] 15 U.S.C. 78c note.

[304] 7 U.S.C. 1a(12)(C).

[305] *See* section 762(b) of the Dodd-Frank Act. Sections 762(c) and (d) of the Dodd-Frank Act also made conforming amendments to the Exchange Act and the Securities Act to reflect the changes to the regulation of "swap agreements" that are either "security-based swaps" or "security-based swap agreements" under the Dodd-Frank Act.

[306] Swaps based on indexes that are not narrow-based security indexes are not included within the definition of the term security-based swap under the Dodd-Frank Act. *See* section 3(a)(68)(A)(ii)(I) of the Exchange Act, 15 U.S.C. 78c(a)(68)(A)(ii)(I), and discussion *supra* part III.G. However, such swaps have a material term that is "based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein," and therefore such swaps fall within the SBSA definition.

[307] Swaps on U.S. Treasury securities that do not have any other underlying references involving securities are expressly excluded from the definition of the term "security-based swap" under the Dodd-Frank Act. *See* section 3(a)(68)(C) of the Exchange Act, 15 U.S.C. 78c(a)(68)(C) (providing that an agreement, contract, or transaction that would be a security-based swap solely because it references, is based on, or settles through the delivery of one or more U.S. Treasury securities (or certain other exempted securities) is excluded from the security-based swap definition). However, swaps on U.S. Treasury securities or on other exempted securities covered by subparagraph (C) of the security-based swap definition have a material term that is "based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein," and therefore they fall within the SBSA definition.

[308] The Commissions note that certain transactions that were not "security-based swap agreements" under the CFMA are nevertheless included in the definition of security-based swap under the Dodd-Frank Act—including, for example, a CDS on a single loan. Accordingly, although such transactions were not subject to insider trading restrictions under the CFMA, under the Dodd-Frank Act they are subject to the Federal securities laws, including insider trading restrictions.

[309] *See* Swap Data Recordkeeping and Reporting Requirements, *supra* note 6 (proposed rules regarding swap data recordkeeping and reporting requirements for SDRs, DCOs, DCMs, SEFs, swap dealers, major swap participants, and swap counterparties who are neither swap dealers nor major swap participants); Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants, *supra* note 7 (proposed rules regarding reporting and recordkeeping requirements and daily trading records requirements for swap dealers and major swap participants).

In addition, the proposed rules would not require persons registered as swap dealers or major swap participants under the CEA and rules and regulations thereunder, or registered as security-based swap dealers or major security-based swap participants under the Exchange Act and rules and regulations thereunder, to keep and maintain additional books and records, including daily trading records, regarding SBSAs other than the books and records regarding swaps those persons would be required to keep and maintain pursuant to the CEA and the rules and regulations thereunder.[310]

Request for Comment

134. The Commissions request comment on the proposed rules regarding books and records requirements for SBSAs. Will requiring the same recordkeeping information for SBSAs that will be required for swaps under the CFTC's recordkeeping rules be sufficient? Should the Commissions impose additional recordkeeping requirements for SBSAs? If so, why, and what additional recordkeeping should be required?

VI. Process for Requesting Interpretations of the Characterization of a Title VII Instrument

As discussed above, there may be Title VII instruments (or classes of Title VII instruments) that may be difficult to categorize definitively as swaps or security-based swaps. Further, because mixed swaps are both swaps and security-based swaps, identifying a mixed swap may not always be straightforward.

Section 712(d)(4) of the Dodd-Frank Act provides that any interpretation of, or guidance by, either the CFTC or SEC regarding a provision of Title VII shall be effective only if issued jointly by the Commissions (after consultation with the Board) on issues where Title VII requires the CFTC and SEC to issue joint regulations to implement the provision. The Commissions believe that any interpretation or guidance regarding whether a Title VII instrument is a swap, a security-based swap, or both (*i.e.,* a mixed swap), must be issued jointly pursuant to this requirement. Consequently, the Commissions are proposing a process for interested persons to request a joint interpretation by the Commissions regarding whether a particular Title VII instrument (or class of Title VII instruments) is a swap, a security-based swap, or both (*i.e.,* a mixed swap).

Section 718 of the Dodd-Frank Act establishes a process for determining the status of "novel derivative products" that may have elements of both securities and futures contracts. Section 718 of the Dodd-Frank Act provides a useful model for a joint Commission review process to appropriately categorize Title VII instruments. As a result, the Commissions' proposed process rules regarding swaps, security-based swaps, and mixed swaps include various attributes of the process established in section 718 of the Dodd-Frank Act. In particular, to permit an appropriate review period that provides sufficient time to ensure Federal regulatory interests are satisfied that also does not unduly delay the introduction of new financial products, the proposed process, like the process established in section 718, would include a deadline for responding to a request for a joint interpretation.[311]

Proposed rule 1.8 under the CEA and proposed rule 3a68–2 under the Exchange Act would establish a process for parties to request a joint interpretation regarding the characterization of a particular Title VII instrument (or class thereof). Specifically, paragraph (a) of the proposed rules would provide that any person may submit a request to the Commissions to provide a public joint interpretation of whether a particular Title VII instrument is a swap, a security-based swap, or both (*i.e.,* a mixed swap).

Paragraph (a) of the proposed rules is intended to afford market participants with the opportunity to obtain greater certainty from the Commissions regarding the regulatory status of particular Title VII instruments under the Dodd-Frank Act. This provision should decrease the possibility that market participants inadvertently might violate the regulatory requirements applicable to a particular Title VII instrument.

Paragraph (b) of proposed rules 1.8 under the CEA and proposed rule 3a68–2 under the Exchange Act would provide that a person requesting an interpretation as to the characterization of a Title VII instrument as a swap, a security-based swap, or both (*i.e.,* a mixed swap), must provide the Commissions with the person's determination of the characterization of the instrument and supporting analysis, along with certain other documentation. Specifically, the person must provide the Commissions with the following information:

- All material information regarding the terms of the Title VII instrument;
- A statement of the economic characteristics and purpose of the Title VII instrument;
- The requesting person's determination as to whether the Title VII instrument should be characterized as a swap, a security-based swap, or both (*i.e.,* a mixed swap), including the basis for such determination; and
- Such other information as may be requested by either Commission.

This provision is intended to provide the Commissions with sufficient information regarding the Title VII instrument at issue so that the Commissions can appropriately evaluate whether it is a swap, a security-based swap, or both (*i.e.,* a mixed swap). By requiring that requesting persons furnish a determination regarding whether they believe the Title VII instrument is a swap, a security-based swap, or both (*i.e.,* a mixed swap), including the basis for such determination, this provision also would assist the Commissions in more quickly identifying and addressing the relevant issues involved in arriving at a joint interpretation of the characterization of the instrument.

Paragraph (c) of proposed rule 1.8 under the CEA and proposed rule 3a68–2 under the Exchange Act would provide that a person may withdraw a request made pursuant to paragraph (a) at any time prior to the issuance of a joint interpretation or joint notice of proposed rulemaking by the Commissions. Notwithstanding any such withdrawal, the Commissions may provide an interpretation regarding the characterization of the Title VII instrument that was the subject of a withdrawn request.

This provision is intended to permit parties to withdraw requests for which the party no longer needs an interpretation. This, in turn, would save the Commissions time and staff resources. If the Commissions believe such an interpretation is necessary regardless of a particular request for interpretation, however, the Commissions may provide such a joint interpretation of their own accord.

Paragraph (d) of proposed rule 1.8 under the CEA and proposed rule 3a68–2 under the Exchange Act would

[310] Proposed rule 1.7 under the CEA and proposed rule 3a69–3 under the Exchange Act would provide that the term "security-based swap agreement" has the meaning set forth in CEA section 1a(47)(A)(v), 7 U.S.C. 1a(47)(A)(v), and section 3(a)(78) of the Exchange Act, 15 U.S.C. 78c(a)(78), respectively.

[311] The Commissions note that section 718 of the Dodd-Frank Act is a separate process from the process the Commissions are proposing, and that any future interpretation involving the process under section 718 would not affect the process being proposed here, nor would any future interpretation involving the process proposed here affect the process under section 718.

provide that if either Commission receives a proposal to list, trade, or clear an agreement, contract, or transaction (or class thereof) that raises questions as to the appropriate characterization of such agreement, contract, or transaction (or class thereof) as a swap, security-based swap, or both (*i.e.,* a mixed swap), the receiving Commission promptly shall notify the other. This provision of the proposed rules would further provide that either Commission, or their Chairmen jointly, may submit a request for a joint interpretation as to the characterization of the Title VII instrument where no external request has been received.

This provision is intended to ensure that Title VII instruments do not fall into regulatory gaps and will help the Commissions to fulfill their responsibility to oversee the regulatory regime established by Title VII of the Dodd-Frank Act by making sure that Title VII instruments are appropriately characterized, and thus appropriately regulated. An agency, or their Chairmen jointly, submitting a request for an interpretation as to the characterization of a Title VII instrument under this paragraph would be required to submit the same information as, and could withdraw a request in the same manner as, a person submitting a request to the Commissions. The bases for these provisions are set forth above with respect to paragraphs (b) and (c) of these proposed rules.

Paragraph (e) of proposed rule 1.8 under the CEA and proposed rule 3a68–2 under the Exchange Act would require the Commissions, if they determine to issue a joint interpretation as to the characterization of a Title VII instrument, to do so within 120 days of receipt of the complete external or agency submission (unless such 120-day period is tolled during the pendency of a request for public comment on the proposed interpretation).[312] If the Commissions do not issue a joint interpretation within the prescribed time period, the proposed rules require that each Commission publicly provide the reasons for not having done so. This provision of the proposed rules also incorporates the mandate of the Dodd-Frank Act that any joint interpretation by the Commissions be issued only after consultation with the Board of Governors of the Federal Reserve System.[313] Finally, paragraph (e) makes clear that nothing in the proposed rules requires either Commission to issue a requested joint interpretation regarding the characterization of a particular instrument.

These provisions are intended to guarantee market participants a prompt review of submissions requesting a joint interpretation of whether a Title VII instrument is a swap, a security-based swap, or both (*i.e.,* a mixed swap). The proposed rules also would provide transparency and accountability by requiring that at the end of the review period, the Commissions issue the requested interpretation or publicly state the reasons for not doing so.

Paragraph (f) of proposed rule 1.8 under the CEA and proposed rule 3a68–2 under the Exchange Act would permit the Commissions, in lieu of issuing a requested interpretation, to issue (within the timeframe for issuing a joint interpretation) a joint notice of proposed rulemaking to further define one or more of the terms "swap," "security-based swap," or "mixed swap." Such a rulemaking, as required by Title VII, would be required to be done in consultation with the Board of Governors of the Federal Reserve System. This paragraph is intended to provide the Commissions with needed flexibility to address issues that may be of broader applicability than the particular Title VII instrument that is the subject of a request for a joint interpretation.

Request for Comment

135. The Commissions request comment generally on all aspects of proposed rule 1.8 under the CEA and proposed rule 3a68–2 under the Exchange Act.

136. Should proposed rule 1.8(a) under the CEA and proposed rule 3a68–2(a) under the Exchange Act include a more specific process for persons to request a joint interpretation of whether a Title VII instrument is a swap, a security-based swap, or both (*i.e.,* a mixed swap)? If so, what additional specificity would be appropriate?

137. Would the information required by paragraph (b) of the proposed rules be sufficient for the Commissions to consider a request? Should requesting persons have to provide a statement regarding the economic characteristics and purpose of the Title VII instrument? Should requesting persons have to provide a determination regarding whether such instrument should be characterized as a swap, a security-based swap, or both (*i.e.,* a mixed swap), along with reasons therefor?

138. Is there additional or alternative information that the Commissions should require persons to submit in connection with a request for an interpretation regarding whether a Title VII instrument is a swap, a security-based swap, or both (*i.e.,* a mixed swap)? If so, what additional or alternative information should be required?

139. Should persons be able to withdraw a request for an interpretation pursuant to paragraph (c) of proposed rule 1.8 under the CEA and proposed rule 3a68–2 under the Exchange Act? Why or why not? Should there be additional parameters around or requirements regarding such withdrawals? If so, what should they be?

140. Is the 120-day timeframe for issuance of a requested joint interpretation provided for in paragraph (e) of proposed rule 1.8 under the CEA and proposed rule 3a68–2 under the Exchange Act appropriate? Is it too short or too long? Are the provisions for tolling this timeframe during a public comment period, and for permitting the Commissions to proceed with a joint notice of proposed rulemaking instead of issuing a joint interpretation, appropriate? Why or why not? Where the Commissions do not issue a joint interpretation, is it helpful that they each publicly provide the reasons for not doing so within the applicable timeframe? Why or why not?

141. Title VII requires that certain persons that are registered with the CFTC keep books and records relating to SBSAs open to inspection and examination by the SEC. As discussed in part V above, the Commissions are not proposing additional recordkeeping or other regulatory requirements for SBSAs that would require pre-transaction identification of a swap as an SBSA by market participants. Under these circumstances, is it appropriate to include SBSAs in the interpretation process set forth in proposed rule 1.8 under the CEA and proposed rule 3a68–2 under the Exchange Act? Why or why not?

142. Would it be appropriate to include SBSAs in the interpretation process, if their inclusion required the Commissions to extend the 120-day timeframe for issuance of a requested joint interpretation to, for example, 180 days for all products in order to address a potential increase in requests? Why or why not?

VII. Anti-Evasion

A. CFTC Proposed Anti-Evasion Rules

Section 721(c) of the Dodd-Frank Act requires the CFTC to adopt a rule to further define the terms "swap," "swap dealer," "major swap participant," and "eligible contract participant," in order "[t]o include transactions and entities

[312] This 120-day period is based on the timeframe set forth in section 718(a)(3) of the Dodd-Frank Act.

[313] *See* section 712(d)(4) of the Dodd-Frank Act.

that have been structured to evade" subtitle A of Title VII (or an amendment made by subtitle A). Section 761(b)(3) of the Dodd-Frank Act, in turn, grants discretionary authority to the SEC to define the terms "security-based swap," "security-based swap dealer," "security-based major swap participant," and "eligible contract participant," with regard to security-based swaps, "for the purpose of including transactions and entities that have been structured to evade subtitle B of Title VII (or amendments made by subtitle B). The CFTC notes that several provisions of Title VII reference the promulgation of anti-evasion rules:

- Subparagraph (E) of the definition of "swap" provides that foreign exchange swaps and foreign exchange forwards shall be considered swaps unless the Secretary of the Treasury makes a written determination that either foreign exchange swaps or foreign exchange forwards, or both, among other things, "are not structured to evade the [Dodd-Frank Act] in violation of any rule promulgated by the [CFTC] pursuant to section 721(c) of that Act;" [314]
- Section 722(d) of the Dodd-Frank Act provides that the provisions of the CEA relating to swaps shall not apply to activities outside the United States unless those activities, among other things, "contravene such rules or regulations as the [CFTC] may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of [the CEA] that was enacted by the [Title VII];" [315] and
- Section 725(g) of the Dodd-Frank Act amends the Legal Certainty for Bank Products Act of 2000 to provide that, although identified banking products generally are excluded from the CEA, that exclusion shall not apply to an identified banking product that is a product of a bank that is not under the regulatory jurisdiction of an appropriate Federal banking agency,[316] meets the definition of "swap" or "security-based swap," and "has been structured as an identified banking product for the purpose of evading the provisions of the [CEA], the [Securities Act], or the [Exchange Act]." [317]

The CFTC has determined to exercise its anti-evasion rulemaking authority under the Dodd-Frank Act.[318]

Structuring transactions and entities to evade the requirements of the Dodd-Frank Act could take any number of forms. As with the law of manipulation, the "methods and techniques" of evasion are "limited only by the ingenuity of man." [319] In light of the myriad methods of potential evasion, any attempt to comprehensively determine what constitutes evasion, or to provide a bright-line test of evasion by rule, would likely not be effective as would-be evaders could simply restructure their transactions or entities to fall outside any rigid boundary. Accordingly, proposed rule 1.3(xxx)(6) under the CEA generally would define as swaps those transactions that are willfully structured to evade the provisions of Title VII governing the regulation of swaps. Specific provisions would apply in similar fashion to currency and interest rate swaps that are willfully structured as foreign exchange forwards or foreign exchange swaps, and to transactions of a bank that is not under the regulatory jurisdiction of an appropriate Federal banking agency where the transactions are willfully structured as identified banking products to evade the new regulatory regime for swaps that was enacted in Title VII. These proposed rules would not apply to any agreement, contract, or transaction structured as a security (including a security-based swap) under the securities laws (as defined in section 3(a)(47) of the Exchange Act).

The Dodd-Frank Act also gives the CFTC general authority to prevent evasion of Title VII that occurs outside of the United States. Specifically, as noted above, section 722(d) of the Dodd-Frank Act states that the provisions of the CEA relating to swaps that were enacted by Title VII (including any rule prescribed or regulation promulgated thereunder) shall not apply to activities outside the United States unless, among other things, those activities "contravene such rules or regulations as the [CFTC] may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of [the CEA] that was enacted by [Title VII]." The CFTC is proposing rules to address potential evasion of Title VII under this provision of the Dodd-Frank Act.

Proposed rule 1.6 under the CEA would prohibit activities conducted outside the United States, including entering into transactions and structuring entities, to willfully evade or attempt to evade any provision of the CEA as enacted under Title VII or the rules and regulations promulgated thereunder. No activity, however, conducted outside of the United States with respect to a security (including a security-based swap) under the securities laws (as defined in section 3(a)(47) of the Exchange Act) and that is subject to the jurisdiction of the SEC would be prohibited pursuant to proposed rule 1.6.

The CFTC's proposed rule 1.3(xxx)(6) further defining the term "swap" would further provide that transactions, other than transactions structured as securities, willfully structured to evade shall be considered in determining whether a person is a swap dealer or major swap participant. Proposed rule 1.6 would further provide that an activity conducted outside the United States, other than an activity with respect to a security (including a security-based swap), to willfully evade or attempt to evade, shall be subject to the swap provisions of the CEA enacted under Title VII of the Dodd-Frank Act. The CFTC believes that these provisions are necessary to fully prevent those who seek to willfully evade the regulatory requirements established by Congress in Title VII relating to swaps from enjoying any benefits from their efforts to evade.

Finally, the CFTC's proposed rules would provide that in determining whether a transaction has been willfully structured to evade, neither the form, label, nor written documentation of the transaction shall be dispositive. The CFTC believes that looking beyond the form of the transaction to examine its actual substance is necessary to prevent evasion through clever draftsmanship. Such an approach is consistent with the CFTC's case law in the context of determining whether a contract is a futures contract.[320]

[314] CEA section 1a(47)(E), 7 U.S.C. 1a(47)(E).

[315] CEA section 2(i), 7 U.S.C. 2(i). New CEA section 2(i), as added by section 722(d) of the Dodd-Frank Act, also provides that the provisions of Title VII relating to swaps shall not apply to activities outside the United State unless those activities "have a direct and significant connection with activities in, or effect on, commerce of the United States."

[316] The term "identified banking product" is defined in section 402 of the Legal Certainty for Bank Products Act of 2000, 7 U.S.C. 27. The term "appropriate Federal banking agency" is defined in CEA section 1a(2), 7 U.S.C. 1a(2), and section 3(a)(72) of the Exchange Act, 15 U.S.C. 78c(a)(72), which were added by sections 721(a) and 761(a) of the Dodd-Frank Act, respectively.

[317] Section 741(b) of the Dodd-Frank Act amends section 6(e) of the CEA, 7 U.S.C. 9a, to provide that any DCO, swap dealer, or major swap participant "that knowingly or recklessly evades or participates in or facilitates an evasion of the requirements of section 2(h) [of the CEA] shall be liable for a civil monetary penalty in twice the amount otherwise available for a violation of section 2(h) [of the CEA]." This anti-evasion provision is not dependent upon the promulgation of a rule under section 721(c) of the Dodd-Frank Act, and hence this release does not apply to the anti-evasion authority regarding CEA section 2(h), 7 U.S.C. 2(h).

[318] No comments were received in response to the ANPR that specifically addressed anti-evasion authority. One commenter, however, noted that evasion is a concern. *See* Letter from David A. Berg, Esq., Vice President & General Counsel, Air Transport Association (Sept. 20, 1010).

[319] *Cargill* v. *Hardin,* 452 F.2d 1154, 1163 (8th Cir. 1971).

[320] *See, e.g., Grain Land, supra* note 61, at 55748 (holding that contract substance is entitled to at

In order to provide clarity concerning the anti-evasion rules, the CFTC also proposes to provide interpretive guidance as to certain types of circumstances that may constitute an evasion of the requirements of Title VII, while at the same time preserving the CFTC's ability to determine, on a case-by-case basis, that particular or other types of transactions or actions constitute an evasion of the requirements of the statute or the regulations promulgate thereunder. In developing this guidance, the CFTC has considered legislative, administrative, and judicial precedent with respect to the anti-evasion provisions in other Federal statutes. For example, the CFTC has examined the anti-evasion provisions in the Truth in Lending Act,[321] the Bank Secrecy Act,[322] and the Internal Revenue Code.[323] Based on these other statutory anti-evasion provisions, as well as the CFTC's authority under the Dodd-Frank Act to define terms and promulgate rules and regulations to prevent evasion, the CFTC is proposing this interpretive guidance as to what may constitute evasion of the requirements of the Dodd-Frank Act with respect to swaps. The CFTC emphasizes, however, that it would examine each individual case on a case-by-case basis, and additional practices or circumstances may warrant a finding that particular conduct or transactions constitute an evasion of the requirements of the Dodd-Frank Act with respect to swaps.

Business Purpose. The CFTC recognizes that transactions may be structured, and entities may be formed, in particular ways for legitimate business purposes, without any intention of circumventing the requirements of the Dodd-Frank Act with respect to swaps. In evaluating whether a person is evading or attempting to evade the requirements with respect to a particular instrument, entity, or transaction, the CFTC would consider the extent to which a person has a legitimate business purpose for structuring the instrument or entity or entering into the transaction in that particular manner. Although different means of structuring a transaction or entity may have differing regulatory implications and attendant requirements, absent other indicia of evasion, the CFTC would not consider transactions, entities, or instruments structured in a manner solely motivated by a legitimate business purpose to constitute evasion. However, to the extent a purpose in structuring an entity or instrument or entering into a transaction is to evade the requirements of Title VII with respect to swaps, the structuring of such instrument, entity, or transaction may be found to constitute evasion.[324]

Fraud, deceit, or unlawful activity. The CFTC believes that the Internal Revenue Service's delineation of what constitutes tax evasion, as elaborated upon by the courts, provides a useful guidepost for determining which types of activities should be considered to constitute an evasion of the Dodd-Frank Act. The Internal Revenue Service distinguished between tax evasion and legitimate means for citizens to minimize, reduce, avoid or alleviate the tax that they pay under the Internal Revenue Code. Whereas permissible means of reducing tax (or "tax avoidance," as the Internal Revenue Service refers to the practice) is associated with full disclosure and explanation of why the tax should be reduced under law, tax evasion consists of the willful attempt to evade tax liability, and generally involves "deceit, subterfuge, camouflage, concealment, or some attempt to color or obscure events or to make things seem other than they are."[325] Similarly, persons that craft derivative transactions, structure entities, or conduct themselves in a deceptive or other illegitimate manner in order to avoid regulatory requirements should not be permitted to enjoy the fruits of their deceptive or illegitimate conduct. In determining whether particular conduct is an evasion of the Dodd-Frank Act, the CFTC will consider the extent to which the conduct involves deceit, deception, or other unlawful or illegitimate activity.[326]

Request for Comment

The CFTC requests comment on all aspects of the proposed anti-evasion rules, including the following:

143. Are the CFTC's proposed rules and interpretive guidance set forth in this section sufficient to address the evasion concerns in Title VII? Is further guidance necessary? If so, what further guidance would be appropriate?

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least as much weight as form); *First Nat'l Monetary Corp., supra* note 152, at 30974; *Stovall, supra* note 152, at 23779 (holding that the CFTC "will not hesitate to look behind whatever label the parties may give to the instrument").

[321] 15 U.S.C. 1604(a) provides, in relevant part, that the Federal Reserve Board:

Shall prescribe regulations to carry out the purposes of this subchapter * * *. [T]hese regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

In affirming the Board's promulgation of Regulation Z, the Supreme Court noted that anti-evasion provisions such as section 1604(a) evince Congress's intent to "stress[] the agency's power to counteract attempts to evade the purposes of a statute." *Mourning* v. *Family Publ'ns Serv., Inc.,* 411 U.S. 356, 370 (1973) (*citing Gemsco* v. *Walling,* 324 U.S. 244 (1945) (giving great deference to a regulation promulgated under similar prevention-of-evasion rulemaking authority in the Fair Labor Standards Act)).

[322] 31 U.S.C. 5324 (stating, in pertinent part, that "[n]o person shall, for the purpose of evading the reporting requirements of [the Bank Secrecy Act (BSA) or any regulation prescribed thereunder].* * * structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions"). The Federal Deposit Insurance Corporation regulations implementing the BSA require banks to report transactions that ""the bank knows, suspects, or has reason to suspect" are "designed to evade any regulations promulgated under the Bank Secrecy Act." 12 CFR 353.3 (2010).

[323] The Internal Revenue Code makes it unlawful for any person willfully to attempt "in any manner to evade or defeat any tax * * *." 26 U.S.C. 7201. While a considerable body of case law has developed under the tax evasion provision, the statute itself does not define the term, but generally prohibits willful attempts to evade tax.

[324] A similar concept applies with respect to tax evasion. A transaction that is structured to avoid the payment of taxes but that lacks a valid business purpose may be found to constitute tax evasion. *See, e.g., Gregory* v. *Helvering,* 293 U.S. 465, 469 (1935) (favorable tax treatment disallowed because transaction lacked any business or corporate purpose). Under the "sham-transaction" doctrine, "a transaction is not entitled to tax respect if it lacks economic effects or substance other than the generation of tax benefits, or if the transaction serves no business purpose." *Winn-Dixie Stores, Inc.* v. *Comm'r,* 254 F.3d 1313, 1316 (11th Cir. 2001) (*citing Knetsch* v. *United States,* 364 U.S. 361 (1960)). "The doctrine has few bright lines, but 'it is clear that transactions whose sole function is to produce tax deductions are substantive shams.'" *Id.* (*quoting United Parcel Serv. of Am., Inc.* v. *Comm'r,* 254 F.3d 1014, 1018 (11th Cir 2001)).

[325] The Internal Revenue Service explains:

Avoidance of taxes is not a criminal offense. Any attempt to reduce, avoid, minimize, or alleviate taxes by legitimate means is permissible. The distinction between avoidance and evasion is fine, yet definite. One who avoids tax does not conceal or misrepresent. He/she shapes events to reduce or eliminate tax liability and, upon the happening of the events, makes a complete disclosure. Evasion, on the other hand, involves deceit, subterfuge, camouflage, concealment, some attempt to color or obscure events or to make things seem other than they are. For example, the creation of a bona fide partnership to reduce the tax liability of a business by dividing the income among several individual partners is tax avoidance. However, the facts of a particular investigation may show that an alleged partnership was not, in fact, established and that one or more of the alleged partners secretly returned his/her share of the profits to the real owner of the business, who, in turn, did not report this income. This would be an instance of attempted evasion.

Internal Revenue Service, *Internal Revenue Manual,* part 9.1.3.3.2.1, available at *http://www.irs.gov/irm/part9/irm_09–001–003.html#d0e169.*

[326] Although deceitful, deceptive, or illegitimate conduct may be sufficient to find that evasion has occurred, such conduct is not a prerequisite for a finding of evasion, particularly when other indicia of evasion are present, such as, for example, when the transaction lacks any business purpose.

144. Is further definition of the term "swap" necessary to address transactions that have been structured to evade subtitle A of Title VII? If so, what further definition is appropriate, and why? Please provide specific examples or scenarios, and a detailed analysis of any such transactions and the guidance that would be appropriate.

145. In addition to defining the term "swap" to address evasion generally, and with respect to certain foreign exchange products and identified banking products in particular, are CFTC rules prohibiting transactions from being willfully structured to evade or attempt to evade (similar to the proposed rules regarding activities conducted outside the United States) subtitle A of Title VII appropriate?

B. SEC Request for Comment Regarding Anti-Evasion

Section 761(b)(3) of the Dodd-Frank Act grants discretionary authority to the SEC to define the terms "security-based swap," "security-based swap dealer," "security-based major swap participant," and "eligible contract participant," with regard to security-based swaps, "for the purpose of including transactions and entities that have been structured to evade subtitle B of Title VII (or amendments made by subtitle B). Section 772(b) of the Dodd-Frank Act states that the provisions of the Exchange Act that were added by Title VII (including any rule or regulation thereunder) shall not apply to any person insofar as that person transacts a business in security-based swaps outside the jurisdiction of the United States, unless such person transacts such business "in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate to prevent evasion of any provision of [the Exchange Act] that was added by [Title VII]." [327]

The SEC is not proposing specific rules regarding anti-evasion at this time. The SEC may consider whether to propose anti-evasion rules based on comments received or after having experience with the new regulatory regime under subtitle B of Title VII.

Request for Comment

146. The SEC requests comment on whether SEC rules or interpretive guidance addressing anti-evasion regarding security-based swaps, security-based swap dealers, major security-based swap participants, or ECPs are necessary. Why or why not? Should the SEC adopt rules and interpretive guidance modeled on the CFTC's proposals? If other rules or interpretive guidance are necessary, please provide a detailed description of what rules or interpretative guidance would be necessary.

147. Are SEC rules or interpretive guidance addressing evasion in the context of activities conducted outside the United States necessary? Why or why not? Should the SEC adopt rules and interpretive guidance modeled on the CFTC's proposals? If other rules or interpretive guidance are necessary, please provide a detailed description of what rules or interpretative guidance would be necessary.

VIII. Administrative Law Matters—CEA Revisions

A. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.[328] Most of the entities that will be impacted by this proposed rulemaking have previously been determined to not be small entities. In addition, this proposed rulemaking, which provides interpretive guidance, general rules of construction and definitions that will largely be used in other rulemakings will, by itself, not impose a significant economic impact on market participants or entities.

1. Effect of the Proposed Rulemaking

The proposed rulemaking in this release further defines, and clarifies, the statutory terms "swap," "security-based swap," "security-based swap agreement," and "mixed swap." It also provides a process for requesting joint interpretations from the Commissions as to whether agreements, contracts, and transactions are swaps, security-based swaps, or mixed swaps, as well as a process for requesting alternative regulatory treatment for certain mixed swaps. This proposed rulemaking also includes books and records, and data, requirements for SDRs, swap dealers, and major swap participants with respect to SBSAs, and implements the anti-evasion rulemaking authority granted to the CFTC under several provisions of the Dodd-Frank Act.

Additionally, this release proposes interpretive guidance that the forward contract exclusion from the swap definition in the Dodd-Frank Act with respect to nonfinancial commodities should be read consistently with the forward contract exclusion from the CEA definition of the term "future delivery." In that regard, the CFTC is proposing to retain the Brent Interpretation and extend it to apply to all nonfinancial commodities, and as a result, to withdraw the Energy Exemption,[329] which had extended the Brent Interpretation regarding the forward contract exclusion from the term "future delivery" to energy commodities other than oil. The Energy Exemption listed certain "appropriate persons" that could rely on the exemption.

The CFTC anticipates that this proposed rulemaking will affect primarily the following entities: DCMs, DCOs, ECPs, swap dealers, major swap participants, SEFs, SDRs, FBOTs, and those "appropriate persons" who previously relied on the Energy Exemption.

2. Specific Entities That Are Not Small Entities

The vast majority of entities impacted by this proposed rulemaking previously have been determined to not be small entities by the CFTC. Prior to the enactment of the Dodd-Frank Act, the following entities had been determined by the CFTC to not be small entities for purposes of the RFA: DCMs, DCOs, and ECPs. Other entities that will be affected by this rulemaking, including swap dealers, major swap participants, SEFs, SDRs, and FBOTs, have been certified by the CFTC not to be small entities in other proposed recent CFTC rulemaking implementing requirements of the Dodd-Frank Act. Specifically:

i. Swap Dealers, Major Swap Participants, SEFs, SDRs, and FBOTs. The CFTC previously has certified that swap dealers, major swap participants, SEFs, SDRs, and FBOTs are not small entities for purposes of the RFA.[330] Nevertheless, because these are new categories of registrants under the Dodd-Frank Act, the CFTC is, again, hereby determining that these entities are not small entities.

a. Swap Dealers: As noted above, the CFTC previously has determined that FCMs are not small entities for the purpose of the RFA based upon, among

[327] *See* section 30(c) of the Exchange Act, 15 U.S.C. 78dd(c).

[328] 5 U.S.C. 601 *et seq.*

[329] Energy Exemption, *supra* note 72.

[330] *See* respectively, Registration of Swap Dealers and Major Swap Participants, 75 FR 71379, 71385, Nov. 23, 2010 (swap dealers and major swap participants); Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75 FR 63732, 63745, Oct. 18, 2010 (SEFs); Swap Data Repositories, 75 FR 80898, 80926, Dec. 23, 2010 (SDRs); Registration of Foreign Boards of Trade, 75 FR 70974, 70987, Nov. 19, 2010 (FBOTs).

other things, the requirements that FCMs must meet, including certain minimum financial requirements that enhance the protection of customers' segregated funds and protect the financial condition of FCMs generally. Swap dealers similarly will be subject to minimum capital and margin requirements, and are expected to comprise the largest global financial firms. Entities that engage in a de minimis quantity of swap dealing in connection with transactions with or on behalf of customers will be exempt from designation as a swap dealer. For purposes of the RFA, the CFTC is hereby determining that swap dealers not be considered to be "small entities" for essentially the same reasons that FCMs previously have been determined not to be small entities.

b. Major Swap Participants: The CFTC also previously has determined that large traders are not small entities for the purpose of the RFA. Major swap participants, among other things, maintain substantial positions in swaps, creating substantial counterparty exposure that could have serious adverse effects on the financial stability of the U.S. banking system or financial markets. For purposes of the RFA, the CFTC is hereby determining that major swap participants not be considered to be "small entities" for essentially the same reasons that large traders previously have been determined not to be small entities.

c. SEFs: The Dodd-Frank Act defines a SEF to mean a trading system or platform in which multiple participants have the ability to accept bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility that facilitates the execution of swaps between persons and is not a DCM. The CFTC previously has determined that DCMs are not small entities because, among other things, they may be designated only when they meet specific criteria, including expenditure of sufficient resources to establish and maintain adequate self-regulatory programs. Likewise, the CFTC will register an entity as a SEF only after it has met specific criteria, including the expenditure of sufficient resources to establish and maintain an adequate self-regulatory program. For purposes of the RFA, the CFTC is hereby determining that SEFs not be considered to be "small entities" for essentially the same reasons that DCMs previously have been determined to be small entities.

d. SDRs: The CFTC previously has determined that DCMs and DCOs are not small entities because, among other things, of "the central role" they play in "the regulatory scheme concerning futures trading." [331] Because of the "importance of futures trading in the national economy," to be designated as a contract market or registered as a DCO, the respective entity must meet stringent requirements set forth in the CEA. Similarly, swap positions that are recorded, reported and disseminated by SDRs will be an important part of the national economy. SDRs will receive data from market participants and will be obligated to facilitate swap execution by reporting real-time data. Similar to DCMs and DCOs, SDRs will play a central role both in the regulatory scheme concerning swap trading. Additionally, the Dodd-Frank Act permits DCOs to register as SDRs. For purposes of the RFA, the CFTC is hereby determining that SDRs not be considered to be "small entities" for essentially the same reasons that DCMs and DCOs previously have been determined not to be small entities.

e. FBOTs. The term "foreign board of trade" has been used in the CEA and in the CFTC's Regulations to refer to a board of trade "located outside the U.S." [332] The term "board of trade" is defined in the CEA as "any organized exchange or trading facility." [333] An "organized exchange," in turn, includes designated or registered exchanges, such as DCMs.[334] The CFTC previously has determined that DCMs are not "small entities." As noted above, because of DCMs' importance to the economy, they must meet stringent requirements set forth in the CEA. Similarly, the CFTC will register an FBOT only after it has met criteria similar to those required of a DCM. Critically, an FBOT will be registered only after demonstrating, among other things, that it possesses the attributes of an organized exchange, adheres to appropriate rules prohibiting abusive trading practices, and enforces appropriate rules to maintain market and financial integrity. Because FBOTs and DCMs are functionally equivalent entities, for purposes of the RFA, the CFTC hereby is determining that FBOTs not be considered to be small entities for essentially the same reasons that DCMs previously have been determined not to be small entities.

ii. DCMs, DCOs, and ECPs. The CFTC previously has determined that DCMs, DCOs, and ECPs, are not small entities for purposes of the Regulatory Flexibility Act.[335] The Dodd-Frank Act requires that counterparties to swaps that are traded on a bilateral basis not on or subject to the rules of a DCM be ECPs. Prior to the enactment of the Dodd-Frank Act, ECPs trading swaps were generally outside the scope of CFTC oversight under the CEA. The CFTC cannot estimate with precision the number of non-ECPs that will, as permitted by the Dodd-Frank Act, trade swaps on DCMs. Nevertheless, this proposed rulemaking by the CFTC provides proposed further definitions of the terms "swap," "security-based swap," "mixed swap" and "security-based swap agreement," and proposes rules of construction and interpretive guidance (including guidance as to agreements, contracts, and transactions that are not included within the scope of the swap definition), that will largely be used in other rulemakings and which, by themselves, do not impose significant new regulatory requirements on market participants.

iii. "Appropriate Persons" who relied on the Energy Exemption. The Energy Exemption listed certain "appropriate persons" that could rely on the exemption and also required that, to be eligible for this exemption, an "appropriate person" must have a demonstrable capacity or ability to make or take delivery. The Energy Exemption stated: "in light of the general nature of the current participants in the market, the CFTC believes that smaller commercial firms, which cannot meet [certain] financial criteria, should not be included." [336] Therefore, the CFTC does not believe that the "appropriate persons" eligible for the Energy Exemption, and who may be affected by its withdrawal, are "small entities" for purposes of RFA.

Accordingly, the Chairman, on behalf of the CFTC, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules will not have a significant impact on a substantial number of small entities. Nonetheless, the CFTC specifically requests comment on the impact that this proposed rulemaking may have on small entities.

[331] Policy Statement and Establishment of Definitions of "Small Entities" for Purposes of the Regulatory Flexibility Act, 47 FR 18618, Apr. 30, 1982.

[332] *See* CEA section 4(a), 7 U.S.C. 6(a); CFTC rule 1.33(ss), 17 C.F.R. 1.33(ss).

[333] CEA section 1a(2), 7 U.S.C. 1a(2).

[334] CEA section 1a(27), 7 U.S.C. 1a(27).

[335] *See* respectively, Policy Statement and Establishment of Definitions of "Small Entities" for Purposes of the Regulatory Flexibility Act, *supra* note 331, at 18619 (DCMs); A New Regulatory Framework for Clearing Organizations, 66 FR 45604, 45609, Aug. 29, 2001 (DCOs); Opting Out of Segregation. 66 FR 20740, 20743, Apr. 25, 2001 (ECPs).

[336] Energy Exemption, *supra* note 72.

B. Paperwork Reduction Act

1. Introduction

Proposed CFTC rules 1.8 and 1.9 would result in new "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA"). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number.

2. Summary of the Proposed Requirements

Proposed rule 1.8 of the CEA would allow persons to submit a request for a joint interpretation from the Commissions regarding whether an agreement, contract or transaction (or a class thereof) is a swap, security-based swap, or mixed swap. Proposed rule 1.8 provides that a person requesting an interpretation as to the nature of an agreement, contract, or transaction as a swap, security-based swap, or mixed swap must provide the Commissions with the person's determination of the nature of the instrument and supporting analysis, along with certain other documentation, including a statement of the economic purpose for, and a copy of all material information regarding the terms of, each relevant agreement, contract, or transaction (or class thereof). The Commissions also may request the submitting person to provide additional information. In response to the submission, the Commissions may issue a joint interpretation regarding the status of that agreement, contract, or transaction (or class of agreements, contracts, or transactions) as a swap, security-based swap, or mixed swap.

Proposed rule 1.9 enables persons to submit requests to the Commissions for joint orders providing an alternative regulatory treatment for particular mixed swaps. Under proposed rule 1.9, a person would provide to the Commissions a statement of the economic purpose for, and a copy of all material information regarding, the relevant mixed swap. In addition, the person would provide the specific alternative provisions that the person believes should apply to the mixed swap, the reasons the person believes it would be appropriate to request an alternative regulatory treatment, and an analysis of: (i) The nature and purposes of the specified provisions; (ii) the comparability of the specified provisions to other statutory provisions of Title VII of the Dodd-Frank Act and the rules and regulations thereunder; and (iii) the extent of any conflicting or incompatible requirements of the specified provisions and other statutory provisions of Title VII and the rules and regulations thereunder. The Commissions also may request the submitting person to provide additional information.

3. Information Provided by Reporting Entities

The burdens imposed by proposed CFTC rules 1.8 and 1.9 are the same as the burdens imposed by the SEC's proposed rules 3a68–2 and 3a68–4. Therefore, the burdens that would be imposed on market participants under CFTC rules 1.8 and 1.9 already have been accounted for within the SEC's calculations regarding the impact of this collection of information under the PRA and the request for a control number that will be submitted by the SEC to OMB.[337]

4. Information Collection Comments

The CFTC invites public comment on any aspect of the reporting and recordkeeping burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the CFTC solicits comments in order to: (i) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the CFTC, including whether the information will have practical utility; (ii) evaluate the accuracy of the CFTC's estimate of the burden of the proposed collections of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Comments may be submitted directly to the OMB's Office of Information and Regulatory Affairs, by fax at (202) 395–6566 or by e-mail at *OIRAsubmissions@omb.eop.gov*. Please provide the CFTC with a copy of submitted comments so that all comments can be summarized and addressed in the preamble to the final rulemaking. Please refer to the Addresses section of this notice of proposed rulemaking for comment submission instructions to the CFTC. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting RegInfo.gov. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this release in the **Federal Register**. Consequently, a comment to OMB is most ensured of being fully effective if received by OMB (and the CFTC) within 30 days after publication of this release. Nothing in the foregoing affects the deadline enumerated above for public comment to the CFTC on the rules and interpretive guidance proposed herein.

C. Cost-Benefit Analysis

CEA section 15(a)[338] requires the CFTC to consider the costs and benefits of its actions before issuing a rulemaking under the CEA. By its terms, section 15(a) does not require the CFTC to quantify the costs and benefits of a rule or to determine whether the benefits of the rulemaking outweigh its costs; rather, it requires that the CFTC "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (i) Protection of market participants and the public; (ii) efficiency, competitiveness, and financial integrity of futures markets; (iii) price discovery; (iv) sound risk management practices; and (v) other public interest considerations. The CFTC may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the CEA.

1. Costs and Benefits of the Proposed Definitions

The proposed rulemaking and interpretive guidance would further define the terms "swap," "security-based swap," "security-based swap agreement," and "mixed swap." The scope of the definitions of the terms "swap," "security-based swap," "security-based swap agreement," and "mixed swap" will be an important factor in determining the scope of activities and entities that will be subject to various requirements set forth in the Dodd-Frank Act, such as reporting, registration, business conduct, and capital requirements. Those requirements, which will be implemented in rules proposed or to be proposed by the CFTC, will likely lead to compliance costs, capital holding costs, and other costs, which have been or will be addressed in the CFTC's proposals to implement those requirements.

[337] 44 U.S.C. 3501–3521. *See also* 44 U.S.C. 3509 and 3510.

[338] 7 U.S.C. 19(a).

Yet, the CFTC believes that the proposal to further define the terms "swap," "security-based swap," "security-based swap agreement," and "mixed swap" is, for the most part, in line with the expectations of market participants and does not depart significantly from how market participants would interpret the statutory definitions of these terms set forth in Title VII of the Dodd-Frank Act. Thus, the CFTC does not believe that the proposed rules and interpretive guidance further defining these terms impose any significant incremental costs beyond the costs associated with the statutory definitions.

The CFTC also believes that the proposed rules and guidance regarding the definitions will lead to benefits in the form of increased market transparency, reduced systemic risk, and a lower incidence of market-wide crises and other market failures. Further, the proposed rules and guidance can be consistently applied by substantially all market participants to determine which agreements, contracts, or transactions are, and which are not, swaps, security-based swaps, security-based swap agreements, or mixed swaps. Thus, the proposed rules and interpretive guidance will help to create a level playing field. Market participants will be able to use Title VII instruments more efficiently and the swap markets will operate more effectively because all market participants will be relying on consistent and clear definitions. The clarity provided by the proposed rules and interpretive guidance relating to the definitions is in the public interest because this clarity will permit the public to better evaluate information about Title VII instruments made available under the Dodd-Frank Act. In particular, they will allow market participants to better understand publicly-available price data. The clarity of the definitions also has the potential to ease the negotiation of Title VII instruments and reduce other transaction costs. These factors are expected to permit the public to make a more extensive use of Title VII instruments for risk management and other purposes.

The CFTC requests comment as to the costs and benefits of the proposed rules and interpretive guidance regarding the definitions for market participants, markets, and the public. In particular, comment is requested as to whether there are any aspects of the proposed rules and interpretive guidance regarding the definitions that are both burdensome to apply and not helpful to achieving clarity as to the scope of the defined terms. In addition, are there less burdensome means of providing clarity as to the scope of the defined terms?

2. Costs and Benefits of Proposed Rules and Interpretive Guidance Regarding Insurance

Proposed CFTC rule 1.3(xxx)(4) under the CEA would clarify that insurance products that meet certain requirements, that are provided by state or Federally regulated insurance companies, and that are regulated as insurance products, would not be swaps. Specifically, proposed rule 1.3(xxx)(4) would define the term "swap" so that it would not include an agreement, contract, or transaction that, by its terms or by law, as a condition of performance on the agreement, contract, or transaction: (i) Requires the beneficiary to have an insurable interest that is the subject of the agreement, contract, or transaction and thereby carry the risk of loss with respect to that interest continuously throughout the duration of the agreement, contract, or transaction; (ii) requires that loss to occur and to be proved, and that any payment or indemnification therefore be limited to the value of the insurable interest, separately from the insured interest; (iii) is not traded, separately from the insured interest, on an organized market or over-the-counter; and (iv) with respect to financial guarantee insurance only, in the event of payment default or insolvency of the obligor, any acceleration of payments under the policy is at the sole discretion of the insurer.

Proposed rule 1.3(xxx)(4) also would require that the agreement, contract, or transaction: (i) Be provided by a person or entity that is organized as an insurance company whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies and that is subject to supervision by the insurance commissioner, or similar official or agency, of a state (as defined under section 3(a)(16) of the Exchange Act [339]) or by the United States or an agency or instrumentality thereof, and be regulated as insurance under the laws of such state or the United States; (ii) be provided by the United States or any of its agents or instrumentalities, or pursuant to a statutorily authorized program thereof; or (iii) in the case of reinsurance only, be provided by a person located outside the United States to an insurance company that meets the above requirements, provided that such person is not prohibited by the law of any state or the United States from offering such agreement, contract, or transaction to such insurance company, the product to be reinsured meets the requirements above for insurance products, and the total amount reimbursable by all reinsurers for such insurance product cannot exceed the claims or losses paid by the cedant.

An agreement, contract, or transaction would have to meet all of these criteria in order to qualify as an insurance product that falls outside of the swap and security-based swap definitions pursuant to the proposed rules. The Commissions also are proposing interpretative guidance to clarify that certain enumerated types of traditional insurance products, such as life insurance, health insurance, and property and casualty insurance, are outside the scope of the statutory swap and security-based swap definitions.

(a) Costs

In complying with proposed rule 1.3(xxx)(4), a market participant will need to ascertain whether an agreement, contract, or transaction is an insurance product according to the criteria set forth in the definition. This analysis will have to be performed upon entering into the agreement, contract, or transaction to ensure compliance with the proposed rule. Absent this analysis, however, the cost associated with the uncertainty cited by commenters as to whether an agreement, contract, or transaction that the participants consider to be insurance could instead be regulated as a swap is expected to be greater than the cost of the analysis proposed herein.

To the extent that the criteria under proposed rule 1.3(xxx)(4) inadvertently fail to exclude certain types of insurance products from the proposed definitions, these failures could lead to costs for market participants entering into agreements, contracts, or transactions that might be improperly regulated as swaps and not as insurance products. Similarly, to the extent that the criteria under the proposed rule lead to the inadvertent treatment of certain types of swaps as insurance, costs for market participants entering into agreements, contracts, or transactions that are improperly regulated as insurance products and not as swaps may increase.

(b) Benefits

The proposed rule and interpretative guidance regarding insurance will help to assure that traditional insurance products remain subject to the current regulatory scheme for insurance and not to the regulatory regime established by the Dodd-Frank Act for swaps. Market

[339] 15 U.S.C. 78c(a)(16).

participants, therefore, will be able to continue to rely on their previous understanding of insurance regulations without any additional burden that may have resulted if they had to instead comply with regulations under the Dodd-Frank Act.

Without the proposed rule and interpretative guidance herein, market participants may be uncertain about whether an agreement, contract, or transaction is an insurance product that is subject to regulation as a swap. Proposed rule 1.3(xxx)(4) is intended to eliminate the potential uncertainty of what constitutes an insurance product by setting forth clear and objective criteria for determining that an agreement, contract, or transaction is an insurance product that is not subject to regulation as a swap. Providing such an objective rule and guidance alleviates additional costs of inquiring with the Commissions, or obtaining an opinion of counsel, about whether an agreement, contract, or transaction is an insurance product or a swap. The added clarity provided by the rule and guidance proposed herein will enhance the efficiency of the swaps market and also allow market participants to engage in sound risk management practices because they will be readily able to consider whether a particular agreement, contract, or transaction is insurance or a swap at the outset.

The CFTC requests comment as to the costs and benefits of proposed rule 1.3(xxx)(4) and interpretive guidance contained herein to distinguish between insurance products and swaps for market participants, markets, and the public.

3. Costs and Benefits of Proposed Rule Regarding Foreign Exchange Products and Forward Rate Agreements

Proposed CFTC rule 1.3(xxx)(2) under the CEA would explicitly define the term "swap" to include an agreement, contract, or transaction that is a cross-currency swap, currency option, foreign currency option, foreign exchange option, foreign exchange rate option, foreign exchange forward, foreign exchange swap, forward rate agreement, and non-deliverable forward involving foreign exchange, unless such agreement, contract, or transaction is otherwise excluded by section 1a(47)(B) of the CEA. Proposed rule 1.3(xxx)(2) also provides that: (i) A foreign exchange forward or a foreign exchange swap shall not be considered a swap if the Secretary of the Treasury makes the determination described in CEA section 1a(47)(E)(i); and (ii) notwithstanding any such determination, certain provisions of the CEA will apply to such foreign exchange forward or foreign exchange swap (specifically, the reporting requirements in section 4r of the CEA and regulations thereunder and, in the case of a swap dealer or major swap participant that is a party to a foreign exchange swap or foreign exchange forward, the business conduct standards in section 4s of the CEA and regulations thereunder). Proposed rule 1.3(xxx)(2) further clarifies that a currency swap, cross-currency swap, currency option, foreign currency option, foreign exchange option, foreign exchange rate option, or non-deliverable forward involving foreign exchange is not a foreign exchange forward or foreign exchange swap subject to a determination by the Secretary of the Treasury as described above.

(a) Costs

In complying with proposed rule 1.3(xxx)(2), a market participant will need to ascertain whether an agreement, contract, or transaction is a swap under the definition. This analysis will have to be performed upon entering into the agreement, contract, or transaction to ensure compliance with the proposed rule. However, any costs associated with this analysis are expected to be less than the costs of doing the same analysis absent the proposed rule, particularly given potential confusion in the event of a determination by the Secretary of the Treasury that foreign exchange forwards and/or foreign exchange swaps not be considered swaps. To the extent that proposed rule 1.3(xxx)(2) leads to the improper inclusion of certain types of agreements, contracts, and transactions in the swap definition, and therefore the imposition of additional requirements and obligations, these requirements and obligations could lead to costs for market participants entering into such agreements, contracts, or transactions.

(b) Benefits

Because the statutory definition of the term "swap" includes a process by which the Secretary of the Treasury may determine that certain agreements, contracts, and transactions that meet the statutory definition of a "foreign exchange forward" or "foreign exchange swap," respectively,[340] shall not be considered a swap, the CFTC is concerned that application of the definition, without further clarification, may cause uncertainty about whether, if the Secretary of the Treasury makes such a determination, certain agreements, contracts, or transactions would be swaps. Proposed rule 1.3(xxx)(2) would clarify that a currency swap, cross-currency swap, currency option, foreign currency option, foreign exchange option, foreign exchange rate option, or non-deliverable forward involving foreign exchange is a swap (unless it is otherwise excluded by the statutory definition of the term "swap"). The proposed rule also would clarify that reporting requirements, and business conduct requirements for swap dealers and major swap participants, are applicable to foreign exchange forwards and foreign exchange swaps even if the Secretary of the Treasury determines that they should not be considered swaps. The CFTC also is concerned that confusion could be generated by the "forward" label of non-deliverable forwards involving foreign exchange, and forward rate agreements. Proposed rule 1.3(xxx)(2) would clarify that these types of agreements, contracts, and transactions are swaps.

Providing a clarifying rule to market participants to determine whether certain types of agreements, contracts, or transactions are swaps alleviates additional costs to persons of inquiring with the Commissions, or obtaining an opinion of counsel, about whether such agreements, contracts, or transactions are swaps. In addition, a clarifying rule regarding the requirements that apply to foreign exchange forwards and foreign exchange swaps that are subject to a determination by the Secretary of the Treasury similarly alleviates additional costs to persons of inquiring with the Commissions, or obtaining an opinion of counsel, to determine the requirements that are applicable to such foreign exchange forwards and foreign exchange swaps. As with the other rules related to product definitions, added clarity will increase the efficiency of the swaps market and also will enable market participants to engage in sound risk management practices, which will benefit both market participants and the public.

The CFTC requests comment as to the costs and benefits of proposed rule 1.3(xxx)(2) for market participants, markets, and the public.

4. Costs and Benefits of Proposed Rules and Interpretive Guidance Regarding Title VII Instruments Where the Underlying Reference Is a Security Index

Proposed CFTC rule 1.3(yyy)(1) provides that, for purposes of the security-based swap definition, the term "narrow-based security index" would have the same meaning as the statutory definition set forth in CEA section

[340] CEA section 1a(24), 7 U.S.C. 1a(24)(definition of a "foreign exchange forward"); CEA section 1a(25), 7 U.S.C. 1a(25)(definition of a "foreign exchange swap").

1a(35), and the rules, regulations, and orders issued by the Commissions relating to such definition. As a result, except as the new rules the Commissions are proposing provide for other treatment, market participants generally will be able to use the Commissions' past guidance in determining whether certain Title VII instruments based on a security index are swaps or security-based swaps.

The Commissions also are proposing interpretive guidance and additional rules regarding Title VII instruments based on a security index. The interpretive guidance and additional rules set forth new narrow-based security index criteria with respect to indexes composed of securities, loans, or issuers of securities referenced by an index CDS. The proposed interpretive guidance and rules also address the definition of an "index" and the treatment of broad-based security indexes that become narrow-based and narrow-based indexes that become broad-based, including rule provisions regarding tolerance and grace periods for swaps on security indexes that are traded on CFTC-regulated trading platforms.

(a) Costs

In complying with the proposed rules, a market participant will need to ascertain whether an index CDS is a swap or a security-based swap according to the criteria set forth in the definitions of the terms "issuers of securities in a narrow-based security index" and "narrow-based security index" as used in the security-based swap definition. This analysis will have to be performed upon entering into an index CDS, and when the material terms of an index CDS are amended or modified, to ensure compliance with proposed rules 1.3(zzz) or 1.3(aaaa). However, any such costs are expected to be less than the costs of doing the same analysis absent the proposed rules, which the CFTC believes would be more difficult and lead to greater uncertainty. Proposed rules 1.3(zzz) and 1.3(aaaa) allow market participants to minimize the costs of determining whether an index CDS is a swap or a security-based swap by providing a test with objective criteria that is similar to a test with which they already are familiar in the security futures context, yet tailored to index CDS in particular.

Additionally, absent proposed rule 1.3(yyy), which applies the tolerance period rules, if a security index underlying a Title VII instrument traded on a trading platform migrated from being broad-based to being narrow-based, market participants may suffer disruption of their ability to offset or enter into new Title VII instruments, and incur additional costs as a result.

(b) Benefits

Proposed rules 1.3(zzz) and 1.3(aaaa) would clarify the treatment of an index CDS as either a swap or a security-based swap by setting forth objective criteria for meeting the definition of the terms "issuers of securities in a narrow-based security index" and "narrow-based security index," respectively. These objective rules will alleviate additional costs to persons trading index CDS of inquiring with the Commissions, or obtaining an opinion of counsel, to make complex determinations regarding whether an index is broad- or narrow-based, and whether an index CDS based on such an underlying index is a swap or security-based swap.

Also, proposed rules 1.3(zzz) and 1.3(aaaa) should reduce the potential for market participants to use an index CDS to evade regulations, because they set objective requirements relating to the concentration of the notional amount allocated to each reference entity or security included in the index, as well as the eligibility conditions for reference entities and securities. Finally, these proposed rules benefit the public by requiring that the providers of index CDS make publicly available sufficient information regarding the reference entities in an index underlying the index CDS. By requiring that such information be made publicly available, proposed rules 1.3(zzz) and 1.3(aaaa) seek to assure the transparency of the index components that will be beneficial to market participants who trade such instruments and to the public.

Separately, proposed rule 1.3(yyy) addresses exchange-traded swaps based on security indexes where the underlying index migrates from broad-based to narrow-based. The proposed rule includes provisions that many market participants are familiar with from security futures trading. The CFTC believes that by using a familiar regulatory scheme, market participants will be able to more readily understand the proposed rule as compared to a wholly new regulatory scheme. Also, the proposal of a "tolerance period" for swaps on security indexes that migrate from broad-based to narrow-based also creates greater clarity by establishing a 45-day timeframe (and subsequent grace period) on which market participants may rely. This tolerance period results in cost savings when compared to the alternative scenario where no tolerance period is provided and a migration of an index from broad-based to narrow-based would result in potential impediments to the ability of market participants to offset their swap positions.

Finally, the Commissions are proposing interpretive guidance that the determination of whether a Title VII instrument is a swap, a security-based swap, or both (*i.e.,* a mixed swap), is made at the execution of the Title VII instrument. If the security index underlying a Title VII instrument migrates from being broad-based to being narrow-based, or vice versa, during the life of a Title VII instrument, the characterization of that Title VII instrument would not change from its initial characterization regardless of whether the Title VII instrument was entered into bilaterally or was executed through a trade on or subject to the rules of a DCM, SEF, FBOT, security-based SEF, or NSE. Absent this guidance, market participants may need to expend additional resources to continually monitor their swaps to see if the indexes on which they are based have migrated from broad-based to narrow-based. Since the proposal provides that the initial determination prevails regardless of whether the underlying index migrates from broad-based to narrow-based, market participants do not need to expend these monitoring costs.

The CFTC requests comment as to the costs and benefits of proposed rules 1.3(yyy), 1.3(zzz), and 1.3(aaaa), and the proposed guidance contained herein, regarding Title VII instruments where the underlying reference is a security index, and regarding index CDS, for market participants, markets, and the public.

5. Costs and Benefits of Processes To Determine Whether a Title VII Instrument Is a Swap, Security-Based Swap, or Mixed Swap, and To Determine Regulatory Treatment for Mixed Swaps

(a) Costs

Proposed rule 1.8 under the CEA would allow persons to submit a request for a joint interpretation from the Commissions regarding whether an agreement, contract or transaction (or a class of agreements, contracts, or transactions) is a swap, security-based swap, or mixed swap. The CFTC estimates the cost of submitting a request for a joint interpretation pursuant to rule 1.8 would be approximately 20 hours of internal company or individual time and a cost of $9,480 for the services of outside professionals. Once such a joint interpretation is made, however, other market participants that seek to transact in the same agreement, contract, or

transaction (or class thereof) would have regulatory clarity about whether it is a swap, security-based swap, or mixed swap.

Separately, proposed CFTC rule 1.9 under the CEA allows persons to submit a request for a joint order from the Commissions regarding an alternative regulatory treatment for particular mixed swaps. This process applies except with respect to bilateral, uncleared mixed swaps where one of the parties to the mixed swap is dually registered with the CFTC as a swap dealer or major swap participant and with the SEC as a security-based swap dealer or major security-based swap participant. With respect to bilateral uncleared mixed swaps where one of the parties is a dual registrant, the proposed rule provides that such mixed swaps would be subject to a regulatory scheme set forth in rule 1.9 in order to provide clarity as to the regulatory treatment of such mixed swaps.

The CFTC estimates that the cost of submitting a request for a joint order seeking an alternative regulatory treatment for a particular mixed swap would be approximately 30 hours of internal company or individual time and a cost of approximately $15,800 for the services of outside professionals. Absent such a process, though, market participants that desire or intend to enter into such a mixed swap (or class thereof) would be required pursuant to Title VII of the Dodd-Frank Act to comply with all regulatory requirements applicable to both swaps and security-based swaps. The CFTC believes that the cost of such dual regulation would likely be at least as great, if not greater, than the costs of the process set forth in proposed rule 1.9 to request an alternative regulatory treatment for such the mixed swap. The proposed rule regarding bilateral uncleared mixed swaps where at least one party is a dual registrant does not entail any additional costs, and may reduce costs for dual registrants that enter into such mixed swaps by eliminating potentially duplicative or inconsistent regulation.

(b) Benefits

The CFTC believes that the proposed rules that enable market participants to submit requests for joint interpretations regarding the nature of various agreements, contracts, or transactions, and requests for joint orders regarding the regulatory treatment of mixed swaps, will help to create a level playing field (since the joint interpretations and joint orders will be available to all market participants) regarding which agreements, contracts, or transactions constitute swaps, security-based swaps, or mixed swaps, and the regulatory treatment applicable to particular mixed swaps. The availability of such joint interpretations and joint orders regarding the scope of the definitions and the regulatory treatment of mixed swaps will reduce transaction costs and thereby promote the use of Title VII instruments and the efficient operation of the swap markets. This, in turn, is expected to encourage the use of Title VII instruments for risk management and other purposes. The separate proposed rule for bilateral uncleared mixed swaps where at least one party is dually registered should eliminate potentially duplicative and inconsistent regulation.

The CFTC requests comment as to the costs and benefits of the processes for seeking joint interpretations and joint orders in proposed rules 1.8 and 1.9, respectively, for market participants, markets, and the public.

6. Costs and Benefits of SBSA Books and Records, and Data, Requirements

Proposed CFTC rule 1.7 under the CEA would clarify that there would not be books and records, or data, requirements regarding SBSAs other than those that would exist for swaps. The proposed rule alleviates any additional books and records or information costs to persons who are required to keep and maintain books and records regarding, or collect and maintain data regarding, SBSAs because the proposed rule does not require such persons to keep or maintain any books and records, or collect and maintain any data, regarding, SBSAs that differs from the books, records, and data required regarding swaps.

Specifically, proposed rule 1.7 would require persons registered as SDRs to: (i) keep and maintain books and records regarding SBSAs only to the extent that SDRs are required to keep and maintain books and records regarding swaps; and (ii) collect and maintain data regarding SBSAs only to the extent that SDRs are required to collect and maintain data regarding swaps. In addition, proposed rule 1.7 would require persons registered as swap dealers or major swap participants to keep and maintain books and records, including daily trading records, regarding SBSAs only to the extent that those persons would be required to keep and maintain books and records regarding swaps.

Because proposed rule 1.7 imposes no requirements with respect to SBSAs other than those that exist for swaps, proposed rule 1.7 would impose no costs other than those that are required with respect to swaps in the absence of proposed rule 1.7. Proposed rule 1.7 provides clarity by establishing uniform requirements regarding books and records, and data collection, requirements for swaps and for SBSAs.

The CFTC requests comment as to the costs and benefits of proposed rule 1.7 for market participants, markets, and the public.

7. Costs and Benefits of the Proposed Interpretive Guidance Regarding the Forward Contract Exclusion From the Swap Definition

The CFTC is proposing interpretive guidance that the forward contract exclusion from the swap definition for nonfinancial commodities should be read consistently with the forward contract exclusion from the CEA definition of the term "future delivery." In that regard, the CFTC is proposing to retain the Brent Interpretation and extend it to apply to all nonfinancial commodities, and to withdraw the Energy Exemption which had extended the Brent Interpretation regarding the forward contract exclusion from the term "future delivery" to energy commodities other than oil. The CFTC also is proposing that its prior guidance regarding commodity options embedded in forward contracts should be applied as well to the treatment of forward contracts in nonfinancial commodities that contain embedded options under the Dodd-Frank Act.

The CFTC anticipates that its proposed interpretive guidance construing the forward contract exclusion consistently with respect to the definitions of the terms "swap" and "future delivery" in this manner will not impose any material costs on market participants. It also will establish a uniform interpretation of the forward contract exclusion for the definitions of both statutory terms, which will avoid the significant costs that some commenters stated would result if the forward contract exclusion were construed differently in these two contexts.[341]

The CFTC requests comment as to the costs and benefits of the proposed interpretative guidance regarding the

[341] *See* EEI Letter ("Without legal certainty as to the regulatory treatment of their forward contracts, EEI's members and other end users who rely on the forward contract exclusion likely will face higher transaction costs due to greater uncertainty. These increased transaction costs may include: (i) More volatile or higher commodity prices; and (ii) increased credit costs, in each case caused by changes in market liquidity as end users change the way they transact in the commodity markets. A single regulatory approach that uses the same criteria to confirm that a forward contract is excluded from the Commission's jurisdiction over swaps and futures will reduce this uncertainty and the associated costs to end users." (footnote omitted)).

forward contract exclusion from the swap definition, including the retention of the Brent Interpretation and its extension to all nonfinancial commodities and the withdrawal of the Energy Exemption, for market participant, markets, and the public.

8. Costs and Benefits of the Proposed Anti-Evasion Rules and Interpretive Guidance

The CFTC is proposing to exercise the anti-evasion rulemaking authority granted to it by the Dodd-Frank Act. Generally, proposed CFTC rule 1.3(xxx)(6) under the CEA would define as a swap any agreement, contract, or transaction that is willfully structured to evade (or as an attempt to evade) the provisions of Title VII governing the regulation of swaps. Further, proposed CFTC rule 1.6 under the CEA would prohibit activities conducted outside the United States, including entering into agreements, contracts, and transactions and structuring entities, to willfully evade any provision of the CEA as enacted by Title VII or the rules and regulations promulgated thereunder.

As opposed to providing a bright-line test, proposed rule 1.3(xxx)(6) would apply to agreements, contracts, and transactions, and proposed rule 1.6 would apply to agreements, contracts, transactions and entities, that are willfully structured to evade (or as an attempt to evade) the provisions of Title VII governing the regulation of swaps. Although this test does not provide a bright line, it helps ensure that would-be evaders cannot intentionally structure their transactions or entities for the sole purpose of evading the requirements of Title VII. The CFTC also is proposing interpretive guidance as to certain types of circumstances that may constitute an evasion of the requirements of Title VII, while at the same time preserving the CFTC's ability to determine, on a case-by-case basis, that other types of transactions or actions constitute an evasion of the requirements of the statute or the regulations promulgated thereunder. This will promote the enforcement of the anti-evasion rules in a manner that does not inappropriately interfere with activities undertaken for legitimate business purposes.

Absent the proposed anti-evasion rules and interpretive guidance, price discovery would be impaired because markets would not be informed about those transactions. Additionally, systemic risk could increase in a manner that the CFTC would not be able to measure accurately. The proposed anti-evasion rules and interpretive guidance will bring the appropriate scope of transactions and entities within the regulatory framework established by the Dodd-Frank Act, which will better allow the CFTC to assure transparency and address systemic risk.

Request for Comment

148. After considering the costs and benefits of the proposed rules and interpretive guidance as discussed in this section, the CFTC has determined to issue the proposal. The CFTC invites public comment on all of its cost-benefit considerations. Commenters are requested to submit empirical data or other factual information quantifying or qualifying the costs and benefits of the proposed rules and interpretive guidance with their comments, to the extent possible.

D. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA") [342] the CFTC must advise the Office of Management and Budget as to whether the proposed rules constitute a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in: (i) An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease); (ii) a major increase in costs or prices for consumers or individual industries; or (iii) significant adverse effect on competition, investment or innovation. If a rule is "major," its effectiveness will generally be delayed for 60 days pending Congressional review. The CFTC does not believe that any of the proposed rules in this release, in their current form, would constitute a major rule.

The CFTC requests comment on the potential impact of the proposed rules on the economy on an annual basis, on the costs or prices for consumers or individual industries, and on competition, investment or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

IX. Administrative Law Matters—Exchange Act Revisions

A. Paperwork Reduction Act

1. Background

Proposed rules 3a68–2 and 3a68–4(c) would contain new "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995.[343] The SEC is submitting them to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[344] An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has not yet assigned a control number to the new collection of information.

These proposed rules contain collections and are being proposed pursuant to the Exchange Act. The proposed rules would establish a process through which a person could submit a request to the Commissions that the Commissions provide a joint interpretation of whether an agreement, contract, or transaction (or class thereof) is a swap, security-based swap, or both (*i.e.,* a mixed swap). The rules also would establish a process with respect to mixed swaps through which a person could submit a request to the Commissions that the Commissions issue a joint order permitting the requesting person (and any other person or persons that subsequently lists, trades, or clears that class of mixed swap) to comply, as to parallel provisions only, with the specified parallel provisions, instead of being required to comply with parallel provisions of both the CEA and the Exchange Act. The hours and costs associated with preparing and sending these requests would constitute reporting and cost burdens imposed by each collection of information.

2. Summary of Collection of Information Under Proposed Rules 3a68–2 and 3a68–4(c)

The SEC is proposing new rules that would allow persons to submit requests to the Commissions for joint interpretations regarding whether a particular agreement, contract, or transaction (or class thereof) is a swap, security-based swap, or both (*i.e.,* a mixed swap), and for joint orders permitting alternative regulatory treatment for particular mixed swaps.

First, the SEC is proposing new rule 3a68–2, which would allow persons to submit a request for a joint interpretation from the Commissions regarding whether an agreement, contract, or transaction (or a class thereof) is a swap, security-based swap, or both (*i.e.,* a mixed swap). Under proposed rule 3a68–2, a person would provide to the Commissions a copy of all material information regarding the terms of, and a statement of the economic characteristics and purpose of, each relevant agreement, contract, or

[342] Public Law 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

[343] 44 U.S.C. 3501 *et seq.*

[344] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

transaction (or class thereof), along with that person's determination as to whether each such agreement, contract, or transaction (or class thereof) should be characterized as a swap, security-based swap, or both (*i.e.,* a mixed swap). The Commissions also may request the submitting person to provide additional information.

The Commissions may issue in response a joint interpretation or joint notice of proposed rulemaking regarding the status of that agreement, contract, or transaction (or class thereof) as a swap, security-based swap, or both (*i.e.,* a mixed swap). Any joint interpretation, like any joint notice of proposed rulemaking, will be public and may discuss the material information regarding the terms of the relevant agreement, contract, or transaction (or class thereof), as well as any other information the Commissions deem material to the interpretation.

Requesting persons also would be permitted to withdraw a request made pursuant to proposed rule 3a68–2 at any time before the Commissions have issued a joint interpretation or joint notice of proposed rulemaking in response to the request. Regardless of a particular request for interpretation, however, the Commissions could provide such a joint interpretation or joint notice of proposed rulemaking of their own accord.

Persons would submit requests pursuant to proposed rule 3a68–2 on a voluntary basis. However, if a person submits a request, all of the information required under the proposed rule, including any additional information requested by the Commissions, must be submitted to the Commission, except to the extent a person withdraws the request pursuant to the proposed rule.

For purposes of the PRA, the SEC estimates that the total annual paperwork burden resulting from proposed rule 3a68–2 would be approximately 20 hours of internal company or individual time and a cost of approximately $9,480 for the services of outside professionals that the SEC believes would consist of services provided by attorneys.[345] As discussed further below, these total costs include all collection burdens associated with the proposed rules, including burdens related to the initial determination requirements.

Second, the SEC is proposing new rule 3a68–4(c), which would allow persons to submit requests to the Commissions for joint orders regarding the regulation of a particular mixed swap (or class thereof). Under proposed rule 3a68–4(c), a person would provide to the Commissions a copy of all material information regarding the terms of, and the economic characteristics and purpose of, the specified (or specified class of) mixed swap. In addition, a person would provide the specified parallel provisions, and the reasons the person believes such specified parallel provisions would be appropriate for relevant mixed swap (or class thereof), and an analysis of: (i) The nature and purposes of the parallel provisions that are the subject of the request; (ii) the comparability of such parallel provision; and (iii) the extent of any conflicts or differences between such parallel provisions. The Commissions also may request the submitting person to provide additional information.

The Commissions may issue in response a joint order, after public notice and opportunity for comment, providing that the requesting person (and any other person or persons that subsequently lists, trades, or clears that mixed swap (or class thereof)) is permitted to comply, as to parallel provisions only, with the specified parallel provisions (or another subset of the parallel provisions that are the subject of the request, as the Commissions determine is appropriate), instead of being required to comply with parallel provisions of both the CEA and the Exchange Act. Any joint order will be public and may discuss the material information regarding the terms of the mixed swap (or class thereof), as well as any other information the Commissions deem material to the order. Requesting persons also would be permitted to withdraw a request made pursuant to proposed rule 3a68–4(c) at any time before the Commissions have issued a joint order in response to the request.

Persons would submit requests pursuant to proposed rule 3a68–4(c) on a voluntary basis. However, if a person submits a request, all of the information required under the proposed rule, including any additional information requested by the Commissions, must be submitted to the Commission, except to the extent a person withdraws the request pursuant to the proposed rule.

For purposes of the PRA, the SEC estimates that the total annual incremental paperwork burden resulting from proposed rule 3a68–4(c) would be approximately 30 hours of internal company or individual time and a cost of approximately $15,800 for the services of outside professionals, which the SEC believes would consist of services provided by attorneys.[346] As discussed further below, these total costs include all collection burdens associated with the proposed rules, including burdens related to the initial determination requirements.

3. Proposed Use of Information

The SEC would use the information collected pursuant to proposed rule 3a68–2 to evaluate an agreement, contract, or transaction (or class thereof) in order to provide joint interpretations or joint notices of proposed rulemaking with the CFTC regarding whether these agreements, contracts, or transactions (or classes thereof) are swaps, security-based swaps, or both (*i.e.,* mixed swaps) as defined in the Dodd-Frank Act. The SEC would use the information collected pursuant to proposed rule 3a68–4(c) to evaluate a specified, or a specified class of, mixed swaps in order to provide joint orders or joint notices of proposed rulemaking with the CFTC regarding the regulation of that particular mixed swap or class of mixed swap. The information provided to the SEC pursuant to proposed rules 3a68–2 and 3a68–4(c) also would allow the SEC to monitor the development of new OTC derivatives products in the marketplace and determine whether additional rulemaking or interpretive guidance is necessary or appropriate.

4. Respondents

It is difficult to calculate the precise number of requests that would be submitted to the Commissions under proposed rules 3a68–2 and 3a68–4(c), given the historical unregulated state of the OTC derivatives market. Although any person could submit a request under proposed rule 3a68–2, the SEC believes as a practical matter that the relevant categories of such persons would be swap dealers and security-based swap dealers, major swap participants and major security-based swap participants, SEFs, security-based SEFs, DCOs clearing swaps, DCMs trading swaps, SDRs, SBSDRs, and clearing agencies clearing security-based swaps, and the total number of persons could be 475.[347] Similarly, although any

[345] For convenience, the estimated PRA hour burdens have been rounded to the nearest whole dollar. Data from SIFMA's "Management & Professional Earnings in the Securities Industry 2009," modified by SEC staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that that the cost of an attorney is $316 per hour.

[346] *See supra* note 345.

[347] This total number includes an estimated 250 swap dealers, 50 major swap participants, 50 security-based swap dealers, 10 major security-based swap participants, 35 SEFs, 20 security-based SEFs, 12 DCOs, 17 DCMs, 15 SDRs, 10 SBSDRs, and 6 clearing agencies, as set forth by the CFTC and SEC, respectively, in their other Dodd-Frank Act

person could submit a request under proposed rule 3a68–4(c), the SEC believes as a practical matter that the relevant categories of such persons would be SEFs, security-based SEFs, and DCMs trading swaps, and the total number of persons could be 72.[348]

However, based on the SEC's experience and information received from commenters to the ANPR[349] and during meetings with the public to discuss the Product Definitions generally, including the interpretation of whether a transaction is a swap, security-based swap, or both (*i.e.,* a mixed swap), and taking into consideration the certainty provided by the proposed rules and interpretive guidance in this release, the SEC believes that the number of requests that would be submitted by such persons to the Commissions to provide joint interpretations as to whether a given agreement, contract, or transaction is a swap, security-based swap, or both (*i.e.,* a mixed swap), would be small, and therefore expects that only a small number of requests would be submitted pursuant to proposed rule 3a68–2. With respect to proposed rule 3a68–4(c), the SEC also estimates the number of requests for joint orders would be small.[350] Pursuant to the Commissions' proposed rules and interpretive guidance, a number of persons that engage in agreements, contracts, or transactions that are swaps, security-based swaps, or both (*i.e.,* a mixed swap) would be certain that their transactions are, indeed, swaps, security-based swaps, or both, (*i.e.,* a mixed swap) and would not request an interpretation pursuant to proposed rule 3a68–2. Also, as the Commissions provide joint interpretations regarding whether agreements, contracts, or transactions (or classes thereof) are or are not swaps, security-based swaps, or both (*i.e.,* mixed swaps), the SEC expects that the number of requests for interpretation will decrease over time. The SEC believes that the rules and interpretive regarding swaps, security-based swaps, and mixed swaps the Commissions are proposing, as well as the additional guidance issues pursuant to joint interpretations and orders under proposed rules 3a68–2 and 3a68–4 will result in a narrow pool of potential respondents, approximately 50,[351] to the collection of information requirements of proposed rule 3a68–2.

Similarly, because the SEC believes that both the category of mixed swap transactions and the number of market participants that engage in mixed swap transactions are small, the SEC believes that the pool of potential persons requesting a joint order regarding the regulation of a specified, or specified class of, mixed swap pursuant to proposed rule 3a68–4(c) would be small (approximately 10[352]). Also, those requests submitted pursuant to proposed rule 3a68–2 that result in an interpretation that the agreement, contract, or transaction (or class thereof) is not a mixed swap would reduce the pool of possible persons submitting a request regarding the regulation of particular mixed swaps (or class thereof) pursuant to proposed rule 3a68–4(c). In addition, not only the requesting party, but also any other person or persons that subsequently lists, trades, or clears that mixed swap, would be subject to, and must comply with, the joint order regarding the regulation of the specified, or specified class of, mixed swap, as issued by the Commissions. Therefore, the SEC believes that the number of requests for a joint order regarding the regulation of mixed swaps, particularly involving specified classes of mixed would decrease over time.

The SEC seeks comment on the number of persons that potentially would submit requests pursuant to rules 3a68–2 and 3a68–4(c).

5. Paperwork Reduction Act Burden Estimates

Proposed rules 3a68–2 and 3a68–4(c) would, if adopted, require submission of certain information to the Commissions to the extent persons elect to request an interpretation and/or alternative regulatory treatment. Proposed rules 3a68–2 and 3a68–4(c) each require the information that a requesting party must include in its request to the Commissions in order to receive a joint interpretation or order, as applicable.

(a) Proposed Rule 3a68–2

Proposed rule 3a68–2 would require any party requesting a joint interpretation under the rule to include disclosures about the agreement, contract, or transaction (or class thereof) in question as well as a statement of economic purpose and the requesting party's initial determination regarding whether the agreement, contract, or transaction (or class thereof) is a swap, security-based swap, or both (*i.e.,* a mixed swap). The proposed rule would apply only to requests made by persons that desire an interpretation from the Commissions. For each agreement, contract, or transaction (or class thereof) for which a person requests the Commissions' joint interpretation, the requesting person would be required to provide a copy of all material information regarding the applicable terms; a statement of the economic characteristics and purpose; and the requesting person's determination as to whether such agreement, contract, or transaction (or class thereof) is a swap, security-based swap, or both (*i.e.,* a mixed swap), including the basis for the requesting person's determination. The requesting person also would be required to provide such other information as the Commissions may request.

As discussed above, the SEC believes the number of persons that would submit requests pursuant to proposed rule 3a68–2 is quite small given the proposed rules and interpretive guidance regarding swaps, security-based swaps, and mixed swaps the Commissions are providing.[353] Although the SEC does not have precise figures for the number of requests that persons would submit, the SEC believes it is reasonable to estimate that it likely

rulemaking proposals. *See* Entity Definitions, *supra* note 12 (regarding security-based swap dealers and major security-based swap participants); Registration of Swap Dealers and Major Swap Participants, *supra* note 330 (regarding swap dealers and major security-based swap participants); Security-Based Swap Data Repository Registration, Duties, and Core Principles, *supra* note 6 (regarding SBSDRs); Swap Data Repositories, *supra* note 330 (regarding SDRs); Core Principles and Other Requirements for Swap Execution Facilities, 76 FR 1214, Jan. 7, 2011 (regarding SEFs); Registration and Regulation of Security-Based Swap Execution Facilities, 76 FR 10948, Feb. 28, 2011 (regarding security-based SEFs); Financial Resources Requirements for Derivatives Clearing Organizations, 75 FR 63113, Oct. 14, 2010 (regarding DCOs); Information Management Requirements for Derivatives Clearing Organizations, 75 FR 78185, Dec. 15, 2010 (regarding DCOs); Risk Management Requirements for Derivatives Clearing Organizations, 76 FR 3698, Jan. 20, 2011 (regarding DCOs); Core Principles and Other Requirements for Designated Contract Markets, 75 FR 80572, Dec. 22, 2010 (regarding DCMs); Clearing Agency Standards for Operation and Governance, 76 FR 14472, Mar. 16, 2011 (regarding clearing agencies).

[348] *Id.*

[349] *See supra* note 283 and accompanying text.

[350] *See* discussion *supra* part IV.A.

[351] The SEC believes that there would be approximately 50 requests in the first year. *See* discussion *infra* part IX.A.5. The SEC recognizes that one person might submit more than one request, but for purposes of the PRA is considering each such request as one person in order to provide a more conservative estimate of the number of persons that would be subject to paperwork burdens.

[352] *See id.*

[353] This estimate is based on comments from and discussions with market participants regarding uncertainty concerning whether certain contracts might be considered swaps, security-based swaps, or both, *i.e.,* mixed swaps, and the size of the mixed swaps category, although the SEC has not received data regarding the specific number of potential transaction types for which there is uncertainty or that are mixed swaps.

would be fewer than 50 requests in the first year. For purposes of the PRA, the SEC estimates the total paperwork burden associated with preparing and submitting a person's request to the Commissions pursuant to proposed rule 3a68–2 would be 20 hours per request and associated costs of $9,480.[354] Assuming 50 requests in the first year, the SEC estimates that this would result in an aggregate burden for the first year of 1000 hours of company time (50 requests × 20 hours/request) and $474,000 for the services of outside professionals (*e.g.,* attorneys) (50 requests × 30 hours/request × $316).

As discussed above, the SEC believes that as the Commissions provide joint interpretations or joint notices of proposed rulemaking, the number of requests received will decrease over time. Although the SEC does not have precise figures for the number of requests that persons would submit after the first year, the SEC believes it is reasonable to estimate that it likely would be fewer than 10 requests on average in ensuing years. Assuming 10 requests in ensuing years, the SEC estimates that this would result in an aggregate burden in each ensuing year of 200 hours of company time (10 requests × 20 hours/request) and $94,800 for the services of outside professionals (*e.g.,* attorneys) (10 requests × 30 hours/request × $316).

(b) Proposed Rule 3a68–4(c)

Proposed rule 3a68–4(c) would require any party requesting a joint order regarding the regulation of a specified, or specified class of, mixed swap under the rule to include disclosure about the agreement, contract, or transaction (or class thereof) that is a mixed swap as well as a statement of economic purpose for the mixed swap (class thereof). In addition, a person would provide the specified parallel provisions that the person believes should apply to the mixed swap (or class thereof), the reasons the person believes the specified parallel provisions would be appropriate for the mixed swap, and an analysis of: (i) The nature and purposes of the parallel provisions that are the subject of the request; (ii) the comparability of such parallel provisions; and (iii) the extent of any conflicts or differences between such parallel provisions. The requesting person also would be required to provide such other information as the Commissions may request.

As discussed above, the SEC believes the number of requests that persons would submit pursuant to proposed rule 3a68–4(c) is quite small given the limited types of agreements, contracts, or transactions (or class thereof) the Commissions believe would constitute mixed swaps.[355] In addition, depending on the characteristics of a mixed swap (or class thereof), a person may choose not to submit a request pursuant to proposed rule 3a68–4(c). The SEC also notes that any joint order issued by the Commissions would apply to any person that subsequently lists, trades, or clears that specified, or specified class of, mixed swap, so that requests for joint orders could diminish over time. Also, persons may submit requests for an interpretation under proposed rule 3a68–4(c) that do not result in an interpretation that the agreement, contract, or transaction (or class thereof) is a mixed swap. Therefore, although the SEC does not have precise figures for the number of requests that persons would submit, the SEC believes it is reasonable to estimate that it likely would be fewer than 20 requests in the first year. For purposes of the PRA, the SEC estimates the total paperwork burden associated with preparing and submitting a party's request to the Commissions pursuant to proposed rule 3a68–4(c) would be 30 hours and associated costs of $15,800 per request for mixed swaps for which a request for a joint interpretation pursuant to proposed rule 3a68–4(c) was not previously made.[356] Assuming 20 requests in the first year, the SEC estimates that this would result in an aggregate burden for the first year of 600 hours of company time (20 requests × 30 hours/request) and $316,000 for the services of outside professionals (20 requests × 50 hours/request × $316).

For mixed swaps for which a request for a joint interpretation pursuant to proposed rule 3a68–2 was previously made, the SEC estimates the total paperwork burden under the PRA associated with preparing and submitting a party's request to the Commissions pursuant to proposed rule 3a68–4(c) would be 10 hours fewer and $4,740 less per request than for mixed swaps for which a request for a joint interpretation pursuant to proposed rule 3a68–2 was not previously made because certain, although not all, of the information required to be submitted and necessary to prepare pursuant to proposed rule 3a68–4(c) would have been required to be submitted and necessary to prepare pursuant to proposed rule 3a68–2.[357] Although certain requests made pursuant to proposed rule 3a68–4(c) may be made without a previous request for a joint interpretation pursuant to proposed rule 3a68–2, the SEC believes that most requests under proposed rule 3a68–2 that result in the interpretation that an agreement, contract, or transaction (or class thereof) is a mixed swap will result in a subsequent request for alternative regulatory treatment pursuant to proposed rule 3a68–4(c). Assuming, therefore, that 90 percent, or 18 of the estimated 20 requests pursuant to proposed rule 3a68–4(c) in the first year, as discussed above, would be such "follow-on" requests, the SEC estimates that this would result in an aggregate burden in the first year of 360 hours of company time (18 requests × 20 hours/request) and $199,080 for the services of outside professionals (18 requests × 35 hours/request × $316).

As discussed above, the SEC believes that as the Commissions provide joint orders regarding alternative regulatory treatment, the number of requests received will decrease over time. The SEC believes it is reasonable to estimate that it likely would be fewer than 5 requests on average in ensuing years. Assuming 5 requests in ensuing years, the SEC estimates that this would result in an aggregate burden in each ensuing year of 150 hours of company time (5 requests × 30 hours/request) and $79,000 for the services of outside professionals (5 requests × 50 hours/request × $316). As discussed above, assuming that approximately 90 percent, or 4 of the estimated 5 requests pursuant to proposed rule 3a68–4(c) in

[354] This estimate is based on information indicating that the average burden associated with preparing and submitting a no-action request to the SEC staff in connection with the identification of whether certain products were securities, which the SEC believes is a process similar to the process under proposed rule 3a68–2, was approximately 20 hours and associated costs of $9,480. Assuming these costs correspond to legal fees, which we estimate at an hourly cost of $316, we estimate that this cost is equivalent to approximately 30 hours ($9,480/$316).

[355] *See supra* note 283 and accompanying text.

[356] This estimate is based on information indicating that the average burden associated with preparing and submitting a no-action request to the SEC staff in connection with the regulatory treatment of certain securities products which the SEC believes is a process similar to the process under proposed rule 3a68–4(c), was approximately 30 hours and associated costs of $15,800. Assuming these costs correspond to legal fees, which we estimate at an hourly cost of $316, we estimate that this cost is equivalent to approximately 50 hours ($15,800/$316).

[357] This estimate takes into account that certain information regarding the mixed swap (or class thereof), namely the material terms and the economic purpose, will have already been gathered and prepared as part of the request submitted pursuant to proposed rule 3a68–2. The SEC estimates that these items constitute approximately 10 hours fewer and a reduction in associated costs of $4,740. Assuming these costs correspond to legal fees, which we estimate at an hourly cost of $316, we estimate that this cost is equivalent to approximately 15 hours ($4,740/$316).

ensuing years would be "follow-on" requests to requests for joint interpretation from the Commissions under proposed rule 3a68–4(c), the SEC estimates that this would result in an aggregate burden in each ensuing year of 80 hours of company time (4 requests × 20 hours/request) and $44,240 for the services of outside professionals (4 requests × 35 hours/request × $316).

Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), the SEC solicits comments to: (i) 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; (ii) evaluate the accuracy of the SEC's estimate of burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) evaluate whether there are ways to minimize the burden of the collection of information on those that are to respond, including through the use of automated collection techniques or other forms of information technology. In addition, the SEC requests comment on the accuracy of the estimates regarding the total paperwork burden.

In particular, the SEC requests comment for purposes of the PRA on the following:

149. How many requests for a joint interpretation from the Commissions would be submitted pursuant to rule 3a68–2?

150. How many requests for a joint order from the Commissions would be submitted pursuant to rule 3a68–4(c)?

151. How many requests for a joint order from the Commissions would be submitted pursuant to rule 3a68–4(c) regarding the same agreement, contract, or transaction (or class thereof) that was the subject of a request for a joint interpretation from the Commissions submitted pursuant to rule 3a68–2?

152. Are the paperwork burden estimates, for both company time and outside services, as discussed above accurate? Do these estimates reflect the paperwork burdens and costs associated with requests made pursuant to proposed rules 3a68–2 and 3a68–4(c)?

Commenters should, when possible, provide empirical data to support their views.

Any member of the public may direct to us or to OMB any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090, with reference to File No. S7–16–11. Requests for materials submitted to OMB by the SEC with regard to these collections of information should be in writing, refer to File No. S7–16–11, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street NE., Washington, DC 20549–0213. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best ensured of having its full effect if OMB receives it within 30 days of publication.

B. Cost-Benefit Analysis

1. Background

Title VII establishes a regulatory framework for OTC derivatives. As part of that framework, Title VII amends the CEA and the Exchange Act to broadly categorize covered derivative products as swaps, security-based swaps, SBSAs, and/or mixed swaps. In particular, section 712(d)(1) of the Dodd-Frank Act provides that the Commissions, in consultation with the Board, shall jointly further define, among other things, the terms "swap," "security-based swap," and "security-based swap agreement." Section 712(a)(8) of the Dodd-Frank Act provides further that the Commissions shall jointly prescribe such regulations regarding "mixed swaps" as may be necessary to carry out the purposes of Title VII. In addition, sections 712(d)(2)(B) and (C) of the Dodd-Frank Act require the Commissions, in consultation with the Board, to jointly adopt rules governing books and records for SBSAs for SDRs that are registered under the CEA, swap dealers, major swap participants, security-based swap dealers, and major security-based swap participants.

The Product Definitions and the regulation of mixed swaps are part of the Dodd-Frank Act's comprehensive framework for regulating the swaps markets whereby the CFTC is given regulatory authority over "swaps,"[358] the SEC is given regulatory authority over "security-based swaps,"[359] and the Commissions shall jointly prescribe such regulations regarding mixed swaps as may be necessary to carry out the purposes of Title VII.[360] In addition, the SEC is given antifraud authority over, and access to information from certain CFTC-regulated entities (*e.g.,* DCOs, SEFs, and swap dealers) regarding, SBSAs.[361]

In most instances, the Commissions' proposed rules and guidance merely clarify the application of the Product Definitions to specific products as is required by the relevant provisions of the CEA and Exchange Act, as modified by the Dodd-Frank Act and the regulation of mixed swaps. However, for some of the rules the Commissions are proposing, the Commissions are exercising their discretion to further define the Product Definitions and to regulate mixed swaps, which would generate costs and benefits to market participants. The Commissions also are fulfilling the requirement in Dodd-Frank that they establish requirements regarding books and records with respect to SBSAs, which also would generate costs and benefits to market participants. The costs and benefits regarding these rules are discussed below.

2. Proposed Rule 3a68–1a

(a) Benefits

A security-based swap includes a swap that is based on the "occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer" (the "Event Provision").[362] Proposed rule 3a68–1a would provide that, solely for purposes of determining whether a CDS is a security-based swap under the Event Provision, the term "issuers of securities in a narrow-based security index" would have the meaning as set forth in proposed rule 3a68–1a.

Because index CDS typically are written on indexes of entity names, not on indexes of the specific securities of those entities, the Commissions are

[358] *See* CEA section 1a(47), 7 U.S.C. 1a(47) (cross-referenced in section 3(a)(69) of the Exchange Act, 15 U.S.C. 78c(a)(69)).

[359] *See* section 3(a)(68) of the Exchange Act, 15 U.S.C. 78c(a)(68) (cross-referenced in CEA section 1a(42), 7 U.S.C. 1a(42)).

[360] *See* CEA section 1a(47)(D), 7 U.S.C. 1a(47)(D); section 3(a)(68)(D) of the Exchange Act, 15 U.S.C. 78c(68)(D).

[361] *See* section 3(a)(78) of the Exchange Act, 15 U.S.C. 78c(a)(78); CEA section 1a(47)(A)(v), 7 U.S.C. 1a(47)(A)(v).

[362] Section 3(a)(68)(A)(ii)(III) of the Exchange Act, 15 U.S.C. 78c(a)(68)(A)(ii)(III).

concerned that the application of the Event Provision, without further clarification, may cause uncertainty about whether certain index CDS would be security-based swaps or swaps. Therefore, proposed rule 3a68–1a would eliminate the potential uncertainty of the treatment of index CDS as either security-based swaps or swaps by setting forth clear and objective criteria for meeting the definition of "issuers of securities in a narrow-based security index" and therefore being a security-based swap.

The SEC requests comments, data, and estimates regarding the benefits associated with proposed rule 3a68–1a. The SEC also requests comments, data, and estimates regarding any additional benefits that could be realized with proposed rule 3a68–1a.

(b) Costs

In complying with proposed rule 3a68–1a, a market participant will need to ascertain whether an index CDS is a security-based swap or swap according to the criteria set forth for meeting the definition of "issuers of securities in a narrow-based security index." This analysis will have to be performed by market participants upon entering into an index CDS to determine whether the index CDS is subject to the SEC's regulatory regime for security-based swaps or the CFTC's regulatory regime for swaps. The SEC notes, however, that any such costs would be in lieu of the costs of doing the same analysis under the statutory security-based swap definition. Because the statutory security-based swap definition lacks the specificity provided by proposed rule 3a68–1a, the SEC believes analysis of an index CDS would under proposed rule 3a68–1a would lead to less uncertainty than would the same analysis under the statutory security-based swap definition. Providing a clear rule to persons to determine whether an index CDS is a security-based swap under section 3(a)(68)(A)(ii)(III) of the Exchange Act [363] could alleviate additional costs to persons of inquiring with the Commissions about whether an index CDS is a swap or security-based swap under that provision, as well as costs of obtaining an opinion of counsel regarding the applicability of that provision to a particular index CDS.

In addition, proposed rule 3a68–1a is generally consistent with the definition of "narrow-based security index" that exists in section 3(a)(55)(B) of the Exchange Act, as modified to address debt securities in the context of security futures.[364] Because some market participants are familiar with this definition, as well as with performing analyses of products in the security futures context based on this definition, the SEC believes that the proposed definition of "issuers of securities in a narrow-based security index" will mitigate uncertainty for those market participants regarding the treatment of index CDS. In addition, because such market participants would be familiar with many of the criteria in proposed rule 3a68–1a, such market participants would require less time and effort, and thus incur less cost, in determining the scope and applicability of such criteria to the determination of whether an index CDS is a swap or security-based swap.

The SEC requests comment as to the costs that determinations under proposed rule 3a68–1a would impose on market participants, as well as estimates and empirical data to support these costs. In addition, the SEC requests comment on any other costs associated with proposed rule 3a68–1a that have not been considered and what the extent of those costs would be.

3. Proposed Rule 3a68–1b

(a) Benefits

A security-based swap includes a swap that is based on "an index that is a narrow-based security index, including any interest therein or on the value thereof." [365] Proposed rule 3a68–1b would provide that, solely for purposes of determining whether a CDS is a security-based swap under section 3(a)(68)(A)(ii)(I) of the Exchange Act,[366] the term "narrow-based security index" would have the meaning as set forth in proposed rule 3a68–1b.

Because index CDS may be written in indexes of the specific securities of entities as well as on indexes of entity names, the Commissions are concerned that the application of section 3(a)(68)(A)(ii)(I) of the Exchange Act,[367] without further clarification, may cause uncertainty about whether certain index CDS would be security-based swaps or swaps. Therefore, proposed rule 3a68–1b would eliminate the potential uncertainty of the treatment of index CDS as either security-based swaps or swaps by setting forth clear and objective criteria for meeting the definition of "narrow-based security index" and therefore being a security-based swap.

The SEC requests comments, data, and estimates regarding the benefits associated with proposed rule 3a68–1b. The SEC also requests comments, data, and estimates regarding any additional benefits that could be realized with proposed rule 3a68–1b.

(b) Costs

In complying with proposed rule 3a68–1b, a market participant will need to ascertain whether an index CDS is a security-based swap or swap according to the criteria set forth for meeting the definition of "narrow-based security index." This analysis will have to be performed by market participants upon entering into an index CDS to determine whether the index CDS is subject to the SEC's regulatory regime for security-based swaps or the CFTC's regulatory regime for swaps. The SEC notes, however, that any such costs would be in lieu of the costs of doing the same analysis under the statutory security-based swap definition. Because the statutory security-based swap definition lacks the specificity provided by proposed rule 3a68–1b, the SEC believes analysis of an index CDS would under proposed rule 3a68–1b lead to less uncertainty than would the same analysis under the statutory security-based swap definition. Providing a clear rule to persons to determine whether an index CDS is a security-based swap under section 3(a)(68)(A)(ii)(I) of the Exchange Act [368] could alleviate additional costs to persons of inquiring with the Commissions about whether an index CDS is a swap or security-based swap under that provision, as well as costs of obtaining an opinion of counsel regarding the applicability of that provision to a particular index CDS.

In addition, proposed rule 3a68–1b is generally consistent with the definition of "narrow-based security index" that exists in section 3(a)(55)(B) of the Exchange Act, as modified to address debt securities in the context of security futures.[369] Because some market participants are familiar with this definition, as well as with performing analyses of products in the security futures context based on this definition, the SEC believes that the proposed definition of "narrow-based security index" will mitigate uncertainty for those market participants regarding the treatment of index CDS. In addition, because such market participants would be familiar with many of the criteria in proposed rule 3a68–1b, such market

[363] 15 U.S.C. 78c(a)(68)(A)(ii)(III).

[364] *See* July 2006 Rules, *supra* note 199.

[365] Section 3(a)(68)(A)(ii)(I) of the Exchange Act, 15 U.S.C. 78c(a)(68)(A)(ii)(I).

[366] 15 U.S.C. 78c(a)(68)(A)(ii)(I).

[367] 15 U.S.C. 78c(a)(68)(A)(ii)(I).

[368] 15 U.S.C. 78c(a)(68)(A)(ii)(I).

[369] *See* July 2006 Rules, *supra* note 199.

participants would require less time and effort, and thus incur less cost, in determining the scope and applicability of such criteria to the determination of whether an index CDS is a swap or security-based swap.

The SEC requests comment as to the costs that determinations under proposed rule 3a68–1a would impose on market participants, as well as estimates and empirical data to support these costs. In addition, the SEC requests comment on any other costs associated with proposed rule 3a68–1a that have not been considered and what the extent of those costs would be.

4. Proposed Rule 3a68–2

(a) Benefits

Proposed rule 3a68–2 would establish a process for persons to request an interpretation of whether an agreement, contract, or transaction (or class of agreements, contracts, or transactions) is a swap, security-based swap, or both (*i.e.,* a mixed swap).

Proposed rule 3a68–2 would afford persons with the opportunity to obtain greater certainty from the Commissions regarding whether certain products are swaps, security-based swaps, or both, *i.e.,* mixed swaps. The SEC believes that this provision would decrease the possibility that market participants inadvertently might violate regulatory requirements regarding products that may constitute swaps, security-based swaps, or mixed swaps, which could lead to enforcement action. It also would decrease the likelihood that products might fall into regulatory gaps by providing a method for market participants to seek interpretations regarding the status of products for which the applicable regulatory regime might otherwise remain uncertain. In addition, the SEC believes the proposed rule will provide the opportunity for financial innovation by providing a flexible structure that will allow for the development of new products that otherwise might be hindered by the lack of regulatory certainty.

(b) Costs

Under proposed rule 3a68–2, a person could request the Commissions to provide an interpretation of whether an agreement, contract, or transaction (or class thereof) is a swap, security-based swap, or mixed swap. The SEC estimates that the cost of requesting this interpretation for a particular agreement, contract, or transaction (or class thereof) would be approximately 20 hours of internal company or individual time and a cost of approximately $9,480 for the services of outside professionals.[370] The SEC notes, however, that any such costs are in lieu of the costs of doing the same analysis without requesting the Commissions to provide an interpretation. In addition, as noted above, if the Commissions provide an interpretation pursuant to a request under proposed rule 3a68–2, a market participant, and other market participants that desire to transact in the same (or same class of) agreement, contract, or transaction, would have regulatory certainty about whether that agreement, contract, or transaction (or class thereof) is a swap, security-based swap, or both (*i.e.,* a mixed swap).

Also, the SEC believes that as persons make requests for interpretations about whether agreements, contracts, or transactions (or classes thereof agreements) are swaps, security-based swaps, or both, *i.e.,* mixed swaps, pursuant to proposed rule 3a68–2, the subsequent costs for persons transacting in those products for which the Commissions have provided interpretations should be reduced.

The SEC requests comment as to the costs that proposed rule 3a68–2 would impose on market participants, as well as estimates and empirical data to support these costs. In addition, the SEC requests comment on any other costs associated with proposed rule 3a68–2 that have not been considered herein and what the extent of those costs would be.

5. Proposed Rule 3a68–3

(a) Benefits

Proposed rule 3a68–3 would provide that, except as otherwise provided in proposed rule 3a68–3, for purposes of section 3(a)(68) of the Exchange Act,[371] the term "narrow-based security index" has the meaning set forth in section 3(a)(55) of the Exchange Act,[372] and the rules, regulations, and orders of the SEC thereunder. This definition would eliminate potential uncertainty regarding the treatment of a narrow-based security index to which section 3(a)(55) of the Exchange Act also applies.[373]

Proposed rule 3a68–3 also would provide a tolerance period for the definition of "narrow-based security index" to ensure that, under certain conditions, a security index underlying a swap will not be considered a narrow-based security index and a security index underlying a security-based swap will be considered a narrow-based security index, even when the security index underlying the swap or security-based swap temporarily assumes characteristics that would render it a narrow-based security index or not a narrow-based security index, respectively. In addition, proposed rule 3a68–3 would provide for an additional 3-month grace period applicable to a security index that becomes narrow-based, or broad-based, as applicable, for more than 45 business days over 3 consecutive calendar months.

Because security indexes underlying Title VII instruments may migrate from narrow-based to broad-based, or vice versa, the Commissions are concerned that application of the narrow-based security index definition, without further clarification, may cause uncertainty regarding treatment of Title VII instruments traded on trading platforms when such migration has occurred. Therefore, proposed rule 3a68–3 would eliminate the potential uncertainty of the treatment of such Title VII instruments by setting forth clear and objective criteria regarding the application of the narrow-based security index definition to security indexes that have migrated from narrow-based to broad-based or from broad-based to narrow-based.

The SEC requests comments, data, and estimates regarding the benefits associated with proposed rule 3a68–3. The SEC also requests comments, data, and estimates regarding any additional benefits that could be realized with proposed rule 3a68–3.

(b) Costs

In complying with proposed rule 3a68–3, a market participant will need to ascertain whether a security index underlying a Title VII instrument is narrow-based or broad-based according to the criteria set forth for the tolerance periods and grace periods in the proposed rule. This analysis would be performed upon entering into Title VII instrument on a security index to ensure compliance with proposed rule 3a68–3. The SEC notes, however, that any such costs would be in lieu of the costs of doing the same analysis under the narrow-based security index definition, which the SEC believes would be more difficult and lead to greater uncertainty, rather than the clarity provided under proposed rule 3a68–3. Providing a clear rule to market participants to determine whether a Title VII instrument traded on a trading platform where the underlying security index has so migrated could alleviate additional costs to persons of inquiring with the Commissions about whether a Title VII instrument is a swap or a security-based swap, as well as costs of obtaining an opinion of counsel

[370] *See* discussion *supra* part VIII.

[371] 15 U.S.C. 78c(a)(68).

[372] 15 U.S.C. 78c(a)(55).

[373] 15 U.S.C. 78c(a)(55).

regarding a particular Title VII instrument.

In addition, proposed rule 3a68–3 is generally consistent with the tolerance period and grace period that exist in section 3(a)(55) of the Exchange Act for futures contracts.[374] Because market participants are familiar with such tolerance period and grace period as well as with performing analyses of products in the futures context based on these provisions, the SEC believes that the proposed tolerance period and grace period in proposed rule 3a68–3 will mitigate uncertainty for market participants regarding the treatment of these Title VII instruments. Proposed rule 3a68–3 also would allow market participants to minimize the costs of determining whether a security index underlying a Title VII instrument is considered narrow-based or not by providing a test that is substantially similar to a test with which they are familiar in the futures context. In addition, the tolerance period under proposed rule 3a68–3 mitigates uncertainty for market participants trading Title VII instruments on trading platforms by allowing temporary migration of an underlying security index within certain specifications without disrupting the status of Title VII instruments based on that security index. Similarly, the grace period under proposed rule 3a68–3 mitigates uncertainty for market participants trading Title VII instruments on trading platforms by allowing time for any necessary actions to be made to accommodate the non-temporary migration of a security index underlying Title VII instruments.

The SEC requests comment as to the costs that determinations under proposed rule 3a68–3 would impose on market participants, as well as estimates and empirical data to support these costs. In addition, the SEC requests comment on any other costs associated with proposed rule 3a68–3 that have not been considered, and what the extent of those costs would be.

6. Proposed Rule 3a68–4

(a) Benefits

A mixed swap is both a security-based swap and a swap, subject to dual regulation by the Commissions, and proposed rule 3a68–4 would define the term "mixed swap" in the same manner as the term is defined in both the Exchange Act.[375] Proposed rule 3a68–4 would also provide that a mixed swap that is not executed on or subject to the rules of a DCM, SEF, FBOT, NSE, or security-based SEF and that will not be submitted to a DCO or registered or exempt clearing agency to be cleared ("bilateral uncleared mixed swap"), and where at least one party to the mixed swap is registered with the SEC as a security-based swap dealer or major security-based swap participant and also with the CFTC as a swap dealer or major swap participant, shall be subject to the provisions of the Securities Act and the rules and regulations promulgated thereunder and only to certain provisions of the CEA and the rules and regulations promulgated thereunder. In addition, proposed rule 3a68–4 would establish a process for persons to request that such persons be permitted to comply, as to parallel provisions only, with the specified parallel provisions, instead of being required to comply with parallel provisions of both the CEA and the Exchange Act.

Because, as noted above, mixed swaps are both swaps and security-based swaps, and thus are subject to regulation as both swaps and security-based swaps, the Commissions are concerned that, without further clarification, there may be uncertainty as to the scope of, and the requirements applicable to, transactions that fall within the definition of the term "mixed swap."

Proposed rule 3a68–4(a) would define the term "mixed swap" in the same manner as the term is defined in the Exchange Act. This rule, coupled with guidance regarding mixed swaps provided by the Commissions, further clarifies whether a security-based swap is a mixed swap and could eliminate the need to obtain an opinion of counsel regarding a particular security-based swap.

The Commissions are proposing rule 3a68–4(b) to eliminate potentially duplicative and conflicting regulation in the context of mixed swaps by providing that a bilateral uncleared mixed swap, where at least one party to the mixed swap is dually-registered with the SEC as a security-based swap dealer or major security-based swap participant and also with the CFTC as a swap dealer or major swap participant, would be subject to all applicable provisions of the securities laws (and SEC rules and regulations promulgated thereunder) but would be subject only to certain CEA provisions (and CFTC rules and regulations promulgated thereunder). Therefore, proposed rule 3a68–4(a) would reduce both the number of and potential uncertainty regarding which requirements of each Commission will apply to bilateral uncleared mixed swaps entered into by dually-registered dealers and major participants.

Proposed rule 3a68–4(c) also would afford persons with an opportunity to seek alternative regulatory treatment of a specified, or specified class of, mixed swap. Absent such alternative regulatory treatment, a person that desires or intends to list, trade, or clear a mixed swap would be required to comply with all the statutory provisions of Title VII, including all the rules and regulations thereunder, that are applicable to both security-based swaps and swaps. The SEC believes that such a requirement could pose practical difficulties for mixed swap transactions[376] and that permitting persons to request alternative regulatory treatment of a specified, or specified class of, mixed swaps would allow the Commissions to address the potential for duplicative or contradictory regulatory requirements regarding a particular mixed swap.

The information submitted by persons pursuant to proposed rule 3a68–4(c) would assist the Commissions in more quickly identifying and addressing the relevant issues involved in providing alternative regulatory treatment.

The SEC requests comments, data, and estimates regarding the benefits associated with proposed rule 3a68–4. The SEC also requests comments, data, and estimates regarding any additional benefits that could be realized with proposed rule 3a68–4.

(b) Costs

Providing a clear rule for persons who engage in bilateral uncleared mixed swaps would reduce the potential for duplicative or contradictory regulatory requirements that apply to such bilateral uncleared mixed swaps.

Under proposed rule 3a68–4(c), a person also could request the Commissions to provide alternative regulatory treatment of a specified, or specified class of, mixed swap. The SEC estimates that the cost of requesting alternative regulatory treatment for a particular mixed swap (or class thereof) would be approximately 30 hours of internal company or individual time and a cost of approximately $15,800 for the services of outside professionals.[377] The SEC notes, however, that any such costs are in lieu of the costs of complying with all the statutory provisions in Title VII, including all the rules and regulations thereunder, that are applicable to both security-based swaps and swaps, which the SEC

[374] *See supra* note 261 and accompanying text.

[375] Section 3(a)(68)(D) of the Exchange Act, 15 U.S.C. 78c(a)(68)(D); CEA section 1(a)(47)(D), 7 U.S.C. 1(a)(47)(D).

[376] *See* discussion *supra* part IV.

[377] *See* discussion *supra* part VIII.

believes would be more costly than requesting alternative regulatory treatment, and which potentially could pose practical difficulties.[378]

Also, the SEC believes that as persons make requests for alternative regulatory treatment of specified, or specified classes of, mixed swaps pursuant to proposed rule 3a68–4, the subsequent costs for persons transacting in those products for which the Commissions have provided for alternative regulatory treatment should be reduced.

The SEC requests comment as to the costs that proposed rule 3a68–4 would impose on market participants, as well as estimates and empirical data to support these costs. In addition, the SEC requests comment on any other costs associated with proposed rule 3a68–4 that have not been considered herein, and what the extent of those costs would be.

7. Proposed Rule 3a69–1

(a) Benefits

Proposed rule 3a69–1 would clarify that state or Federally regulated insurance products provided by state or Federally regulated insurance companies, or by certain reinsurers, provided such insurance products meet certain other requirements, would not be swaps. Specifically, proposed rule 3a69–1 would define the term "swap" so that it would not include an agreement, contract, or transaction that, by its terms or by law, as a condition of performance on the agreement, contract, or transaction: (i) Requires the beneficiary of the agreement, contract, or transaction to have an insurable interest that is the subject of the agreement, contract, or transaction and thereby carry the risk of loss with respect to that interest continuously throughout the duration of the agreement, contract, or transaction; (ii) requires that loss to occur and to be proved, and that any payment or indemnification therefor be limited to the value of the insurable interest; (iii) is not traded, separately from the insured interest, on an organized market or over-the-counter; and (iv) with respect to financial guarantee insurance only, in the event of payment default or insolvency of the obligor, any acceleration of payments under the policy is at the sole discretion of the insurer. Proposed rule 3a69–1 also would require that the agreement, contract, or transaction: (i) Be provided by a company that is organized as an insurance company whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies and that is subject to supervision by the insurance commissioner, or similar official or agency, of a state, as defined under section 3(a)(16) of the Exchange Act,[379] or by the United States or an agency or instrumentality thereof, and be regulated as insurance under the laws of such state or the United States; (ii) be provided by the United States or any of its agents or instrumentalities, or pursuant to a statutorily authorized program thereof; or (iii) in the case of reinsurance only, be provided by a person located outside the United States to an insurance company that meets the above requirements, provided that such person is not prohibited by the law of any state or the United States from offering such agreement, contract, or transaction to such insurance company, the product to be reinsured meets the requirements above for insurance products, and the total amount reimbursable by all reinsurers for such insurance product cannot exceed the claims or losses paid by the cedant. An agreement, contract, or transaction would have to meet all of these criteria in order to qualify as an insurance product that falls outside of the swap and security-based swap definitions pursuant to the proposed rules.

The SEC is concerned that, without further clarification, market participants may be uncertain about whether an agreement, contract, or transaction is an insurance product that is not subject to regulation as a swap or security-based swap. Therefore, proposed rule 3a69–1 would eliminate the potential uncertainty of what constitutes an insurance product by setting forth clear and objective criteria for meeting the definition of an insurance product that is not subject to regulation as a swap or security-based swap.

The SEC requests comments, data, and estimates regarding the benefits associated with proposed rule 3a69–1. The SEC also requests comments, data, and estimates regarding any additional benefits that could be realized with proposed rule 3a69–1.

(b) Costs

In complying with proposed rule 3a69–1, a market participant will need to analyze its agreements, contracts, and transactions that are insurance products under the provisions of the proposed rule to determine whether such insurance products fall outside the definitions of the terms "swaps" and "security-based swap." This analysis will have to be performed upon entering into the agreement, contract, or transaction to ensure compliance with proposed rule 3a69–1. The SEC notes, however, that any such costs would be in lieu of the costs of doing the same analysis absent proposed rule 3a69–1, which the SEC believes would be more difficult and lead to greater uncertainty than if the analysis were done under proposed rule 3a69–1. Providing an objective rule to determine whether an agreement, contract, or transaction is an insurance product could alleviate additional costs of inquiring with the Commissions about whether an agreement, contract, or transaction is an insurance product or a swap, or costs of obtaining an opinion of counsel regarding a particular agreement, contract, or transaction.

To the extent that the criteria under proposed rule 3a69–1 lead to the inadvertent omission of certain types of insurance products, these omissions could lead to costs for market participants entering into agreements, contracts, or transactions that might be omitted because these agreements, contracts, or transactions would be regulated as swaps and not as insurance products. Similarly, to the extent that the criteria under proposed rule 3a69–1 lead to the inadvertent inclusion of certain types of swaps or security-based swaps, these inclusions could lead to costs for market participants entering into agreements, contracts, or transactions that are regulated as insurance products and not as swaps or security-based swaps. The SEC has requested comment on whether the criteria under proposed rule 3a69–1 inadvertently omits certain types of insurance products or includes certain types of swaps in order to minimize these potential costs. The SEC believes that, pursuant to comments on the proposed criteria, any subsequent modifications the Commissions make to proposed rule 3a69–1 would significantly curtail the potential for inadvertent omissions or inclusions.

The SEC requests comment as to the costs that determinations under proposed rule 3a69–1 would impose on market participants, as well as estimates and empirical data to support these costs. In addition, the SEC requests comment on any other costs associated with proposed rule 3a69–1 that have not been considered, and what the extent of those costs would be.

8. Proposed Rule 3a69–2

(a) Benefits

Proposed rule 3a69–2 provides that the term "swap" has the meaning set forth in section 3(a)(69) of the Exchange

[378] *See* discussion *supra* part IV.B.

[379] 15 U.S.C. 78c(a)(16).

Act and that, without limiting the definition of "swap" in section 3(a)(69) of the Exchange Act, an agreement, contract, or transaction that is a cross-currency swap, currency option, foreign currency option, foreign exchange option, foreign exchange rate option, foreign exchange forward, foreign exchange swap, FRA, or NDF would fall within the meaning of the term "swap", unless such agreement, contract, or transaction is otherwise excluded by section 1a(47)(B) of the CEA.[380] Proposed rule 3a69–2 also provides that a foreign exchange forward or a foreign exchange swap shall not be considered a swap if the Secretary of the Treasury makes a determination described in section 1a(47)(E)(i) of the CEA[381] and that, notwithstanding such provision, certain provisions of the CEA will apply to such foreign exchange forward or foreign exchange swap, namely the reporting requirements in section 4r of the CEA,[382] and regulations thereunder, and, in the case of a swap dealer or major swap participant that is a party to a foreign exchange swap or foreign exchange forward, the business conduct standards in section 4s of the CEA,[383] and regulations thereunder. In addition, proposed rule 3a69–2 provides that the terms "foreign exchange forward" and "foreign exchange swap" have the meanings set forth in the CEA and that a currency swap, cross-currency swap, currency option, foreign currency option, foreign exchange option, foreign exchange rate option, and NDF is not a foreign exchange forward or foreign exchange swap for purposes of sections 1a(24) and 1a(25) of the CEA.[384]

Proposed rule 3a69–2 would restate portions of the statutory definition of "swap" and enumerate certain types of agreements, contracts, and transactions that are swaps in order to consolidate parts of the definition and related interpretations for ease of reference. Proposed rule 3a69–2 would also specify certain reporting and business conduct requirements that are applicable to foreign exchange forwards and foreign exchange swaps, and provide definitions for such terms.

Because the statutory definition of the term "swap," though broadly worded and specific regarding the status of certain agreements, contracts, and transactions, does not explicitly mention every agreement, contract, or transaction that would fall within the definition, the Commissions are concerned that application of the definition, without further clarification, may cause uncertainty about whether certain agreements, contracts, or transactions would be swaps. Proposed rule 3a69–2 would eliminate the potential uncertainty of the treatment of such agreements, contracts, and transactions as swaps by setting forth clear and objective criteria for certain agreements, contracts, and transactions without limiting the scope of the statutory definition of the term "swap." Proposed rule 3a69–2 also would eliminate the potential uncertainty regarding the reporting and business conduct requirements applicable to foreign exchange forwards and foreign exchange swaps by specifying the provisions for which compliance is required.

(b) Costs

In complying with proposed rule 3a69–2, a market participant will need to analyze its agreements, contracts, and transactions under the provisions of the proposed rule to determine whether such agreements, contracts, and transactions are swaps according to the criteria set forth in the proposed rule. This analysis will have to be performed upon entering into the agreement, contract, or transaction to ensure compliance with proposed rule 3a69–2. The SEC notes, however, that any such costs would be in lieu of the costs of doing the same analysis absent proposed rule 3a69–2, which the SEC believes would be more difficult and lead to greater uncertainty than if the analysis were done under proposed rule 3a69–2.

Providing an objective rule to market participants to determine whether certain types of agreements, contracts, or transactions are swaps could alleviate additional costs to persons of inquiring with the Commissions about whether such agreements, contracts, or transactions are swaps, as well as costs of obtaining an opinion of counsel regarding a particular agreement, contract, or transaction. In addition, an objective rule regarding reporting and business conduct requirements could alleviate additional costs to persons of inquiring with the Commissions about which reporting and business conduct requirements are applicable to foreign exchange forwards and foreign exchange swaps, and could reduce the costs of obtaining an opinion of counsel regarding a particular foreign exchange forward or foreign exchange swap.

To the extent that the criteria under proposed rule 3a69–2 lead to the inadvertent inclusion of certain types of agreements, contracts, and transactions or additional reporting or business conduct obligations for certain swaps, these inclusions and additional requirements could lead to costs for market participants entering into agreements, contracts, or transactions to which proposed rule 3a69–2 applies. The SEC has requested comment on whether the criteria under proposed rule 3a69–2 provide sufficient clarity regarding the specific products included in the rule and whether the criteria should clarify the applicability of reporting and business conduct requirements in order to minimize these potential costs. The SEC believes that, pursuant to comments on the proposed criteria, any subsequent modifications the Commissions make to proposed rule 3a69–2 would significantly curtail the potential for inadvertent inclusions or additional reporting or business conduct requirements.

The SEC requests comment as to the costs that determinations under and compliance with proposed rule 3a69–2 would impose on market participants, as well as estimates and empirical data to support these costs. In addition, the SEC requests comment on any other costs associated with proposed rule 3a69–2 that have not been considered, and what the extent of those costs would be.

9. Proposed Rule 3a69–3

(a) Benefits

Proposed rule 3a69–3 would provide that the term "security-based swap agreement" has the meaning set forth in section 3(a)(78) of the Exchange Act.[385] Proposed rule 3a69–3 also would provide that registered SDRs, swap dealers, major swap participants, security-based swap dealers, and major security-based swap participants are not required to maintain additional books and records, or, in the case of registered SDRs, collect and maintain additional information regarding, SBSAs other than the books and records (and, in the case of registered SDRs, information) required to be kept (or collected) and maintained regarding swaps pursuant to the CEA and the CFTC rules and regulations promulgated thereunder.

Because, as noted above, security-based swap agreements are subject the CFTC's regulatory and enforcement authority and the SEC's antifraud and certain other authority, the Commissions are concerned that, without further clarification, there may be uncertainty as to the scope of transactions that fall within the definition of the term "security-based

[380] 15 U.S.C. 78c(a)(69); 7 U.S.C. 1a(47)(B).

[381] 7 U.S.C. 1a(47)(E)(i).

[382] 7 U.S.C. 6r.

[383] 7 U.S.C. 6s.

[384] 7 U.S.C. 1a(24) and 1a(25).

[385] 15 U.S.C. 78c(a)(78).

swap agreement." Proposed rule 3a69–3(c) would define the term "security-based swap agreement" in the same manner as the term is defined in the Exchange Act. This rule, coupled with guidance regarding security-based swap agreements provided by the Commissions, further clarifies whether a swap is a security-based swap agreement and could eliminate the need to obtain an opinion of counsel regarding a particular security-based swap agreement.

Section 712(d)(2)(B) and (C) of the Dodd-Frank Act requires the Commissions to engage in joint rulemaking regarding books and records requirements for SBSAs. Providing that persons required to keep and maintain books and records regarding, or collect and maintain data regarding, swaps are not required to keep or maintain additional books and records regarding, or collect and maintain additional data regarding, SBSAs alleviates any additional books and records or information costs to such persons.

(b) Costs

The SEC believes that, because proposed rule 3a69–3 includes within the definition of SBSA no agreements, contracts, or transactions that would not be an SBSA in the absence of the proposed rule, proposed rule 3a69–3 would impose no costs other than those that are required with respect to swaps in the absence of proposed rule 3a69–3. In addition, the SEC believes that, because proposed rule 3a69–3 imposes no requirements with respect to SBSAs other than those that exist for swaps, proposed rule 3a69–3 would impose no costs other than those that are required with respect to swaps in the absence of proposed rule 3a69–3.

To the extent that the criteria under proposed rule 3a69–3 inadvertently lead to additional requirements with respect to SBSAs, these additional requirements could lead to costs for market participants entering into the SBSAs to which proposed rule 3a69–3 applies. The SEC has requested comment regarding whether the requirements under proposed rule 3a69–3 are sufficient. The SEC believes that, pursuant to comments on the proposed rule, any subsequent modifications the Commissions make to proposed rule 3a69–3 would significantly curtail the potential for inadvertent additional requirements.

The SEC requests comment as to the costs that compliance with proposed rule 3a69–3 would impose on market participants, as well as estimates and empirical data to support these costs. In addition, the SEC requests comment on any other costs associated with proposed rule 3a69–3 that have not been considered, and what the extent of those costs would be.

Request for Comment

153. The SEC has considered the costs and benefits of the proposed rules and clarifications regarding the Product Definitions, the regulation of mixed swaps, and the books and records requirements for SBSAs. The SEC is sensitive to these costs and benefits, and encourages commenters to discuss any additional costs or benefits beyond those discussed here, as well as any reductions in costs. In particular, the SEC requests comment on the potential costs, as well as any potential benefits, resulting from the proposed rules and clarifications regarding the Product Definitions, the regulation of mixed swaps, and the books and records requirements for SBSAs for issuers, investors, broker-dealers, security-based swap dealers, major security-based swap participants, persons associated with a security-based swap dealer or a major security-based swap participant, other security-based swap industry professionals, regulators, and other market participants. The SEC also seeks comment on the accuracy of any of the benefits identified and also welcomes comment on any of the costs identified here. In addition, the SEC encourages commenters to identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such costs or benefits, including estimates and views regarding these costs and benefits for particular types of market participants, as well as any other costs or benefits that may result from the adoption of the proposed rules, as well as the clarifications provided.

C. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act [386] requires the SEC, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action would promote efficiency, competition, and capital formation. In addition, section 23(a)(2) of the Exchange Act [387] requires the SEC, when adopting rules under the Exchange Act, to consider the impact such rules would have on competition. Section 23(a)(2) of the Exchange Act also prohibits the SEC from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[388]

1. Proposed Rule 3a68–1a

The SEC believes that proposed rule 3a68–1a would create an efficient process for a market participant to determine whether an index CDS is a swap or a security-based swap by setting forth clear methods and guidelines, thereby reducing potential uncertainty. Because swaps and security-based swaps both are regulated pursuant to the Dodd-Frank Act by either the CFTC or the SEC, and an index CDS would be either a swap or a security-based swap, regardless of whether the SEC proposed rule 3a68–1a, the SEC believes that the proposed rule would not have an adverse effect on capital formation.

Similarly, the SEC believes that proposed rule 3a68–1a would not impose any significant burdens on competition because an index CDS would be regulated as a swap or security-based swap regardless of whether the SEC proposed rule 3a68–1a. The proposed rule is a means of providing greater clarity for market participants on whether a specific index CDS is a swap or a security-based swap.

2. Proposed Rule 3a68–1b

The SEC believes that proposed rule 3a68–1b would create an efficient process for a market participant to determine whether an index CDS is a swap or a security-based swap by setting forth clear methods and guidelines, thereby reducing potential uncertainty. Because swaps and security-based swaps both are regulated pursuant to the Dodd-Frank Act by either the CFTC or the SEC, and an index CDS would be either a swap or a security-based swap, regardless of whether the SEC proposed rule 3a68–1b, the SEC believes that the proposed rule would not have an adverse effect on capital formation.

Similarly, the SEC believes that proposed rule 3a68–1b would not impose any significant burdens on competition because an index CDS would be regulated as a swap or security-based swap regardless of whether the SEC proposed rule 3a68–1b. The proposed rule is a means of providing greater clarity for market participants on whether a specific index CDS is a swap or a security-based swap.

3. Proposed Rule 3a68–2

The SEC believes that proposed rule 3a68–2 would create an efficient process for a market participant to request the Commissions to determine whether an

[386] 15 U.S.C. 78c(f).

[387] 15 U.S.C. 78w(a)(2).

[388] *Id.*

agreement, contract, or transaction (or class thereof) is a swap, security-based swap, or both (*i.e.,* a mixed swap) by setting forth clear methods and guidelines, thereby reducing potential uncertainty. Because swaps, security-based swaps, and mixed swaps all are regulated pursuant to the Dodd-Frank Act by either the CFTC, the SEC, or both the CFTC and SEC, and because market participants still would need to determine whether an agreement, contract, or transaction (or class thereof) is a swap, security-based swap, or mixed swap regardless of whether the SEC proposed rule 3a68–2, the SEC believes that the proposed rule would not have an adverse effect on capital formation.

In addition, the SEC believes the proposed rule will provide the opportunity for financial innovation by providing a flexible structure that will allow for the development of new products, which may promote capital formation.

Similarly, the SEC believes that proposed rule 3a68–2 would not impose any significant burdens on competition because, to the extent an agreement, contract, or transaction (or class thereof) is a swap, security-based swap, or both (*i.e.,* a mixed swap), that agreement, contract, or transaction (or class thereof) would be regulated as a swap, security-based swap, or mixed swap regardless of whether the SEC proposed rule 3a68–2. The proposed rule is a means of providing a process for market participants to request clarity regarding whether a specific agreement, contract, or transaction (or class thereof) is a swap, security-based swap, or mixed swap.

4. Proposed Rule 3a68–3

The SEC believes that proposed rule 3a68–3 would create an efficient process for a market participant to determine whether a security index underlying a Title VII instrument is narrow-based or broad-based, and therefore whether the Title VII instrument is a swap or a security-based swap, by setting forth clear methods and guidelines, thereby reducing potential uncertainty. Because swaps and security-based swaps both are regulated pursuant to the Dodd-Frank Act by either the CFTC or the SEC, and a Title VII instrument on a security index would be either a swap or a security-based swap regardless of whether the SEC proposed rule 3a68–3, the SEC believes that the proposed rule would not have an adverse effect on capital formation.

Similarly, the SEC believes that proposed rule 3a68–3 would not impose any significant burdens on competition because a Title VII instrument on a security index would be regulated as a swap or security-based swap regardless of whether the SEC proposed rule 3a68–3. The proposed rule is a means of providing greater clarity for market participants regarding whether a specific Title VII instrument on a security index is a swap or a security-based swap.

5. Proposed Rule 3a68–4

The SEC believes that proposed rule 3a68–4 would create an efficient process for a market participant to request alternative regulatory treatment regarding a specified, or specified class of, mixed swap by setting forth clear methods and guidelines, thereby reducing potential uncertainty and dual regulatory requirements. Because a mixed swap is regulated pursuant to the Dodd-Frank Act, and, absent proposed rule 3a68–4, persons that desire or intend to list, trade, or clear a mixed swap would be required to comply with all the statutory provisions in Title VII, including all the rules and regulations thereunder, that are applicable to both swaps and security-based swaps, the SEC believes that the proposed rule would not have an adverse effect on capital formation. Proposed rule 3a68–4 would permit such persons to request a joint order permitting themto comply with an alternative regulatory regime that would address the potential dual regulatory requirements applicable to transactions in mixed swaps under Title VII.

Similarly, the SEC believes that proposed rule 3a68–4 would not impose any significant burdens on competition because to the extent an agreement, contract, or transaction (or class thereof) is a mixed swap, transactions in that mixed swap would be subject to all of the statutory provisions of Title VII, including all the rules and regulations thereunder, that are applicable to both swaps and security-based swaps, if the Commissions were not to provide alternative regulatory treatment pursuant to proposed rule 3a68–4.

6. Proposed Rule 3a69–1

The SEC believes that proposed rule 3a69–1 would create an efficient process for a market participant to determine whether an agreement, contract, or transaction is an insurance product and is not a swap by setting forth clear methods and guidelines, thereby reducing potential uncertainty. Because insurance products and insurance companies currently are regulated pursuant to state insurance law, and would continue to be so regardless of whether the SEC proposed rule 3a69–1, the SEC believes that the proposed rule would not have an adverse effect on capital formation.

Similarly, the SEC believes that proposed rule 3a69–1 would not impose any significant burdens on competition because insurance products and insurance companies currently are regulated pursuant to state insurance law and would continue to be so regardless of whether the SEC proposed rule 3a69–1. The proposed rule is a means of providing greater clarity for market participants on whether a specific agreement, contract, or transaction is an insurance product and is not a swap.

7. Proposed Rule 3a69–2

The SEC believes that proposed rule 3a69–2 would create an efficient process for a market participant to determine whether an agreement, contract, or transaction is a swap, a foreign exchange forward, or a foreign exchange swap or is subject to certain reporting and business conduct requirements, by setting forth clear methods and guidelines, thereby reducing potential uncertainty. Because agreements, contracts, and transactions that are swaps, foreign exchange forwards, or foreign exchange swaps under proposed rule 3a69–2 would be swaps, foreign exchange forwards, or foreign exchange swaps and, in the case of foreign exchange forwards and foreign exchange swaps, would be subject to reporting and business conduct requirements under the CEA, in the absence of proposed rule 3a69–2, the SEC believes that the proposed rule would not have an adverse effect on capital formation.

Similarly, the SEC believes that proposed rule 3a69–2 would not impose any significant burdens on competition because swaps, foreign exchange swaps, and foreign exchange forwards continue to be regulated as such regardless of whether the SEC proposed rule 3a69–2. The proposed rule is a means of providing greater clarity for market participants on whether a specific agreement, contract, or transaction is a swap, foreign exchange forward, or foreign exchange swap and whether certain reporting and business conduct requirements apply in the case of foreign exchange forwards and foreign exchange swaps.

8. Proposed Rule 3a69–3

The SEC believes that proposed rule 3a69–3 would create an efficient process for registered SDRs, SDs, MSPs, security-based swap dealers, and major security-based swap participants to determine the books and records requirements for SBSAs by setting forth

clear guidelines, thereby reducing potential uncertainty. Proposed rule 3a69–3(c) also would define the term "security-based swap agreement" in the same manner as the term is defined in the Exchange Act. Because SBSAs are swaps, they are subject to certain books and records requirements under the CEA (and CFTC rules and regulations promulgated thereunder) that are applicable to swaps and would continue to be so regardless of whether the SEC proposed rule 3a69–3. The SEC believes that the proposed rule would thus not have an adverse effect on capital formation.

Similarly, the SEC believes that proposed rule 3a69–3 would not impose any significant burdens on competition because SBSAs would be regulated as swaps regardless of whether the SEC proposed rule 3a69–3. The proposed rule is a means of providing greater clarity for market participants regarding SBSAs, including the books and records requirements for SBSAs.

Request for Comment

154. The SEC requests comment on the possible effects of the proposed rules under the Exchange Act regarding efficiency, competition, and capital formation. The SEC requests that commenters provide views and supporting information regarding any such effects. The SEC notes that such effects are difficult to quantify. The SEC seeks comment on possible anti-competitive effects of the proposed rules under the Exchange Act not already identified. The SEC also requests comment regarding the competitive effects of pursuing alternative regulatory approaches that are consistent with section 712(a) and 712(d) of the Dodd-Frank Act. In addition, the SEC requests comment on how the other provisions of the Dodd-Frank Act for which SEC rulemaking is required will interact with and influence the competitive effects of the proposed rules and clarifications under the Exchange Act.

D. Consideration of Impact on the Economy

For purposes of SBREFA the SEC must advise the OMB as to whether the proposed rules and interpretive guidance under the Exchange Act constitute "major" rules. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in: (1) An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease); (2) a major increase in costs or prices for consumers or individual industries; or (3) significant adverse effect on competition, investment or innovation. If a rule is "major," its effectiveness will generally be delayed for 60 days pending Congressional review.

The SEC requests comment on the potential impact of the proposed rules and interpretive guidance under the Exchange Act on the economy on an annual basis, on the costs or prices for consumers or individual industries, and on competition, investment, or innovation. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

E. Initial Regulatory Flexibility Act Certification

The RFA requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a) [389] of the Administrative Procedure Act,[390] as amended by the RFA, generally requires the SEC to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on "small entities." [391] Section 605(b) of the RFA states that this requirement shall not apply to any proposed rule or proposed rule amendment, that, if adopted, would not have a significant economic impact on a substantial number of small entities.[392]

For purposes of SEC rulemaking in connection with the RFA, a small entity includes: (i) When used with reference to an "issuer" or a "person," other than an investment company, an "issuer" or "person" that, on the last day of its most recent fiscal year, had total assets of $5 million or less,[393] or (ii) a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to rule 17a–5(d) under the Exchange Act,[394] or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[395] Under the standards adopted by the Small Business Administration, small entities in the finance and insurance industry include the following: (i) For entities in credit intermediation and related activities, entities with $175 million or less in assets or, for non-depository credit intermediation and certain other activities, $7 million or less in annual receipts; (ii) for entities in financial investments and related activities, entities with $7 million or less in annual receipts; (iii) for insurance carriers and entities in related activities, entities with $7 million or less in annual receipts; and (iv) for funds, trusts, and other financial vehicles, entities with $7 million or less in annual receipts.[396]

Based on the SEC's existing information about the swap markets, the SEC believes that the swap markets, while broad in scope, are largely dominated by entities such as those that would be covered by the "swap dealer," "security-based swap dealer," "major swap participant," and "major security-based swap participant" definitions.[397] The SEC believes that such entities exceed the thresholds defining "small entities" set out above. Moreover, although it is possible that other persons may engage in swap and security-based swap transactions, the SEC does not believe that any of these entities would be "small entities" as defined in rule 0–10 under the Exchange Act.[398] Feedback from industry participants about the swap markets indicates that only persons or entities with assets significantly in excess of $5 million (or with annual receipts significantly in excess of $7 million) participate in the swap markets.

To the extent that a small number of transactions did have a counterparty that was defined as a "small entity" under SEC rule 0–10, the SEC believes it is unlikely that the proposed rules and clarifications regarding the Product Definitions, the regulation of mixed swaps, and the books and records requirements for SBSAs would have a significant economic impact on that

[389] 5 U.S.C. 603(a).

[390] 5 U.S.C. 551 *et seq.*

[391] Although section 601(b) of the RFA defines the term "small entity," the statute permits agencies to formulate their own definitions. The SEC has adopted definitions for the term small entity for the purposes of SEC rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in rule 0–10, 17 CFR 240.0–10. *See* Statement of Management on Internal Accounting Control, 47 FR 5215, Feb. 4, 1982.

[392] *See* 5 U.S.C. 605(b).

[393] *See* 17 CFR 240.0–10(a).

[394] *See* 17 CFR 240.17a–5(d).

[395] *See* 17 CFR 240.0–10(c).

[396] *See* 13 CFR 121.201.

[397] *See, e.g.,* CEA section 1a(49), 7 U.S.C. 1a(49) (defining "swap dealer"); section 3(a)(71)(A) of the Exchange Act, 15 U.S.C. 78c(a)(71)(A) (defining "security-based swap dealer"); CEA section 1a(33), 7 U.S.C. 1a(33) (defining "major swap participant"); section 3(a)(67)(A) of the Exchange Act, 15 U.S.C. 78c(a)(67)(A) (defining "major security-based swap participant"). Such entities also would include commercial entities that may use swaps to hedge or mitigate commercial risk.

[398] *See* 17 CFR 240.0–10(a).

entity. The proposed rules and clarifications simply would address whether certain products fall within the swap definition, address whether certain products are swaps, security-based swaps, SBSAs, or mixed swaps, provide a process for requesting interpretations of whether agreements, contracts, and transactions are swaps, security-based swaps, and mixed swaps, provide a process for requesting alternative regulatory treatment for mixed swaps, and establish books and records requirements for SBSAs, which are applicable to all entities.

For the foregoing reasons, the SEC certifies that the proposed rules and clarifications regarding the Product Definitions, the regulation of mixed swaps, and the books and records requirements for SBSAs would not have a significant economic impact on a substantial number of small entities for purposes of the RFA. The SEC encourages written comments regarding this certification. The SEC requests that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

X. Statutory Basis and Rule Text

List of Subjects

17 CFR Part 1

Definitions, General swap provisions.

17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

Commodity Futures Trading Commission

Pursuant to the Commodity Exchange Act, 7 U.S.C. 1 *et seq.,* as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010) ("Dodd-Frank Act"), and sections 712(a)(8), 712(d), 721(a), 721(b), 721(c), 722(d), and 725(g) of the Dodd-Frank Act, the CFTC is proposing to adopt rules 1.3(xxx) through 1.3(aaaa) and 1.6 through 1.9 under the Commodity Exchange Act.

Text of Proposed Rules

For the reasons stated in the preamble, the CFTC is proposing to further amend Title 17, Chapter I, of the Code of Federal Regulations, as amended at 75 FR 63732, October 18, 2010, 75 FR 65586, Oct. 26, 2010, 75 FR 77576, Dec. 13, 2010, 75 FR 80174, Dec. 21, 2010, and 76 FR 722, Jan. 6, 2011, as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6c, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 6n, 6o, 6p, 6r, 7, 7a, 7b, 8, 9, 10, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 21, 23, and 24.

2. Amend § 1.3 by adding paragraphs (xxx), (yyy), (zzz), and (aaaa) to read as follows:

§ 1.3 Definitions.

* * * * *

(xxx) *Swap.* (1) *In general.* The term *swap* has the meaning set forth in section 1a(47) of the Commodity Exchange Act.

(2) *Inclusion of particular products.* (i) The term *swap* includes, without limiting the meaning set forth in section 1a(47) of the Commodity Exchange Act, the following agreements, contracts, and transactions:

(A) A cross-currency swap;

(B) A currency option, foreign currency option, foreign exchange option and foreign exchange rate option;

(C) A foreign exchange forward;

(D) A foreign exchange swap;

(E) A forward rate agreement; and

(F) A non-deliverable forward involving foreign exchange.

(ii) The term *swap* does not include an agreement, contract, or transaction described in paragraph (xxx)(2)(i) of this section that is otherwise excluded by section 1a(47)(B) of the Commodity Exchange Act.

(3) *Foreign exchange forwards and foreign exchange swaps.* Notwithstanding paragraph (xxx)(2) of this section:

(i) A foreign exchange forward or a foreign exchange swap shall not be considered a swap if the Secretary of the Treasury makes a determination described in section 1a(47)(E)(i) of the Commodity Exchange Act.

(ii) Notwithstanding paragraph (xxx)(3)(i) of this section:

(A) The reporting requirements set forth in section 4r of the Commodity Exchange Act and regulations promulgated thereunder shall apply to a foreign exchange forward or foreign exchange swap; and

(B) The business conduct standards set forth in section 4s of the Commodity Exchange Act and regulations promulgated thereunder shall apply to a swap dealer or major swap participant that is a party to a foreign exchange forward or foreign exchange swap.

(iii) For purposes of section 1a(47)(E) of the Commodity Exchange Act and this § 1.3(xxx), the term *foreign exchange forward* has the meaning set forth in section 1a(24) of the Commodity Exchange Act.

(iv) For purposes of section 1a(47)(E) of the Commodity Exchange Act and this § 1.3(xxx), the term *foreign exchange swap* has the meaning set forth in section 1a(25) of the Commodity Exchange Act.

(v) For purposes of sections 1a(24) and 1a(25) of the Commodity Exchange Act and this § 1.3(xxx), the following transactions are not foreign exchange forwards or foreign exchange swaps:

(A) A currency swap or a cross-currency swap;

(B) A currency option, foreign currency option, foreign exchange option, or foreign exchange rate option; and

(C) A non-deliverable forward involving foreign exchange.

(4) *Insurance.* The term *swap* as used in section 1a(47) of the Commodity Exchange Act does not include an agreement, contract, or transaction that:

(i) By its terms or by law, as a condition of performance on the agreement, contract, or transaction:

(A) Requires the beneficiary of the agreement, contract, or transaction to have an insurable interest that is the subject of the agreement, contract, or transaction and thereby carry the risk of loss with respect to that interest continuously throughout the duration of the agreement, contract, or transaction;

(B) Requires that loss to occur and to be proved, and that any payment or indemnification therefor be limited to the value of the insurable interest;

(C) Is not traded, separately from the insured interest, on an organized market or over-the-counter; and

(D) With respect to financial guaranty insurance only, in the event of payment default or insolvency of the obligor, any acceleration of payments under the policy is at the sole discretion of the insurer; and

(ii) Is provided:

(A) By a company that is organized as an insurance company whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies and that is subject to supervision by the insurance commissioner (or similar official or agency) of any State or by the United States or an agency or instrumentality thereof, and such agreement, contract, or transaction is regulated as insurance under the laws of such State or of the United States;

(B) By the United States or any of its agencies or instrumentalities, or pursuant to a statutorily authorized program thereof; or

(C) In the case of reinsurance only, by a person located outside the United States to an insurance company that is eligible under paragraph (xxx)(4)(ii) of this section, provided that:

(*1*) Such person is not prohibited by any law of any State or of the United States from offering such agreement, contract, or transaction to such an insurance company;

(*2*) The product to be reinsured meets the requirements under paragraph (xxx)(4)(i) of this section to be insurance; and

(*3*) The total amount reimbursable by all reinsurers for such insurance product cannot exceed the claims or losses paid by the cedant.

(5) *State.* For purposes of paragraph (xxx)(4) of this section, the term *State* means any state of the United States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, or any other possession of the United States.

(6) *Anti-evasion.* (i) An agreement, contract, or transaction that is willfully structured to evade any provision of Subtitle A of the Wall Street Transparency and Accountability Act of 2010, including any amendments made to the Commodity Exchange Act thereby (*Subtitle A*), shall be deemed a swap for purposes of Subtitle A and the rules, regulations, and orders of the Commission promulgated thereunder.

(ii) An interest rate swap or currency swap, including but not limited to a transaction identified in paragraph (xxx)(3)(v) of this section, that is willfully structured as a foreign exchange forward or foreign exchange swap to evade any provision of Subtitle A shall be deemed a swap for purposes of Subtitle A and the rules, regulations, and orders of the Commission promulgated thereunder.

(iii) An agreement, contract, or transaction of a bank that is not under the regulatory jurisdiction of an appropriate Federal banking agency (as defined in section 1a(2) of the Commodity Exchange Act), where the agreement, contract, or transaction is willfully structured as an identified banking product (as defined in section 402 of the Legal Certainty for Bank Products Act of 2000) to evade the provisions of the Commodity Exchange Act, shall be deemed a swap for purposes of the Commodity Exchange Act and the rules, regulations, and orders of the Commission promulgated thereunder.

(iv) The form, label, and written documentation of an agreement, contract, or transaction shall not be dispositive in determining whether the agreement, contract, or transaction has been willfully structured to evade as provided in paragraphs (xxx)(6)(i) through (xxx)(6)(iii) of this section.

(v) An agreement, contract, or transaction that has been willfully structured to evade as provided in paragraphs (xxx)(6)(i) through (xxx)(6)(iii) of this section shall be considered in determining whether a person is a swap dealer or major swap participant.

(vi) Notwithstanding the foregoing, no agreement, contract, or transaction structured as a security (including a security-based swap) under the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))) shall be deemed a swap pursuant to this § 1.3(xxx)(6) or shall be considered for purposes of paragraph (xxx)(6)(v) of this section.

(yyy) *Narrow-based security index as used in the definition of "security-based swap."*

(1) *In general.* Except as otherwise provided in paragraphs (zzz) and (aaaa) of this section, for purposes of section 1a(42) of the Commodity Exchange Act, the term *narrow-based security index* has the meaning set forth in section 1a(35) of the Commodity Exchange Act, and the rules, regulations and orders of the Commission thereunder.

(2) *Tolerance period for swaps traded on designated contract markets, swap execution facilities, and foreign boards of trade.* Notwithstanding paragraph (yyy)(1) of this section, solely for purposes of swaps traded on or subject to the rules of a designated contract market, swap execution facility, or foreign board of trade, a security index underlying such swaps shall not be considered a narrow-based security index if:

(i)(A) A swap on the index is traded on or subject to the rules of a designated contract market, swap execution facility, or foreign board of trade for at least 30 days as a swap on an index that was not a narrow-based security index; or

(B) Such index was not a narrow-based security index during every trading day of the six full calendar months preceding a date no earlier than 30 days prior to the commencement of trading of a swap on such index on a market described in paragraph (yyy)(2)(i)(A) of this section; and

(ii) The index has been a narrow-based security index for no more than 45 business days over three consecutive calendar months.

(3) *Tolerance period for security-based swaps traded on national securities exchanges or security-based swap execution facilities.* Notwithstanding paragraph (yyy)(1) of this section, solely for purposes of security-based swaps traded on a national securities exchange or security-based swap execution facility, a security index underlying such security-based swaps shall be considered a narrow-based security index if:

(i)(A) A security-based swap on the index is traded on a national securities exchange or security-based swap execution facility for at least 30 days as a security-based swap on a narrow-based security index; or

(B) Such index was a narrow-based security index during every trading day of the six full calendar months preceding a date no earlier than 30 days prior to the commencement of trading of a security-based swap on such index on a market described in paragraph (yyy)(3)(i)(A) of this section; and

(ii) The index has been a security index that is not a narrow-based security index for no more than 45 business days over three consecutive calendar months.

(4) *Grace period.* (i) Solely with respect to a swap that is traded on or subject to the rules of a designated contract market, swap execution facility, or foreign board of trade, an index that becomes a narrow-based security index under paragraph (yyy)(2) of this section solely because it was a narrow-based security index for more than 45 business days over three consecutive calendar months shall not be a narrow-based security index for the following three calendar months.

(ii) Solely with respect to a security-based swap that is traded on a national securities exchange or security-based swap execution facility, an index that becomes a security index that is not a narrow-based security index under paragraph (yyy)(3) of this section solely because it was not a narrow-based security index for more than 45 business days over three consecutive calendar months shall be a narrow-based security index for the following three calendar months.

(zzz) *Meaning of "issuers of securities in a narrow-based security index" as used in the definition of "security-based swap" as applied to index credit default swaps.*

(1) Notwithstanding paragraph (yyy)(1) of this section, and solely for purposes of determining whether a credit default swap is a security-based swap under the definition of "security-based swap" in section 3(a)(68)(A)(ii)(III) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)(A)(ii)(III), as incorporated in section 1a(42) of the Commodity Exchange Act, the term *issuers of securities in a narrow-based security index* means issuers of

securities identified in an index in which:

(i)(A) There are 9 or fewer non-affiliated issuers of securities that are reference entities in the index, provided that an issuer of securities shall not be deemed a reference entity for purposes of this section unless:

(*1*) A credit event with respect to such reference entity would result in a payment by the credit protection seller to the credit protection buyer under the credit default swap based on the related notional amount allocated to such reference entity; or

(*2*) The fact of such credit event or the calculation in accordance with paragraph (zzz)(1)(i)(A)(*1*) of this section of the amount owed with respect to such credit event is taken into account in determining whether to make any future payments under the credit default swap with respect to any future credit events;

(B) The effective notional amount allocated to any reference entity included in the index comprises more than 30 percent of the index's weighting;

(C) The effective notional amount allocated to any five non-affiliated reference entities included in the index comprises more than 60 percent of the index's weighting; or

(D) Except as provided in paragraph (zzz)(2) of this section, for each reference entity included in the index, none of the following criteria is satisfied:

(*1*) The reference entity is required to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d));

(*2*) The reference entity is eligible to rely on the exemption provided in rule 12g3–2(b) under the Securities Exchange Act of 1934 (17 CFR 240.12g3–2(b));

(*3*) The reference entity has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more;

(*4*) The reference entity (other than an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)) has outstanding securities that are notes, bonds, debentures, or evidences of indebtedness having a total remaining principal amount of at least $1 billion;

(*5*) The reference entity is the issuer of an exempted security as defined in section 3(a)(12) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(12)) (other than any municipal security as defined in section 3(a)(29) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(29)));

(*6*) The reference entity is a government of a foreign country or a political subdivision of a foreign country;

(*7*) If the reference entity is an issuer of asset-backed securities as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)), such asset-based securities were issued in a transaction registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and have publicly available distribution reports; and

(*8*) For a credit default swap entered into solely between eligible contract participants as defined in section 1a(18) of the Commodity Exchange Act:

(*i*) The reference entity (other than a reference entity that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77))) provides to the public or to such eligible contract participant information about the reference entity pursuant to rule 144A(d)(4) under the Securities Act of 1933 (17 CFR 230.144A(d)(4));

(*ii*) Financial information about the reference entity (other than a reference entity that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77))) is otherwise publicly available; or

(*iii*) In the case of a reference entity that is an issuing entity of asset-backed securities as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)), information of the type and level included in public distribution reports for similar asset-backed securities is publicly available about both the reference entity and such asset-backed securities; and

(ii)(A) The index is not composed solely of reference entities that are issuers of exempted securities as defined in section 3(a)(12) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(29))), as in effect on the date of enactment of the Futures Trading Act of 1982); and

(B) Without taking into account any portion of the index composed of reference entities that are issuers of exempted securities as defined in section 3(a)(12) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(29))), the remaining portion of the index would be a narrow-based security index under paragraph (zzz)(1)(i) of this section.

(2) Paragraph (zzz)(1)(i)(D) of this section will not apply with respect to a reference entity included in the index if:

(i) The effective notional amounts allocated to such reference entity comprise less than five percent of the index's weighting; and

(ii) The effective notional amounts allocated to reference entities that satisfy paragraph (zzz)(1)(i)(D) of this section comprise at least 80 percent of the index's weighting.

(3) For purposes of this paragraph (zzz):

(i) A reference entity is affiliated with another entity if it controls, is controlled by, or is under common control with, that entity; provided that each reference entity that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)) will not be considered affiliated with any other issuing entity of an asset-backed security.

(ii) *Control* means ownership of 20 percent or more of an entity's equity, or the ability to direct the voting of 20 percent or more of the entity's voting equity.

(iii) The term *reference entity* includes:

(A) An issuer of securities;

(B) An issuing entity of an asset-based security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)); and

(C) A single reference entity or a group of affiliated entities; provided that each issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)) is a separate reference entity.

(aaaa) *Meaning of* "*narrow-based security index*" *as used in the definition of* "*security-based swap*" *as applied to index credit default swaps.*

(1) Notwithstanding paragraph (yyy)(1) of this section, and solely for purposes of determining whether a credit default swap is a security-based swap under the definition of "security-based swap" in section 3(a)(68)(A)(ii)(I) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)(A)(ii)(I), as incorporated in section 1a(42) of the Commodity Exchange Act, the term *narrow-based security index* means an index in which:

(i)(A) The index is composed of 9 or fewer securities or securities that are issued by 9 or fewer non-affiliated issuers, provided that a security shall

not be deemed a component of the index for purposes of this section unless:

(*1*) A credit event with respect to the issuer of such security or a credit event with respect to such security would result in a payment by the credit protection seller to the credit protection buyer under the credit default swap based on the related notional amount allocated to such security; or

(*2*) The fact of such credit event or the calculation in accordance with paragraph (aaaa)(1)(i)(A)(*1*) of this section of the amount owed with respect to such credit event is taken into account in determining whether to make any future payments under the credit default swap with respect to any future credit events;

(B) The effective notional amount allocated to the securities of any issuer included in the index comprises more than 30 percent of the index's weighting;

(C) The effective notional amount allocated to the securities of any five non-affiliated issuers included in the index comprises more than 60 percent of the index's weighting; or

(D) Except as provided in paragraph (aaaa)(2) of this section, for each security included in the index, none of the following criteria is satisfied:

(*1*) The issuer of the security is required to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d));

(*2*) The issuer of the security is eligible to rely on the exemption provided in rule 12g3–2(b) under the Securities Exchange Act of 1934 (17 CFR 240.12g3–2(b));

(*3*) The issuer of the security has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more;

(*4*) The issuer of the security (other than an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77))) has outstanding securities that are notes, bonds, debentures, or evidences of indebtedness having a total remaining principal amount of at least $1 billion;

(*5*) The security is an exempted security as defined in section 3(a)(12) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(12)) (other than any municipal security as defined in section 3(a)(29) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(29)));

(*6*) The issuer of the security is a government of a foreign country or a political subdivision of a foreign country;

(*7*) If the security is an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)), the security was issued in a transaction registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and has publicly available distribution reports; and

(*8*) For a credit default swap entered into solely between eligible contract participants as defined in section 1a(18) of the Commodity Exchange Act:

(*i*) The issuer of the security (other than an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77))) provides to the public or to such eligible contract participant information about such issuer pursuant to rule 144A(d)(4) of the Securities Act of 1933 (17 CFR 230.144A(d)(4));

(*ii*) Financial information about the issuer of the security (other than an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77))) is otherwise publicly available; or

(*iii*) In the case of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)), information of the type and level included in public distribution reports for similar asset-backed securities is publicly available about both the issuing entity and such asset-backed security; and

(ii)(A) The index is not composed solely of exempted securities as defined in section 3(a)(12) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(29))), as in effect on the date of enactment of the Futures Trading Act of 1982); and

(B) Without taking into account any portion of the index composed of exempted securities as defined in section 3(a)(12) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(29))), the remaining portion of the index would be a narrow-based security index under paragraph (aaaa)(1)(i) of this section.

(2) Paragraph (aaaa)(1)(i)(D) of this section will not apply with respect to securities of an issuer included in the index if:

(i) The effective notional amounts allocated to all securities of such issuer included in the index comprise less than five percent of the index's weighting; and

(ii) The securities that satisfy paragraph (aaaa)(1)(i)(D) of this section comprise at least 80 percent of the index's weighting.

(3) For purposes of this paragraph (aaaa):

(i) An issuer is affiliated with another issuer if it controls, is controlled by, or is under common control with, that issuer; provided that each issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)) will not be considered affiliated with any other issuing entity of an asset-backed security.

(ii) *Control* means ownership of 20 percent or more of an issuer's equity, or the ability to direct the voting of 20 percent or more of the issuer's voting equity.

(iii) The term *issuer* includes:

(A) An issuer of securities;

(B) An issuing entity of an asset-based security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)); and

(C) A single issuer or a group of affiliated issuers; provided that each issuing entity of an asset-backed security as defined in section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)) is a separate issuer.

3. Add §§ 1.6 through 1.9 to read as follows:

Sec.

1.6 Anti-evasion.
1.7 Books and records requirements for security-based swap agreements.
1.8 Interpretation of swaps, security-based swaps, and mixed swaps.
1.9 Regulation of mixed swaps.

* * * * *

§ 1.6 Anti-evasion.

(a) It shall be unlawful to conduct activities outside the United States, including entering into agreements, contracts, and transactions and structuring entities, to willfully evade or attempt to evade any provision of the Commodity Exchange Act as enacted by Subtitle A of the Wall Street Transparency and Accountability Act of 2010 or the rules, regulations, and orders of the Commission promulgated thereunder (*Subtitle A*).

(b) The form, label, and written documentation of an agreement, contract, or transaction, or an entity, shall not be dispositive in determining whether the agreement, contract, or transaction, or entity, has been entered into or structured to willfully evade as

provided in paragraph (a) of this section.

(c) An activity conducted outside the United States to evade as provided in paragraph (a) of this section shall be subject to the provisions of Subtitle A.

(d) Notwithstanding the foregoing, no agreement, contract, or transaction structured as a security (including a security-based swap) under the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))) shall be deemed a swap pursuant to this § 1.6.

5. Add § 1.7 to read as follows:

§ 1.7 Books and records requirements for security-based swap agreements.

(a) A person registered as a swap data repository under section 21 of the Commodity Exchange Act and the rules and regulations thereunder:

(1) Shall not be required to keep and maintain additional books and records regarding security-based swap agreements other than the books and records regarding swaps required to be kept and maintained pursuant to section 21 of the Commodity Exchange Act and the rules and regulations thereunder; and

(2) Shall not be required to collect and maintain additional data regarding security-based swap agreements other than the data regarding swaps required to be collected and maintained by such persons pursuant to section 21 of the Commodity Exchange Act and the rules and regulations thereunder.

(b) A person shall not be required to keep and maintain additional books and records, including daily trading records, regarding security-based swap agreements other than the books and records regarding swaps required to be kept and maintained by such persons pursuant to section 4s of the Commodity Exchange Act and the rules and regulations thereunder if such person is registered as:

(1) A swap dealer under section 4s(a)(1) of the Commodity Exchange Act and the rules and regulations thereunder;

(2) A major swap participant under section 4s(a)(2) of the Commodity Exchange Act and the rules and regulations thereunder;

(3) A security-based swap dealer under section 15F(a)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o-10(a)(1)) and the rules and regulations thereunder; or

(4) A major security-based swap participant under section 15F(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78o-10(a)(2)) and the rules and regulations thereunder.

(c) The term *security-based swap agreement* has the meaning set forth in section 1a(47)(A)(v) of the Commodity Exchange Act.

6. Add § 1.8 to read as follows:

§ 1.8 Interpretation of swaps, security-based swaps, and mixed swaps.

(a) *In general.* Any person may submit a request to the Commission and the Securities and Exchange Commission to provide a joint interpretation of whether a particular agreement, contract, or transaction (or class thereof) is:

(1) A swap, as that term is defined in section 1a(47) of the Commodity Exchange Act and the rules and regulations promulgated thereunder;

(2) A security-based swap, as that term is defined in section 1a(42) of the Commodity Exchange Act and the rules and regulations promulgated thereunder; or

(3) A mixed swap, as that term is defined in section 1a(47)(D) of the Commodity Exchange Act and the rules and regulations promulgated thereunder.

(b) *Request process.* In making a request pursuant to paragraph (a) of this section, the requesting person must provide the Commission and the Securities and Exchange Commission with the following:

(1) All material information regarding the terms of the agreement, contract, or transaction (or class thereof);

(2) A statement of the economic characteristics and purpose of the agreement, contract, or transaction (or class thereof);

(3) The requesting person's determination as to whether the agreement, contract, or transaction (or class thereof) should be characterized as a swap, a security-based swap, or both, (*i.e.,* a mixed swap), including the basis for such determination; and

(4) Such other information as may be requested by the Commission or the Securities and Exchange Commission.

(c) *Request withdrawal.* A person may withdraw a request made pursuant to paragraph (a) of this section at any time prior to the issuance of a joint interpretation or joint notice of proposed rulemaking by the Commission and the Securities and Exchange Commission in response to the request; provided, however, that notwithstanding such withdrawal, the Commission and the Securities and Exchange Commission may provide a joint interpretation of whether the agreement, contract, or transaction (or class thereof) is a swap, a security-based swap, or both (*i.e.,* a mixed swap).

(d) *Request by the Commission or the Securities and Exchange Commission.* In the absence of a request for a joint interpretation under paragraph (a) of this section:

(1) If the Commission or the Securities and Exchange Commission receives a proposal to list, trade, or clear an agreement, contract, or transaction (or class thereof) that raises questions as to the appropriate characterization of such agreement, contract, or transaction (or class thereof) as a swap, a security-based swap, or both (*i.e.,* a mixed swap), the Commission or the Securities and Exchange Commission, as applicable, promptly shall notify the other of the agreement, contract, or transaction (or class thereof); and

(2) The Commission or the Securities and Exchange Commission, or their Chairmen jointly, may submit a request for a joint interpretation as described in paragraph (a) of this section; such submission shall be made pursuant to paragraph (b) of this section, and may be withdrawn pursuant to paragraph (c) of this section.

(e) *Timeframe for joint interpretation.* (1) If the Commission and the Securities and Exchange Commission determine to issue a joint interpretation as described in paragraph (a) of this section, such joint interpretation shall be issued within 120 days after receipt of a complete submission requesting a joint interpretation under paragraph (a) or (d) of this section.

(2) The Commission and the Securities and Exchange Commission shall consult with the Board of Governors of the Federal Reserve System prior to issuing any joint interpretation as described in paragraph (a) of this section.

(3) If the Commission and the Securities and Exchange Commission seek public comment with respect to a joint interpretation regarding an agreement, contract, or transaction (or class thereof), the 120-day period described in paragraph (e)(1) of this section shall be stayed during the pendency of the comment period, but shall recommence with the business day after the public comment period ends.

(4) Nothing in this section shall require the Commission and the Securities and Exchange Commission to issue any joint interpretation.

(5) If the Commission and the Securities and Exchange Commission do not issue a joint interpretation within the time period described in paragraph (e)(1) or (e)(3) of this section, each of the Commission and the Securities and Exchange Commission shall publicly provide the reasons for not issuing such a joint interpretation within the applicable timeframes.

(f) *Joint notice of proposed rulemaking.* (1) Rather than issue a joint interpretation pursuant to paragraph (a) of this section, the Commission and the

Securities and Exchange Commission may issue a joint notice of proposed rulemaking, in consultation with the Board of Governors of the Federal Reserve System, to further define one or more of the terms swap, security-based swap, or mixed swap.

(2) A joint notice of proposed rulemaking described in paragraph (f)(1) of this section shall be issued within the timeframe for issuing a joint interpretation set forth in paragraph (e) of this section.

7. Add § 1.9 to read as follows:

§ 1.9 Regulation of mixed swaps.

(a) *In general.* The term mixed swap has the meaning set forth in section 1a(47)(D) of the Commodity Exchange Act.

(b) *Regulation of bilateral uncleared mixed swaps entered into by dually-registered dealers or major participants.* A mixed swap:

(1) That is neither executed on nor subject to the rules of a designated contract market, national securities exchange, swap execution facility, security-based swap execution facility, or foreign board of trade;

(2) That will not be submitted to a derivatives clearing organization or registered or exempt clearing agency to be cleared; and

(3) Where at least one party is registered with the Commission as a swap dealer or major swap participant and also with the Securities and Exchange Commission as a security-based swap dealer or major security-based swap participant, shall be subject to:

(i) The following provisions of the Commodity Exchange Act, and the rules and regulations promulgated thereunder:

(A) Examinations and information sharing: sections 4s(f) and 8 of the Commodity Exchange Act;

(B) Enforcement: sections 2(a)(1)(B), 4(b), 4b, 4c, 6(c), 6(d), 6c, 6d, 9, 13(a), 13(b), and 23 of the Commodity Exchange Act;

(C) Reporting to a swap data repository: section 4r of the Commodity Exchange Act;

(D) Real-time reporting: section 2(a)(13) of the Commodity Exchange Act;

(E) Capital: section 4s(e) of the Commodity Exchange Act; and

(F) Position Limits: section 4a of the Commodity Exchange Act; and

(ii) The provisions of the Federal securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), and the rules and regulations promulgated thereunder.

(c) *Process for determining regulatory treatment for other mixed swaps*—(1) *In general.* Any person who desires or intends to list, trade, or clear a mixed swap (or class thereof) that is not subject to paragraph (b) of this section may request the Commission and the Securities and Exchange Commission to issue a joint order permitting the requesting person (and any other person or persons that subsequently lists, trades, or clears that mixed swap) to comply, as to parallel provisions only, with specified parallel provisions of either the Commodity Exchange Act or the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), and the rules and regulations thereunder (collectively, *specified parallel provisions*), instead of being required to comply with parallel provisions of both the Commodity Exchange Act and the Securities Exchange Act of 1934. For purposes of this paragraph (c), *parallel provisions* means comparable provisions of the Commodity Exchange Act and the Securities Exchange Act of 1934 that were added or amended by the Wall Street Transparency and Accountability Act of 2010 with respect to swaps and security-based swaps, and the rules and regulations thereunder.

(2) *Request process.* A person submitting a request pursuant to paragraph (c)(1) of this section must provide the Commission and the Securities and Exchange Commission with the following:

(i) All material information regarding the terms of the specified, or specified class of, mixed swap;

(ii) The economic characteristics and purpose of the specified, or specified class of, mixed swap;

(iii) The specified parallel provisions, and the reasons the person believes such specified parallel provisions would be appropriate for the mixed swap (or class thereof); and

(iv) An analysis of:

(A) The nature and purposes of the parallel provisions that are the subject of the request;

(B) The comparability of such parallel provisions;

(C) The extent of any conflicts or differences between such parallel provisions; and

(D) Such other information as may be requested by the Commission or the Securities and Exchange Commission.

(3) *Request withdrawal.* A person may withdraw a request made pursuant to paragraph (c)(1) of this section at any time prior to the issuance of a joint order under paragraph (c)(4) of this section by the Commission and the Securities and Exchange Commission in response to the request.

(4) *Issuance of orders.* In response to a request under paragraph (c)(1) of this section, the Commission and the Securities and Exchange Commission, as necessary to carry out the purposes of the Wall Street Transparency and Accountability Act of 2010, may issue a joint order, after notice and opportunity for comment, permitting the requesting person (and any other person or persons that subsequently lists, trades, or clears that mixed swap) to comply, as to parallel provisions only, with the specified parallel provisions (or another subset of the parallel provisions that are the subject of the request, as the Commissions determine is appropriate), instead of being required to comply with parallel provisions of both the Commodity Exchange Act and the Securities Exchange Act of 1934. In determining the contents of such joint order, the Commission and the Securities and Exchange Commission may consider, among other things:

(i) The nature and purposes of the parallel provisions that are the subject of the request;

(ii) The comparability of such parallel provisions; and

(iii) The extent of any conflicts or differences between such parallel provisions.

(5) *Timeframe.* (i) If the Commission and the Securities and Exchange Commission determine to issue a joint order as described in paragraph (c)(4) of this section, such joint order shall be issued within 120 days after receipt of a complete request for a joint order under paragraph (c)(1) of this section, which time period shall be stayed during the pendency of the public comment period provided for in paragraph (c)(4) of this section and shall recommence with the business day after the public comment period ends.

(ii) Nothing in this section shall require the Commission and the Securities and Exchange Commission to issue any joint order.

(iii) If the Commission and the Securities and Exchange Commission do not issue a joint order within the time period described in paragraph (c)(5)(i) of this section, each of the Commission and the Securities and Exchange Commission shall publicly provide the reasons for not issuing such a joint order within that timeframe.

Securities and Exchange Commission

Pursuant to the Exchange Act, 15 U.S.C. 78a *et seq.,* and particularly, sections 3 and 23 thereof, and sections 712(a)(8), 712(d), 721(a), 761(a) of the Dodd-Frank Act, the SEC is proposing to adopt rules 3a68–1a through 3a68–4 and

3a69–1 through 3a69–3 under the Exchange Act.

Text of Proposed Rules

For the reasons stated in the preamble, the SEC is proposing to amend Title 17, Chapter II of the Code of the Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The general authority citation for Part 240 is revised to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78o, 78o–4, 78o–8, 78p, 78q, 78s, 78u–5, 78w, 78x, 78dd(b), 78dd(c), 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.;* 18 U.S.C. 1350; and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

2. Add §§ 240.3a68–1a through 240.3a68–4 and §§ 240.3a69–1 through 240.3a69–3 to read as follows:

240.3a68–1a Meaning of "issuers of securities in a narrow-based security index" as used in section 3(a)(68)(A)(ii)(III) of the Act.
240.3a68–1b Meaning of "narrow-based security index" as used in section 3(a)(68)(A)(ii)(I) of the Act.
240.3a68–2 Interpretation of swaps, security-based swaps, and mixed swaps.
240.3a68–3 Meaning of "narrow-based security index" as used in the definition of "security-based swap".
240.3a68–4 Regulation of mixed swaps.
240.3a69–1 Definition of "swap" as used in section 3(a)(69) of the Act—insurance.
240.3a69–2 Definition of "swap" as used in section 3(a)(69) of the Act—additional products.
240.3a69–3 Books and records requirements for security-based swap agreements.

* * * * *

§ 240.3a68–1a Meaning of "issuers of securities in a narrow-based security index" as used in section 3(a)(68)(A)(ii)(III) of the Act.

(a) Notwithstanding § 240.3a68–3(a) of this chapter, and solely for purposes of determining whether a credit default swap is a security-based swap under section 3(a)(68)(A)(ii)(III) of the Act (15 U.S.C. 78c(a)(68)(A)(ii)(III)), the term *issuers of securities in a narrow-based security index* as used in section 3(a)(68)(A)(ii)(III) of the Act means issuers of securities identified in an index in which:

(1)(i) There are 9 or fewer non-affiliated issuers of securities that are reference entities in the index, provided that an issuer of securities shall not be deemed a reference entity for purposes of this section unless:

(A) A credit event with respect to such reference entity would result in a payment by the credit protection seller to the credit protection buyer under the credit default swap based on the related notional amount allocated to such reference entity; or

(B) The fact of such credit event or the calculation in accordance with paragraph (a)(1)(i)(A) of this section of the amount owed with respect to such credit event is taken into account in determining whether to make any future payments under the credit default swap with respect to any future credit events;

(ii) The effective notional amount allocated to any reference entity included in the index comprises more than 30 percent of the index's weighting;

(iii) The effective notional amount allocated to any five non-affiliated reference entities included in the index comprises more than 60 percent of the index's weighting; or

(iv) Except as provided in paragraph (b) of this section, for each reference entity included in the index, none of the following criteria is satisfied:

(A) The reference entity is required to file reports pursuant to section 13 or section 15(d) of the Act (15 U.S.C. 78m or 78o(d));

(B) The reference entity is eligible to rely on the exemption provided in § 240.12g3–2(b) of this chapter;

(C) The reference entity has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more;

(D) The reference entity (other than an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77))) has outstanding securities that are notes, bonds, debentures, or evidences of indebtedness having a total remaining principal amount of at least $1 billion;

(E) The reference entity is the issuer of an exempted security as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)) (other than any municipal security as defined in section 3(a)(29) of the Act (15 U.S.C. 78c(a)(29)));

(F) The reference entity is a government of a foreign country or a political subdivision of a foreign country;

(G) If the reference entity is an issuer of asset-backed securities as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)), such asset-based securities were issued in a transaction registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and have publicly available distribution reports; and

(H) For a credit default swap entered into solely between eligible contract participants as defined in section 3(a)(65) of the Act (15 U.S.C. 78c(a)(65)):

(*1*) The reference entity (other than a reference entity that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77))) provides to the public or to such eligible contract participant information about the reference entity pursuant to § 230.144A(d)(4)) of this chapter;

(*2*) Financial information about the reference entity (other than a reference entity that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77))) is otherwise publicly available; or

(*3*) In the case of a reference entity that is an issuing entity of asset-backed securities as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)), information of the type and level included in public distribution reports for similar asset-backed securities is publicly available about both the reference entity and such asset-backed securities; and

(2)(i) The index is not composed solely of reference entities that are issuers of exempted securities as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Act (15 U.S.C. 78c(a)(29))), as in effect on the date of enactment of the Futures Trading Act of 1982); and

(ii) Without taking into account any portion of the index composed of reference entities that are issuers of exempted securities as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Act (15 U.S.C. 78c(a)(29))), the remaining portion of the index would be a narrow-based security index under paragraph (a)(1) of this section.

(b) Paragraph (a)(1)(iv) of this section will not apply with respect to a reference entity included in the index if:

(1) The effective notional amounts allocated to such reference entity comprise less than five percent of the index's weighting; and

(2) The effective notional amounts allocated to reference entities that satisfy paragraph (a)(1)(iv) of this section comprise at least 80 percent of the index's weighting.

(c) For purposes of this § 3a68–1a:

(1) A reference entity is affiliated with another entity if it controls, is controlled by, or is under common control with,

that entity; provided that each reference entity that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)) will not be considered affiliated with any other issuing entity of an asset-backed security.

(2) *Control* means ownership of 20 percent or more of an entity's equity, or the ability to direct the voting of 20 percent or more of the entity's voting equity.

(3) The term *reference entity* includes:

(i) An issuer of securities;

(ii) An issuing entity of an asset-based security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)); and

(iii) A single reference entity or a group of affiliated entities; provided that each issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)) is a separate reference entity.

§ 240.3a68–1b Meaning of "narrow-based security index" as used in section 3(a)(68)(A)(ii)(I) of the Act.

(a) Notwithstanding § 240.3a68–3(a) of this chapter, and solely for purposes of determining whether a credit default swap is a security-based swap under section 3(a)(68)(A)(ii)(I) of the Act (15 U.S.C. 78c(a)(68)(A)(ii)(I)), the term *narrow-based security index* as used in section 3(a)(68)(A)(ii)(I) of the Act means an index in which:

(1)(i) The index is composed of 9 or fewer securities or securities that are issued by 9 or fewer non-affiliated issuers, provided that a security shall not be deemed a component of the index for purposes of this section unless:

(A) A credit event with respect to the issuer of such security or a credit event with respect to such security would result in a payment by the credit protection seller to the credit protection buyer under the credit default swap based on the related notional amount allocated to such security; or

(B) The fact of such credit event or the calculation in accordance with paragraph (a)(1)(i)(A) of this section of the amount owed with respect to such credit event is taken into account in determining whether to make any future payments under the credit default swap with respect to any future credit events;

(ii) The effective notional amount allocated to the securities of any issuer included in the index comprises more than 30 percent of the index's weighting;

(iii) The effective notional amount allocated to the securities of any five non-affiliated issuers included in the index comprises more than 60 percent of the index's weighting; or

(iv) Except as provided in paragraph (b) of this section, for each security included in the index none of the following criteria is satisfied:

(A) The issuer of the security is required to file reports pursuant to section 13 or section 15(d) of the Act (15 U.S.C. 78m or 78o(d));

(B) The issuer of the security is eligible to rely on the exemption provided in § 40.12g3–2(b) of this chapter;

(C) The issuer of the security has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more;

(D) The issuer of the security (other than an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77))) has outstanding securities that are notes, bonds, debentures, or evidences of indebtedness having a total remaining principal amount of at least $1 billion;

(E) The security is an exempted security as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)) (other than any municipal security as defined in section 3(a)(29) of the Act (15 U.S.C. 78c(a)(29)));

(F) The issuer of the security is a government of a foreign country or a political subdivision of a foreign country;

(G) If the security is an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)), the security was issued in a transaction registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and has publicly available distribution reports; and

(H) For a credit default swap entered into solely between eligible contract participants as defined in section 3(a)(65) of the Act (15 U.S.C. 78c(a)(65)):

(*1*) The issuer of the security (other than an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77))) provides to the public or to such eligible contract participant information about such issuer pursuant to § 230.144A(d)(4)) of this chapter;

(*2*) Financial information about the issuer of the security (other than an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77))) is otherwise publicly available; or

(*3*) In the case of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)), information of the type and level included in public distribution reports for similar asset-backed securities is publicly available about both the issuing entity and such asset-backed security; and

(2)(i) The index is not composed solely of exempted securities as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Act (15 U.S.C. 78c(a)(29))), as in effect on the date of enactment of the Futures Trading Act of 1982); and

(ii) Without taking into account any portion of the index composed of exempted securities as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Act (15 U.S.C. 78c(a)(29))), the remaining portion of the index would be a narrow-based security index under paragraph (a)(1) of this section.

(b) Paragraph (a)(1)(iv) of this section will not apply with respect to securities of an issuer included in the index if:

(1) The effective notional amounts allocated to all securities of such issuer included in the index comprise less than five percent of the index's weighting; and

(2) The securities that satisfy paragraph (a)(1)(iv) of this section comprise at least 80 percent of the index's weighting.

(c) For purposes of this § 240.3a68–1b:

(1) An issuer is affiliated with another issuer if it controls, is controlled by, or is under common control with, that issuer; provided that each issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)) will not be considered affiliated with any other issuing entity of an asset-backed security.

(2) *Control* means ownership of 20 percent or more of an issuer's equity, or the ability to direct the voting of 20 percent or more of the issuer's voting equity.

(3) The term *issuer* includes:

(i) An issuer of securities;

(ii) An issuing entity of an asset-based security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)); and

(iii) A single issuer or a group of affiliated issuers; provided that each issuing entity of an asset-backed security as defined in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)) is a separate issuer.

§ 240.3a68–2 Interpretation of swaps, security-based swaps, and mixed swaps.

(a) *In general.* Any person may submit a request to the Commission and the Commodity Futures Trading Commission to provide a joint interpretation of whether a particular agreement, contract, or transaction (or

class thereof) is a swap, as that term is defined in section 3(a)(69) of the Act (15 U.S.C. 78c(a)(69)) and the rules and regulations promulgated thereunder, a security-based swap, as that term is defined in section 3(a)(68) of the Act (15 U.S.C. 78c(a)(68)) and the rules and regulations promulgated thereunder, or a mixed swap, as that term is defined in section 3(a)(68)(D) of the Act and the rules and regulations promulgated thereunder.

(b) *Request process.* In making a request pursuant to paragraph (a) of this section, the requesting person must provide the Commission and the Commodity Futures Trading Commission with the following:

(1) All material information regarding the terms of the agreement, contract, or transaction (or class thereof);

(2) A statement of the economic characteristics and purpose of the agreement, contract, or transaction (or class thereof);

(3) The requesting person's determination as to whether the agreement, contract, or transaction (or class thereof) should be characterized as a swap, a security-based swap, or both (*i.e.,* a mixed swap), including the basis for such determination; and

(4) Such other information as may be requested by the Commission or the Commodity Futures Trading Commission.

(c) *Request withdrawal.* A person may withdraw a request made pursuant to paragraph (a) of this section at any time prior to the issuance of a joint interpretation or joint notice of proposed rulemaking by the Commission and the Commodity Futures Trading Commission in response to the request; provided, however, that notwithstanding such withdrawal, the Commission and the Commodity Futures Trading Commission may provide a joint interpretation of whether the agreement, contract, or transaction (or class thereof) is a swap, a security-based swap, or both (*i.e.,* a mixed swap).

(d) *Request by the Commission or the Commodity Futures Trading Commission.* In the absence of a request for a joint interpretation under paragraph (a) of this section:

(1) If the Commission or the Commodity Futures Trading Commission receives a proposal to list, trade, or clear an agreement, contract, or transaction (or class thereof) that raises questions as to the appropriate characterization of such agreement, contract, or transaction (or class thereof) as a swap, a security-based swap, or both (*i.e.,* a mixed swap), the Commission or the Commodity Futures Trading Commission, as applicable, promptly shall notify the other of the agreement, contract, or transaction (or class thereof); and

(2) The Commission or the Commodity Futures Trading Commission, or their Chairmen jointly, may submit a request for a joint interpretation as described in paragraph (a) of this section; such submission shall be made pursuant to paragraph (b) of this section, and may be withdrawn pursuant to paragraph (c) of this section.

(e) *Timeframe for joint interpretation.*

(1) If the Commission and the Commodity Futures Trading Commission determine to issue a joint interpretation as described in paragraph (a) of this section, such joint interpretation shall be issued within 120 days after receipt of a complete submission requesting a joint interpretation under paragraph (a) or (d) of this section.

(2) The Commission and the Commodity Futures Trading Commission shall consult with the Board of Governors of the Federal Reserve System prior to issuing any joint interpretation as described in paragraph (a) of this section.

(3) If the Commission and the Commodity Futures Trading Commission seek public comment with respect to a joint interpretation regarding an agreement, contract, or transaction (or class thereof), the 120-day period described in paragraph (e)(1) of this section shall be stayed during the pendency of the comment period, but shall recommence with the business day after the public comment period ends.

(4) Nothing in this section shall require the Commission and the Commodity Futures Trading Commission to issue any joint interpretation.

(5) If the Commission and the Commodity Futures Trading Commission do not issue a joint interpretation within the time period described in paragraph (e)(1) or (e)(3) of this section, each of the Commission and the Commodity Futures Trading Commission shall publicly provide the reasons for not issuing such a joint interpretation within the applicable timeframes.

(f) *Joint notice of proposed rulemaking.*

(1) Rather than issue a joint interpretation pursuant to paragraph (a) of this section, the Commission and the Commodity Futures Trading Commission may issue a joint notice of proposed rulemaking, in consultation with the Board of Governors of the Federal Reserve System, to further define one or more of the terms swap, security-based swap, or mixed swap.

(2) A joint notice of proposed rulemaking described in paragraph (f)(1) of this section shall be issued within the timeframe for issuing a joint interpretation set forth in paragraph (e) of this section.

§ 240.3a68–3 Meaning of "narrow-based security index" as used in the definition of "security-based swap."

(a) *In general.* Except as otherwise provided in § 240.3a68–1a and § 240.3a68–1b of this chapter, for purposes of section 3(a)(68) of the Act (15 U.S.C. 78c(a)(68)), the term *narrow-based security index* has the meaning set forth in section 3(a)(55) of the Act (15 U.S.C. 78c(a)(55)), and the rules, regulations, and orders of the Commission thereunder.

(b) *Tolerance period for swaps traded on designated contract markets, swap execution facilities and foreign boards of trade.* Notwithstanding paragraph (a) of this section, solely for purposes of swaps traded on or subject to the rules of a designated contract market, swap execution facility, or foreign board of trade pursuant to the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), a security index underlying such swaps shall not be considered a narrow-based security index if:

(1)(i) A swap on the index is traded on or subject to the rules of a designated contract market, swap execution facility, or foreign board of trade pursuant to the Commodity Exchange Act (7 U.S.C. 1 *et seq.*) for at least 30 days as a swap on an index that was not a narrow-based security index; or

(ii) Such index was not a narrow-based security index during every trading day of the six full calendar months preceding a date no earlier than 30 days prior to the commencement of trading of a swap on such index on a market described in paragraph (b)(1)(i) of this section; and

(2) The index has been a narrow-based security index for no more than 45 business days over three consecutive calendar months.

(c) *Tolerance period for security-based swaps traded on national securities exchanges or security-based swap execution facilities.* Notwithstanding paragraph (a) of this section, solely for purposes of security-based swaps traded on a national securities exchange or security-based swap execution facility, a security index underlying such security-based swaps shall be considered a narrow-based security index if:

(1)(i) A security-based swap on the index is traded on a national securities

exchange or security-based swap execution facility for at least 30 days as a security-based swap on a narrow-based security index; or

(ii) Such index was a narrow-based security index during every trading day of the six full calendar months preceding a date no earlier than 30 days prior to the commencement of trading of a security-based swap on such index on a market described in paragraph (c)(1)(i) of this section; and

(2) The index has been a security index that is not a narrow-based security index for no more than 45 business days over three consecutive calendar months.

(d) *Grace period.*

(1) Solely with respect to a swap that is traded on or subject to the rules of a designated contract market, swap execution facility or foreign board of trade pursuant to the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), an index that becomes a narrow-based security index under paragraph (b) of this section solely because it was a narrow-based security index for more than 45 business days over three consecutive calendar months shall not be a narrow-based security index for the following three calendar months.

(2) Solely with respect to a security-based swap that is traded on a national securities exchange or security-based swap execution facility, an index that becomes a security index that is not a narrow-based security index under paragraph (c) of this section solely because it was not a narrow-based security index for more than 45 business days over three consecutive calendar months shall be a narrow-based security index for the following three calendar months.

§ 240.3a68–4 Regulation of mixed swaps.

(a) *In general.* The term mixed swap has the meaning set forth in section 3(a)(68)(D) of the Act (15 U.S.C. 78c(a)(68)(D)).

(b) *Regulation of mixed swaps entered into by dually-registered dealers or major participants.* A mixed swap:

(1) That is neither executed on nor subject to the rules of a designated contract market, national securities exchange, swap execution facility, security-based swap execution facility, or foreign board of trade;

(2) That will not be submitted to a derivatives clearing organization or registered or exempt clearing agency to be cleared; and

(3) Where at least one party is registered with the Commission as a security-based swap dealer or major security-based swap participant and also with the Commodity Futures Trading Commission as a swap dealer or major swap participant, shall be subject to:

(i) The following provisions of the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), and the rules and regulations promulgated thereunder, set forth in the rules and regulations of the Commodity Futures Trading Commission:

(A) Examinations and information sharing: 7 U.S.C. 6s(f) and 12;

(B) Enforcement: 7 U.S.C. 2(a)(1)(B), 6(b), 6b, 6c, 9, 13b, 13a–1, 13a–2, 13, 13c(a), 13c(b), 15 and 26;

(C) Reporting to a swap data repository: 7 U.S.C. 6r;

(D) Real-time reporting: 7 U.S.C. 2(a)(13);

(E) Capital: 7 U.S.C. 6s(e); and

(F) Position Limits: 7 U.S.C. 6a; and

(ii) The provisions of the Federal securities laws, as defined in section 3(a)(47) of the Act (15 U.S.C. 78c(a)(47)), and the rules and regulations promulgated thereunder.

(c) *Process for determining regulatory treatment for mixed swaps.*

(1) *In general.* Any person who desires or intends to list, trade, or clear a mixed swap (or class thereof) that is not subject to paragraph (b) of this section may request the Commission and the Commodity Futures Trading Commission to issue a joint order permitting the requesting person (and any other person or persons that subsequently lists, trades, or clears that mixed swap) to comply, as to parallel provisions only, with specified parallel provisions of either the Act (15 U.S.C. 78a *et seq.*) or the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), and the rules and regulations thereunder (collectively, *specified parallel provisions*), instead of being required to comply with parallel provisions of both the Act and the Commodity Exchange Act. For purposes of this paragraph (c), *parallel provisions* means comparable provisions of the Act and the Commodity Exchange Act that were added or amended by the Wall Street Transparency and Accountability Act of 2010 with respect to security-based swaps and swaps, and the rules and regulations thereunder.

(2) *Request process.* A person submitting a request pursuant to paragraph (c)(1) of this section must provide the Commission and the Commodity Futures Trading Commission with the following:

(i) All material information regarding the terms of the specified, or specified class of, mixed swap;

(ii) The economic characteristics and purpose of the specified, or specified class of, mixed swap;

(iii) The specified parallel provisions, and the reasons the person believes such specified parallel provisions would be appropriate for the mixed swap (or class thereof); and

(iv) An analysis of:

(A) The nature and purposes of the parallel provisions that are the subject of the request;

(B) The comparability of such parallel provisions;

(C) The extent of any conflicts or differences between such parallel provisions; and

(D) Such other information as may be requested by the Commission or the Commodity Futures Trading Commission.

(3) *Request withdrawal.* A person may withdraw a request made pursuant to paragraph (c)(1) of this section at any time prior to the issuance of a joint order under paragraph (c)(4) of this section by the Commission and the Commodity Futures Trading Commission in response to the request.

(4) *Issuance of orders.* In response to a request under paragraph (c)(1) of this section, the Commission and the Commodity Futures Trading Commission, as necessary to carry out the purposes of the Wall Street Transparency and Accountability Act of 2010, may issue a joint order, after notice and opportunity for comment, permitting the requesting person (and any other person or persons that subsequently lists, trades, or clears that mixed swap) to comply, as to parallel provisions only, with the specified parallel provisions (or another subset of the parallel provisions that are the subject of the request, as the Commissions determine is appropriate), instead of being required to comply with parallel provisions of both the Act (15 U.S.C. 78a *et seq.*) and the Commodity Exchange Act (7 U.S.C. 1 *et seq.*). In determining the contents of such joint order, the Commission and the Commodity Futures Trading Commission may consider, among other things:

(i) The nature and purposes of the parallel provisions that are the subject of the request;

(ii) The comparability of such parallel provisions; and

(iii) The extent of any conflicts or differences between such parallel provisions.

(5) *Timeframe.*

(i) If the Commission and the Commodity Futures Trading Commission determine to issue a joint order as described in paragraph (c)(4) of this section, such joint order shall be issued within 120 days after receipt of a complete request for a joint order under paragraph (c)(1) of this section, which time period shall be stayed

during the pendency of the public comment period provided for in paragraph (c)(4) of this section and shall recommence with the business day after the public comment period ends.

(ii) Nothing in this section shall require the Commission and the Commodity Futures Trading Commission to issue any joint order.

(iii) If the Commission and the Commodity Futures Trading Commission do not issue a joint order within the time period described in paragraph (c)(5)(i) of this section, each of the Commission and the Commodity Futures Trading Commission shall publicly provide the reasons for not issuing such a joint order within that timeframe.

§ 240.3a69–1 Definition of "swap" as used in section 3(a)(69) of the Act—Insurance

The term *swap* as used in section 3(a)(69) of the Act (15 U.S.C. 78c(a)(69)) does not include an agreement, contract, or transaction that:

(a) By its terms or by law, as a condition of performance on the agreement, contract, or transaction:

(1) Requires the beneficiary of the agreement, contract, or transaction to have an insurable interest that is the subject of the agreement, contract, or transaction and thereby carry the risk of loss with respect to that interest continuously throughout the duration of the agreement, contract, or transaction;

(2) Requires that loss to occur and to be proved, and that any payment or indemnification therefor be limited to the value of the insurable interest;

(3) Is not traded, separately from the insured interest, on an organized market or over-the-counter; and

(4) With respect to financial guaranty insurance only, in the event of payment default or insolvency of the obligor, any acceleration of payments under the policy is at the sole discretion of the insurer; and

(b) Is provided:

(1) By a company that is organized as an insurance company whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies and that is subject to supervision by the insurance commissioner (or similar official or agency) of any State, as defined in section 3(a)(16) of the Act (15 U.S.C. 78c(a)(16)), or by the United States or an agency or instrumentality thereof, and such agreement, contract, or transaction is regulated as insurance under the laws of such State or of the United States;

(2) By the United States or any of its agencies or instrumentalities, or pursuant to a statutorily authorized program thereof; or

(3) In the case of reinsurance only, by a person located outside the United States to an insurance company that is eligible under paragraph (b) of this section, provided that:

(i) Such person is not prohibited by any law of any State or of the United States from offering such agreement, contract, or transaction to such an insurance company;

(ii) The product to be reinsured meets the requirements under paragraph (a) of this section to be insurance; and

(iii) The total amount reimbursable by all reinsurers for such insurance product cannot exceed the claims or losses paid by the cedant.

§ 240.3a69–2 Definition of "swap" as used in section 3(a)(69) of the Act—Additional Products.

(a) *In general.* The term *swap* has the meaning set forth in section 3(a)(69) of the Act (15 U.S.C. 78c(a)(69)).

(b) *Inclusion of particular products.* (1) The term *swap* includes, without limiting the meaning set forth in section 3(a)(69) of the Act (15 U.S.C. 78c(a)(69), the following agreements, contracts, and transactions:

(i) A cross-currency swap;

(ii) A currency option, foreign currency option, foreign exchange option and foreign exchange rate option;

(iii) A foreign exchange forward;

(iv) A foreign exchange swap;

(v) A forward rate agreement; and

(vi) A non-deliverable forward involving foreign exchange.

(2) The term *swap* does not include an agreement, contract, or transaction described in paragraph (b)(1) of this section that is otherwise excluded by section 1a(47)(B) of the Commodity Exchange Act (7 U.S.C. 1a(47)(B)).

(c) *Foreign exchange forwards and foreign exchange swaps.* Notwithstanding paragraph (b)(2) of this section:

(1) A foreign exchange forward or a foreign exchange swap shall not be considered a swap if the Secretary of the Treasury makes a determination described in section 1a(47)(E)(i) of the Commodity Exchange Act (7 U.S.C. 1a(47)(E)(i)).

(2) Notwithstanding paragraph (c)(1) of this section:

(i) The reporting requirements set forth in section 4r of the Commodity Exchange Act (7 U.S.C. 6r) and regulations promulgated thereunder shall apply to a foreign exchange forward or foreign exchange swap; and

(ii) The business conduct standards set forth in section 4s of the Commodity Exchange Act (7 U.S.C. 6s) and regulations promulgated thereunder shall apply to a swap dealer or major swap participant that is a party to a foreign exchange forward or foreign exchange swap.

(3) For purposes of section 1a(47)(E) of the Commodity Exchange Act (7 U.S.C. 1a(47)(E)) and this § 240.3a69–2, the term *foreign exchange forward* has the meaning set forth in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)).

(4) For purposes of section 1a(47)(E) of the Commodity Exchange Act (7 U.S.C. 1a(47)(E)) and this § 240.3a69–2, the term *foreign exchange swap* has the meaning set forth in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25)).

(5) For purposes of sections 1a(24) and 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(24) and (25)) and this § 240.3a69–2, the following transactions are not foreign exchange forwards or foreign exchange swaps:

(i) A currency swap or a cross-currency swap;

(ii) A currency option, foreign currency option, foreign exchange option, or foreign exchange rate option; and

(iii) A non-deliverable forward involving foreign exchange.

§ 240.3a69–3 Books and records requirements for security-based swap agreements.

(a) A person registered as a swap data repository under section 21 of the Commodity Exchange Act (7 U.S.C. 24a) and the rules and regulations thereunder:

(1) Shall not be required to keep and maintain additional books and records regarding security-based swap agreements other than the books and records regarding swaps required to be kept and maintained pursuant to section 21 of the Commodity Exchange Act (7 U.S.C. 24a) and the rules and regulations thereunder; and

(2) Shall not be required to collect and maintain additional data regarding security-based swap agreements other than the data regarding swaps required to be collected and maintained by such persons pursuant to section 21 of the Commodity Exchange Act (7 U.S.C. 24a) and the rules and regulations thereunder.

(b) A person shall not be required to keep and maintain additional books and records, including daily trading records, regarding security-based swap agreements other than the books and records regarding swaps required to be kept and maintained by such persons pursuant to section 4s of the Commodity Exchange Act (7 U.S.C. 6s) and the rules

and regulations thereunder if such person is registered as:

(1) A swap dealer under section 4s(a)(1) of the Commodity Exchange Act (7 U.S.C. 6s(a)(1)) and the rules and regulations thereunder;

(2) A major swap participant under section 4s(a)(2) of the Commodity Exchange Act (7 U.S.C. 6s(a)(2)) and the rules and regulations thereunder;

(3) A security-based swap dealer under section 15F(a)(1) of the Act (15 U.S.C. 78o–10(a)(1)) and the rules and regulations thereunder; or

(4) A major security-based swap participant under section 15F(a)(2) of the Act (15 U.S.C. 78o–10(a)(2)) and the rules and regulations thereunder.

(c) The term *security-based swap agreement* has the meaning set forth in section 3(a)(78) of the Act (15 U.S.C. 78c(a)(78)).

Dated: April 29, 2011.

By the Commodity Futures Trading Commission.

David A. Stawick,

Secretary.

Dated: April 29, 2011.

By the Securities and Exchange Commission.

Cathy H. Ahn,

Deputy Secretary.

Product Definitions Contained in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act—CFTC Voting Summary and Statements of CFTC Commissioners

Note: The following will not appear in the Code of Federal Regulations.

CFTC Voting Summary

On this matter, Chairman Gensler and Commissioners Dunn, Chilton and O'Malia voted in the affirmative; Commissioner Sommers voted in the negative.

Statement of CFTC Chairman Gary Gensler

I support the proposed rulemaking to implement the Dodd-Frank Act's requirement to further define derivatives products that come under Title VII of the Act.

The CFTC worked closely with the SEC, in consultation with the Federal Reserve, on this proposed rule to further define swaps, security-based swaps, mixed swaps and security-based swap agreements. The statutory definition of swap is very detailed. This rule is consistent with that detailed definition and Congressional intent. For example, interest rate swaps, currency swaps, commodity swaps, including energy, metals and agricultural swaps, and broad-based index swaps, such as index credit default swaps, are all swaps. Consistent with Congress's definition of swaps, the rule also defines options as swaps.

In preparing the proposed rule, staff worked to address the more than 80 comments that were submitted by the public in response to the joint advance notice of proposed rulemaking on product definitions. Many of the commenters asked that the Commissions specifically provide guidance on what is not a swap or security-based swap.

For example, under the Commodity Exchange Act, the CFTC does not regulate forward contracts. Over the decades, there has been a series of orders, interpretations and cases that market participants have come to rely upon regarding the exception from futures regulation for forwards and forwards with embedded options. Consistent with that history, the Dodd-Frank Act excluded from the definition of swaps "any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled." The proposed rule interprets that exclusion in a manner that is consistent with the Commission's previous history of the forward exclusion from futures regulation.

Further, consistent with the Dodd-Frank Act, the proposed rule clarifies that state or Federally regulated insurance products that are provided by regulated insurance companies will not be regulated under Title VII of the Act. Similarly, the proposal clarifies that certain consumer and commercial arrangements that historically have not been considered swaps, such as consumer mortgage rate locks, contracts to lock in the price of home heating oil and contracts relating to inventory or equipment, also will not be regulated under Title VII of the Act.

Statement of CFTC Commissioner Jill Sommers

I respectfully dissent from the action taken today by the Commission to issue proposed regulations relating to "Product Definitions Contained in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act."

I disagree with the approach taken by the Commission with regard to the proposed "Anti-Evasion" provisions. I agree that Dodd-Frank Section 721(c) directs the Commission to further define certain terms to include transactions or entities that have been structured to evade Dodd-Frank. I do not agree that Congress directed the Commission to promulgate broad "Anti-Evasion" provisions, and I point out that the Securities and Exchange Commission today has declined to promulgate such provisions in this joint rulemaking.

By promulgating a broad regulation today that essentially says that any transaction that does not fall within the definition of "swap" because it has been structured to evade Dodd-Frank nonetheless is a swap, the Commission is over-reading its Congressional mandate. The statutory definition of "swap" includes a laundry-list of transactions that Congress intended to include within the definition. If Congress intended the definition of "swap" also to include a broad statement that any transaction structured to evade Dodd-Frank is a "swap," Congress would have incorporated such a provision within the statutory definition. By directing the Commission to "further define" the term "swap" by rule, Congress is directing the Commission not to make the broad statement it declined to make, but to think through whether the definition of "swap" needs to be modified by rule to include specific transactions within the definition.

In addition to my concern about the "Anti-Evasion" provisions included within this proposal, I am concerned about an important issue that is not raised within this proposal. Multinational organizations whose statutory mission is to combat poverty and foster economic development have raised concerns about the application of Dodd-Frank to their activities. This proposal omits any discussion of their issues. In my view the following language should be included within the proposal, and I urge the public to comment upon the issues raised:

Transactions Involving Certain Foreign or Multinational Entities

The swap definition expressly excludes "any agreement, contract, or transaction a counterparty of which is a Federal Reserve bank, the Federal Government, or a Federal agency that is expressly backed by the full faith and credit of the United States."[399] Some commenters have suggested that the Commissions should exercise their authority to further define the terms "swap" and "security-based swap" to similarly exclude transactions in which a counterparty is an international public organization, a foreign central bank, a foreign sovereign, or a multi-or supra-national organization.[400] Commenters

[399] 7 U.S.C. 1a(47)(B)(ix).

[400] *See, e.g.,* letter from Gunter Pleines, Head of Banking Department, and Diego Devos, General

Continued

have advanced international comity, national treatment, limited regulatory resources, limits on the Commissions' respective extraterritorial jurisdiction, and international harmonization as rationales for such an approach.[401]

Counsel, Bank for International Settlements ("BIS Letter"); Cleary Letter. The Commissions note that various other terms may be used to refer to organizations that generally: (i) Limit their membership to sovereign nations; (ii) are established by treaty; (iii) have a separate legal identity from their members; and (iv) "are usually specialized and of international or regional scope" and "formed between three or more nations to work on issues that relate to all of the countries in the organization. See, *e.g., http://portal.unesco.org/en/ev.php-URL_ID=32408&URL_DO=DO_TOPIC&URL_SECCTION=201.html; http://www.geni.org/globalenergy/library/organizations/index.shtml.* For convenience, the Commissions use the term "supranational organization" herein to refer to organizations having such characteristics.

[401] *See, e.g.,* BIS Letter (citing Article 1, paragraph 4, of the proposed EU Regulation on Central Clearing of OTC Derivatives, available at *http://register.consilium.europa.eu/pdf/en/11/st05/st05059.en11.pdf,* which excludes from its coverage the BIS, multilateral development banks, European central banks and similarly situated "other national bodies performing similar functions and other public bodies charged with or intervening in the management of the public debt").

Request for Comment

- The Commissions request comment generally on the appropriate application of the Dodd-Frank Act to international public organizations, foreign central banks, foreign sovereigns (or foreign sovereign wealth funds), supranational organizations, and any other foreign or multinational entity that may be analogous to the entities excluded from the swap definition in CEA Section 1a(47)(B)(ix).
- Should the Commissions further define the terms "swap" and "security-based swap" to exclude transactions in which a counterparty is an international public organization, foreign central bank, foreign sovereign (or foreign sovereign wealth fund), supranational organization, or any other foreign or multinational entity that may be analogous to an entity excluded from the swap definition in CEA Section 1a(47)(B)(ix)? Why or why not? If so, how should the Commissions delineate the scope of entities whose transactions would be excluded? Please describe in detail the nature of the entity whose transactions would be excluded and explain the reasons for such an exclusion. Would such an exclusion inappropriately cause transactions that should be regulated as swaps or security-based swaps to fall outside of the regulatory regime established by the Dodd-Frank Act? Why or why not?
- If the Commissions further define the terms "swap" and "security-based swap" to exclude any such entity, should the exclusion be subject to any conditions, or should the exclusion be limited to particular requirements of Title VII? Why or why not? If so, what conditions would be appropriate, and/or what requirements of Title VII should the exclusion apply to, and why?
- If the Commissions further define the terms "swap" and "security-based swap" to exclude any such entity, to what extent should counterparties to such transactions be subject to the requirements of Title VII? What would be the appropriate regulatory treatment of such counterparties in these circumstances?

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Part III

Federal Reserve System

12 CFR Part 205
Electronic Fund Transfers; Proposed Rule

FEDERAL RESERVE SYSTEM

12 CFR Part 205

[Regulation E; Docket No. R–1419]

RIN 7100–AD76

Electronic Fund Transfers

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule; request for public comment.

SUMMARY: The Board is proposing to amend Regulation E, which implements the Electronic Fund Transfer Act, and the official staff commentary to the regulation, which interprets the requirements of Regulation E. The proposal contains new protections for consumers who send remittance transfers to consumers or entities in a foreign country, by providing consumers with disclosures and error resolution rights. The proposed amendments implement statutory requirements set forth in the Dodd-Frank Wall Street Reform and Consumer Protection Act.

DATES: Comments must be received on or before July 22, 2011. All comment letters will be transferred to the Consumer Financial Protection Bureau.

ADDRESSES: You may submit comments, identified by Docket No. R–1419 and RIN 7100–AD76, 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: Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form 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: Dana Miller, Mandie Aubrey or Samantha Pelosi, Senior Attorneys, or Vivian Wong, Counsel, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, Washington, DC 20551, at (202) 452–2412 or (202) 452–3667. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

SUPPLEMENTARY INFORMATION:

I. Statutory Background

The Electronic Fund Transfer Act (15 U.S.C. 1693 *et seq.*) (EFTA or Act), enacted in 1978, provides a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer (EFT) systems. The EFTA is implemented by the Board's Regulation E (12 CFR part 205). Examples of the types of transactions covered by the EFTA and Regulation E include transfers initiated through an automated teller machine (ATM), point-of-sale terminal, automated clearinghouse (ACH), telephone bill-payment plan, or remote banking service. The Act and regulation provide for the disclosure of terms and conditions of an EFT service; documentation of EFTs by means of terminal receipts and periodic statements; limitations on consumer liability for unauthorized transfers; procedures for error resolution; and certain rights related to preauthorized EFTs. Further, the Act and regulation restrict the unsolicited issuance of ATM cards and other access devices.

The official staff commentary (12 CFR part 205 (Supp. I)) interprets the requirements of Regulation E to facilitate compliance and provides protection from liability under Sections 916 and 917 of the EFTA for financial institutions and other persons subject to the Act who act in conformity with the Board's commentary interpretations. 15 U.S.C. 1693m(d)(1). The commentary is updated periodically to address significant questions that arise.

On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) was signed into law.[1] Section 1073 of the Dodd-Frank Act adds a new Section 919 to the EFTA to create new protections for consumers who send remittance transfers to designated recipients located in a foreign country. The Dodd-Frank Act requires that remittance transfer providers give senders of remittance transfers certain disclosures, including information about fees, the applicable exchange rate, and the amount of currency to be received by the recipient. In addition, the Dodd-Frank Act provides error resolution rights for senders of remittance transfers and directs the Board to promulgate standards for resolving errors and recordkeeping rules. Finally, the Dodd-Frank Act requires the Board to issue rules regarding appropriate cancellation and refund policies. Final rules must be prescribed not later than 18 months after enactment, which is January 21, 2012.[2]

II. Background

A. General

The term "remittance transfer" typically describes a transaction where a consumer sends funds to a relative or other individual located in another country, often the consumer's country of origin. Traditional remittance transfers often consist of consumer-to-consumer payments of low monetary value.

Information on the volume of remittance transfers varies widely, in part because of the difficulty in obtaining reliable data regarding the subject population, and in part because of differences in the scope of transactions included in estimates. The World Bank estimates that the total volume of remittance transfers worldwide to developing countries reached $325 billion in 2010.[3] The World Bank further estimates that the United States has the highest volume of remittances, totaling $48.3 billion in 2009.[4] The U.S. Bureau of Economic Analysis estimates that cash and in-kind "personal transfers" made by foreign-born residents in the United States to households abroad totaled $37.6 billion in 2009,[5] while the U.S. Census Bureau estimates that cash "monetary transfers" from U.S. residents to nonresident households totaled approximately $12 billion in 2008.[6] The majority of

[1] Public Law 111–203, 124 Stat. 1376 (2010).

[2] As discussed below, due to the timing of the statute and this proposal, the Board anticipates that final rules on remittance transfers will be issued by the Consumer Financial Protection Bureau ("Bureau").

[3] World Bank, *Migration and Remittances Factbook 2011* 17 (2011). The World Bank includes cash and in-kind transfers, earnings of temporary workers, and other transfers in its calculations.

[4] *Id.* at 15.

[5] U.S. Bureau of Economic Analysis [BEA], *Personal Transfers, 1992:I –2010:I* (Dec. 16, 2010). For more on the BEA's methodology, *see* Christopher L. Bach, BEA, "Annual Revision of the U.S. International Accounts, 1991–2004," *Surv. Of Current Bus.* No. 7 (July 2005) at 64–66.

[6] Elizabeth M. Grieco, Patricia de la Cruz *et al, Who in the United States Sends and Receives Remittances? An Initial Analysis of the Monetary Transfer Data from the August 2008 CPS Migration Supplement,* U.S. Census Bureau Working Paper No. 87 (Nov. 2010), *available at: http://www.census.gov/population/www/documentation/*

remittances from the United States are sent to the Caribbean and Latin America, and primarily to Mexico.[7] Significant sums are also sent to Asia, and to the Philippines in particular.

B. Methods for Sending Remittance Transfers

Remittance transfers can be sent in a variety of ways. The primary methods for sending remittances transfers are discussed below.

Remittance Transfers Through Money Transmitters

Traditionally, consumers send remittance transfers through a money transmitter[8] operating through its own store or through an agent, such as a grocery store or neighborhood convenience store. The remittance transfer provider may have an exclusive arrangement with the agent, or may be one of several providers available to consumers through that agent. Typically, the consumer provides basic identifying information about himself and the recipient, and pays cash sufficient to cover the transfer amount and any transfer fees charged by the money transmitter. The consumer is provided a confirmation code, which the consumer relays to the recipient. The money transmitter sends an instruction to a specified payout location or locations in the recipient's country where the recipient may pick up the transferred funds, often in local currency, on or after a specified date, upon presentation of the confirmation code and other identification. These transfers are generally referred to as cash-to-cash remittances. In some cases, the consumer can also use other methods of payment for the transfer, such as a credit or debit card, or can provide a checking or savings account number from which funds can be debited for the transfer.

Although most money transmitters focus on cash-to-cash remittance transfers, many have also broadened their product offerings, with respect to both the method for sending and the method for receiving remittance transfers. A recent survey of remittance transfer providers operating in Latin America showed that approximately 75% also permit consumers to send transfers of funds that can be deposited directly into a recipient's bank account, and about 15% offer Internet-based transfers.[9] Several money transmitters permit consumers to send remittances only via the Internet. Money transmitters may also permit transfers to be sent through a dedicated telephone at an agent, at a stand-alone kiosk, or by telephone.

In most cases where funds are made available to the recipient in the local currency, the exchange rate is set when the sender tenders payment, although some money transmitters offer floating rate products where the exchange rate is not determined until the recipient picks up the funds. Funds sent through a money transmitter are generally available in one to three business days, although faster delivery may be available for a higher fee.

International Wire Transfers

Consumers may also send remittances through banks and credit unions. Traditionally, consumers have sent remittances through financial institutions by international wire transfer. Consumers may choose to send funds by wire transfer when traditional money transmitters do not send funds where a recipient is located, or when consumers feel that depositing funds directly to a recipient's account provides a more secure method of transmitting funds, particularly when sending larger amounts. A wire transfer is generally an account-to-account transaction. Funds are transferred from the consumer's account into a recipient's account at a foreign financial institution. The two account-holding financial institutions will not communicate directly if they do not have a correspondent relationship. Rather, the sending institution will send funds or a payment instruction to a correspondent institution, which will then be transmitted to the recipient institution directly or indirectly through a series of intermediary institutions. Each wire transfer sent from the sender's financial institution to the recipient's institution may travel through a different transmittal route of financial institutions.

Fees for international wire transfers are typically higher than fees for cash-to-cash transfers. Intermediary institutions along the transmittal route for international wire transfers may deduct fees from the amount transferred, which are often referred to as "lifting fees." The recipient institution may also deduct a fee from the recipient's account for converting the funds into local currency and depositing them into the recipient's account. Further, depending on the number of institutions involved in the transmittal route, it may take longer for funds to be deposited into the recipient's account via international wire transfer than is typically the case for transfers conducted through money transmitters. If the sending institution does not have a direct relationship with the intermediary or receiving institutions, it likely does not have knowledge of all fees that might be imposed on the recipient, or when the funds ultimately will be deposited into the recipient's account.

Financial institutions also do not always know the exchange rate that will apply to wire transfers. In some instances, financial institutions purchase foreign currency at wholesale prices on the commodities market. Before sending a wire transfer, the institution will convert U.S. dollars into local currency using an exchange rate it sets (usually based on the wholesale rate plus a margin), and it thus can determine the exchange rate applicable to the wire transfer. Other financial institutions, however, do not purchase foreign currency on the market, or certain currencies may not be readily available for purchase on the market. In these circumstances, the sending financial institution will send a wire transfer in U.S. dollars, and will not set the exchange rate. In those cases, either the first cross-border intermediary institution in the recipient's country, or the recipient's institution, will set the rate. If the sending financial institution does not have a correspondent relationship with these parties, it generally will not be able to determine the applicable rate.

International ACH

More recently, financial institutions have begun to offer other methods for sending remittances, such as through international automated clearing house (ACH) transactions. In 2001, the Federal Reserve Banks began offering cross-border ACH services to Canada. In 2003, the United States and Mexico launched the "Partnership for Prosperity" initiative aimed at fostering economic development. One of the efforts under this initiative was to lower the cost of remittance transfers from the United States to Mexico. Under this initiative, the Federal Reserve Banks worked with

twps0087/twps0087.html. The report recognizes the substantial difference between its estimate and that of the BEA and offers several possible explanations, but does not come to a conclusion.

[7] U.S. Gov't Accountability Office, GAO–06–204, *International Remittances: Information on Products, Costs, and Consumer Disclosures* 7 (November 2005) ("*GAO Report*"); *see also* Cong. Budget Office, *Migrants' Remittances and Related Economic Flows* 7 (Feb. 2011).

[8] Federal law requires money transmitters to register with the Financial Crimes Enforcement Network of the U.S. Department of the Treasury. 31 U.S.C. 5330; 31 CFR 103.41. Most states also require money transmitters to be licensed by the state.

[9] Manuel Orozco, Elizabeth Burgess et al, Inter-American Dialogue, *A Scorecard in the Market for Money Transfers: Trends in Competition in Latin American and the Caribbean* 6 (June 18, 2010) ("*Scorecard*").

the central bank of Mexico to create an interbank mechanism, later branded "Directo a México," to carry out cross-border ACH transactions between the United States and Mexico. The Directo a México service was introduced in 2004, and the Federal Reserve Banks now offer international ACH services to over 35 countries in Europe, Canada, and Latin America through agreements with private-sector or government entities.

In each case, the Federal Reserve and the entity or entities with which the Federal Reserve has an agreement receive, process, and distribute ACH payments to financial institutions or recipients within the respective domestic payment systems.[10] The Federal Reserve provides U.S. financial institutions access to its FedGlobal ACH Payments Service for a small charge. Financial institutions, in turn, offer the product to their customers for a competitive fee.[11] Institutions may offer customers account-to-account transfers, or allow customers to send transfers that may be picked up at a participating institution or other payout location abroad.[12] In some instances, the financial institution will know the exchange rate when the transfer is requested. In other cases, however, the exchange rate is determined by the foreign ACH counterpart and applied the next business day when funds are deposited into the recipient's account or made available to be picked up.

Other Account-Based Methods

Over the last decade, some financial institutions have independently developed lower-cost remittance transfer products, or have directly partnered with or joined a larger distribution network of financial institutions or other payout locations. These products generally are account-to-account or account-to-cash products that resemble those offered by traditional money transmitters. Transferred funds are generally available in one to three days, similar to the traditional money transmitter model, for a competitive fee.[13]

Additional Methods

In addition to the primary remittance transfer methods described above, there are various other methods and products for delivering funds to a person located abroad. For example, consumers may send funds to recipients abroad using prepaid cards. In one model, a consumer purchases a prepaid card from a remittance transfer provider, which loads funds onto the card and sends it to a specified recipient in another country. The recipient may then use the prepaid card at an ATM or at a point of sale. The consumer can reload the recipient's prepaid card through the provider's Web site. In this model, the exchange rate is set when the recipient uses the card. Other card-based products permit the cardholder to send funds using his or her debit or credit card to the debit or credit card account of a recipient.

A consumer may also add a recipient in another country as an authorized user on his or her checking or savings account. A debit card linked to the consumer's account is provided to the recipient, who can use it to withdraw funds at an ATM or at a point of sale. Remittance transfer providers are also exploring the use of mobile applications to send remittances.[14]

C. Consumer Choice, Pricing, and Disclosure

Consumers choose a particular remittance transfer provider or product over another for a number of reasons. Significant factors include trust in the provider, security, reliability (*i.e.,* having funds available at the specified time), and convenience to the recipient, particularly in markets where the recipient may have limited options where funds can be picked up.[15] Fees and exchange rates are also key factors in choosing a provider. Some studies have shown consumers may agree to pay more to ensure that recipients receive the entire amount promised at the promised delivery time, and that consumers also tend to continue using a service provider once it proves reliable.[16]

Studies also suggest that increasing diversification and competition in the remittance transfer market have contributed to downward market pressure on prices.[17] One study shows that transfer costs to Latin America, the largest recipient of remittances from the United States, have decreased from about 15% of the value transferred before 2000 to approximately 5% of the value transferred, although the rate of decline has slowed in the last few years.[18] Similarly, the World Bank estimates that worldwide, transfer costs declined to an estimated 8.7% of the value of the transfer in first quarter of 2010.[19]

Although the remittance transfer market has seen an overall price decline, concerns remain regarding the adequacy of disclosures. Even though consumers often can obtain exchange rate and fee information orally upon request, many consumers currently do not receive written information about their remittance transaction until after payment is tendered. Consumer advocates have argued that providing written disclosures prior to payment is essential to help the consumer understand the transaction before committing to pay.[20] However, one survey indicated that a majority of consumers are satisfied with the transparency of the exchange rate and fees.[21] Concerns have also been raised that state money transmitter laws address licensing and money laundering issues, but largely do not require disclosures.

Further, there is inconsistency in the type of information disclosed by different providers. In some instances, the provider may disclose the total cost of the transaction to the sender, but not the amount the recipient will receive. In other instances, the consumer may believe that the recipient will receive a specified amount, but lifting fees, recipient agent fees, or foreign taxes reduce the amount the recipient

[10] Fed. Reserve Bank Services, *FedGlobal® ACH Payments Service Origination Manual, available at: http://www.frbservices.org/files/serviceofferings/pdf/fedach_global_service_orig_manual.pdf.*

[11] *See, e.g.,* Lenora Suki, *Competition and Remittances in Latin America: Lower Prices and More Efficient Markets,* Working Paper at 27 (Feb. 2007), available at: *http://www.oecd.org/dataoecd/31/52/38821426.pdf* ("*Competition and Remittances*").

[12] Fed. Reserve Bank Services, *FedGlobal ACH Payments,* available at: *http://www.frbservices.org/serviceofferings/fedach/fedach_international_ach_payments.html.*

[13] *See, e.g., Competition and Remittances* at 27; *Scorecard* at 7.

[14] Consumers may also use informal methods to send money abroad, such as sending funds through the mail or with a friend, relative, or courier traveling to the destination country. *See, e.g.,* Bendixen & Amandi, *Survey of Latin American Immigrants in the United States* (2008), available at: *http://www.bendixenandassociates.com/studies2008.html* (estimating about 12% of remittances to Latin America are through informal means) ("Bendixen Survey").

[15] Marianne A. Hilgert, Jeanne M. Hogarth, et al. "Banking on Remittances: Extending Financial Services to Immigrants." 15 *Partners* No. 2 at 18 (2005); *Competition and Remittances* at 25. *See also* the discussion below regarding the Board's consumer testing.

[16] *GAO Report* at 8. *See also* Appleseed, *The Fair Exchange: Improving the Market for International Remittances* 7 (Apr. 2007).

[17] *Scorecard* at 7. Technology is also a driving factor.

[18] Inter-American Development Bank, Multilateral Investment Fund. *Ten Years of Innovation in Remittances: Lessons Learned and Models for the Future* 8 (2005). The market has recently seen remittance transfer provider consolidation.

[19] World Bank *Migration and Development Brief* No. 13 at 10 (Nov. 2010).

[20] *See, e.g.,* Testimony of Annette LoVoi, Appleseed, in Hearing Before House Subcomm. on Fin. Insts. And Cons. Credit, No. 111–39 (June 3, 2009).

[21] *Scorecard* at 10.

ultimately receives. Thus, consumers could benefit from consistent, accessible disclosures regarding remittance transfers. Concerns have also been raised about a consumer's ability to pursue the resolution of errors with providers, particularly given variations in state law regulation of money transmitters.[22]

Outreach and Consumer Testing

In the fall of 2010, Board staff conducted outreach with various parties regarding remittances and implementation of the statute. Board staff met with representatives from a variety of money transmitters, financial institutions, industry trade associations, consumer advocates, and other interested parties to discuss current remittance transfer business models, consumer disclosure and error resolution practices, operational issues, and specific provisions of the statute.[23]

The Board also engaged a testing consultant, ICF Macro (Macro), to conduct focus groups and one-on-one interviews regarding remittance transfers. Participants represented a range of ages, education levels, amount of time lived in the United States, and country or region to which remittances were sent.

In December 2010, Macro conducted a series of six focus groups with eight to ten participants each, to explore current remittance provider practices and attitudes about remittance disclosures. Three focus groups were held in Bethesda, Maryland, and three were held in Los Angeles, California. At each location, two of the three focus groups were conducted in English, and the third in Spanish. Among other things, participants were asked about the factors they consider when choosing a remittance provider, and information they receive from providers before and after their transaction. Consistent with the research described above, focus group participants identified cost, convenience, and security among the most important factors when choosing a provider, and tended to use the same provider over time. Most participants said they did not receive any written information before completing an in-person remittance transfer, but said they could get information about fees and exchange rates orally if they asked an agent. Only a few participants regularly compared provider prices. Those who did compare would generally call or look on-line for approximate fees and exchange rates. When asked about the usefulness of a storefront sign showing how much a recipient would receive in local currency if $100 were sent, most participants responded by highlighting the limitations and obstacles of such a sign.

In early 2011, Macro conducted a series of one-on-one interviews in New York City, Atlanta, Georgia, and Bethesda, Maryland, with nine to ten participants in each city. During the interview, participants were given scenarios in which they completed a hypothetical remittance transfer and received one or more disclosure forms. For each scenario, participants were asked specific questions to test their understanding of the information presented in the disclosure form. Nearly all participants understood the information presented in the disclosure forms. Most participants said that getting information prior to completing the transaction could be useful in that it would give consumers the opportunity to review or confirm information before sending money. Participants also generally responded positively to disclosures about their error resolution rights.

III. Summary of Proposal

The Board is proposing to implement the Dodd-Frank Act remittance transfer provisions in a new Subpart B of Regulation E, § 205.30 *et seq.*[24] The proposed rule contains new protections for consumers who send remittance transfers to designated recipients in a foreign country by providing consumers with disclosures and error resolution rights.

Under the proposed rule, a remittance transfer provider must generally provide a written pre-payment disclosure to a sender[25] containing information about the specific transfer, such as the exchange rate, applicable fees and taxes, and the amount to be received by the designated recipient. Oral pre-payment disclosures would be permitted if the transaction is conducted entirely by telephone.

The remittance transfer provider must also generally provide a written receipt when payment is made for the remittance transfer that includes the information provided on the pre-payment disclosure, as well as additional information such as the date of availability, the recipient's contact information, and information regarding the sender's error resolution and cancellation rights. Alternatively, the proposed rule permits remittance transfer providers to provide senders a single written pre-payment disclosure containing all of the information required on the receipt.

The proposal also implements two statutory exceptions that permit a remittance transfer provider to disclose an estimate of the amount of currency to be received, rather than the actual amount. The first exception applies for five years from the date of enactment of the Dodd-Frank Act. This temporary exception applies to insured depository institutions and insured credit unions that cannot determine certain disclosed amounts for reasons beyond their control, which primarily occurs with international wire transfers. The second exception is a permanent exception and applies where the provider cannot determine certain amounts to be disclosed because of (a) the laws of a recipient country or (b) the method by which transactions are made in the recipient country. Under the proposed rule, the permanent exception applies when the government of a foreign country sets the exchange rate after a transfer has been sent, or where the exchange rate, by law, is not set until the recipient picks up the funds. The permanent exception also applies to certain international ACH transactions, where the central bank of the foreign country sets the exchange rate after the transfer has been sent.

The proposed rule also implements the statutory requirement that disclosures must generally be provided in English and in each of the foreign languages principally used by the remittance transfer provider to advertise, solicit, or market remittance transfer services at a particular office, with several modifications. The proposed rule provides guidance on how and when foreign language disclosures must be provided, and proposes several foreign language disclosure alternatives.

Additionally, the proposed rule prescribes error resolution standards, including recordkeeping standards, consistent with the statute. The proposed rule requires a sender to provide notice of an error to the remittance transfer provider within 180 days of the stated date of availability of a remittance transfer. The notice triggers a provider's duty to investigate the claim and correct any error within 90 days of receiving the notice of error. The proposed rule would establish error resolution procedures similar to those

[22] Nat. Council of La Raza, *Wiring Change: New Protections for Remittances Can Help Families,* at: *http://www.nclr.org/images/uploads/pages/Remittances_and_Banking_Reform_5_5_2010_Final.pdf* (May 2010).

[23] Summaries of these meetings are available on the Board's Web site at: *http://www.federalreserve.gov/newsevents/reform_consumer.htm.*

[24] Existing provisions of Regulation E would be incorporated into a new Subpart A.

[25] As discussed in more detail below, the proposed rule is applicable to senders who are consumers.

that apply to a financial institution under Regulation E with respect to errors involving electronic fund transfers. The proposal also provides senders specified cancellation and refund rights.

Finally, the proposed rule sets forth two alternative approaches for implementing the standards of liability for remittance transfer providers, including those that act through an agent. Under the first alternative, a remittance transfer provider would be liable for violations by an agent, when such agent acts for the provider. Under the second alternative, a remittance transfer provider would be liable for violations by an agent acting for the provider unless the provider establishes and maintains policies and procedures for agent compliance, including appropriate oversight measures, and the provider corrects any violation, to the extent appropriate.

Request for Comment

The Board requests comment on all aspects of this remittances proposal, including on the various alternatives set forth in the proposal, as well as projected implementation and compliance costs. The Board also solicits comment on whether an effective date of one year from the date the final rule is published, or an alternative effective date, would be appropriate. Specifically, the Board requests comment on the length of time remittance transfer providers may need to implement the rule.

Transition Issues

The Dodd-Frank Act requires the Board to issue rules implementing the remittance transfer provisions within 18 months from the date of enactment, or by January 21, 2012. However, the Act transfers rulemaking authority for most consumer protection statutes, including the EFTA, from the Board to the Bureau as of the designated transfer date, which has been designated as July 21, 2011.[26] As a result, the Board anticipates that final rules on remittance transfers will be issued by the Bureau.

IV. Legal Authority

Section 1073 of the Dodd-Frank Act creates a new Section 919 of the EFTA and requires remittance transfer providers to make disclosures to senders of remittance transfers, pursuant to rules prescribed by the Board. In particular, providers must give senders a written pre-payment disclosure containing specified information applicable to the sender's remittance transfer. The remittance transfer provider must also provide a written receipt that includes the information provided on the pre-payment disclosure, as well as additional specified information. EFTA Section 919(a); 15 U.S.C. 1693o–1(a).

In addition, EFTA Section 919 provides for specific error resolution procedures. The Act directs the Board to promulgate error resolution standards and rules regarding appropriate cancellation and refund policies. EFTA Section 919(d); 15 U.S.C. 1693o–1(d). Finally, EFTA Section 919 requires the Board to establish standards of liability for remittance transfer providers, including those that act through agents. EFTA Section 919(f); 15 U.S.C. 1693o–1(f). Except as described below, the remittance transfer rule is proposed under the authority provided to the Board in EFTA Section 919, and as more specifically described in this **SUPPLEMENTARY INFORMATION**.

In addition to the statutory mandates set forth in the Dodd-Frank Act, EFTA Section 904(a) authorizes the Board to prescribe regulations necessary to carry out the purposes of the title. The express purposes of the EFTA, as amended by the Dodd-Frank Act, are to establish "the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems" and to provide "individual consumer rights." EFTA Section 902(b); 15 U.S.C. 1693. As described in more detail in the **SUPPLEMENTARY INFORMATION**, the following provisions are proposed in part or in whole pursuant to the Board's authority in EFTA Section 904(a): §§ 205.31(b)(1)(i), (b)(1)(iii), (b)(1)(v), (b)(1)(vi), (g)(2), and 205.33(c)(1). The proposed Model Forms in Appendix A are also proposed pursuant to EFTA Section 904(a). The Section-by-Section analysis, Initial Regulatory Flexibility Analysis, and Paperwork Reduction Act analysis serve as the economic impact analysis pursuant to EFTA Section 904(a)(2).

EFTA Section 904(c) further provides that regulations prescribed by the Board may contain any classifications, differentiations, or other provisions, and may provide for such adjustments or exceptions for any class of electronic fund transfers or remittance transfers that the Board deems necessary or proper to effectuate the purposes of the title, to prevent circumvention or evasion, or to facilitate compliance. As described in more detail in the **SUPPLEMENTARY INFORMATION**, proposed §§ 205.31(g)(1)(ii), (g)(2), (g)(3), 205.32(a), and 205.31(e)(2) are proposed in part or in whole pursuant to the Board's authority in EFTA Section 904(c).

V. Section-by-Section Analysis

Section 205.3 Coverage

Section 205.3(a), which describes Regulation E's coverage, is proposed to be revised to provide that the requirements of Subpart B apply to remittance transfer providers. The revision reflects that the scope of the Dodd-Frank Act's remittance transfer provisions is not limited to financial institutions. Specifically, EFTA Section 919(g)(3) defines a remittance transfer provider as "*any person* that provides remittance transfers for a consumer in the normal course of its business, whether or not the consumer holds an account with such person" (emphasis added). Thus, Subpart B would also apply to non-financial institutions, such as money transmitters, that send remittance transfers.

Section 205.30 Remittance Transfer Definitions

EFTA Section 919(g) sets forth several definitions applicable to the remittance transfer provisions in Subpart B. Proposed § 205.30 incorporates these definitions, with modifications, and other terms used in the rule, with proposed commentary for further clarification.

30(a) Agent

Proposed § 205.30(a) states that an "agent" means an agent, authorized delegate, or person affiliated with a remittance transfer provider under state or other applicable law, when such agent, authorized delegate, or affiliate acts for that remittance transfer provider. EFTA Section 919 does not use consistent terminology concerning agents of remittance transfer providers. For example, EFTA Section 919(f)(1) uses the phrase "agent, authorized delegate, or person affiliated with a remittance transfer provider," when that person "acts for that remittance transfer provider," while other provisions use the phrase "agent or authorized delegate" (EFTA Section 919(f)(2)) or simply "agent" (EFTA Section 919(b)). The Board does not believe that these statutory wording differences are intended to establish different standards across the rule. Therefore, the proposed rule generally refers to "agents," as defined in proposed § 205.30(a), to provide consistency across the proposed rule. Because the concept of agency is historically tied to state law, the proposed definition references these parties under state or other applicable law.

[26] 75 FR 57252 (Sept. 20, 2010).

30(b) Business Day

Several provisions in the proposed rule use the term "business day." *See, e.g.,* §§ 205.31(e)(2) and 205.33(c)(1). The existing definition of "business day" in Regulation E applies only to financial institutions and includes inapt commentary. *See* 12 CFR 205.2(d). Because remittance transfer providers include non-financial institutions, proposed § 205.30(b) contains a new definition of "business day" applicable to Subpart B. The proposed rule states that "business day" means any day on which a remittance transfer provider accepts funds for sending remittance transfers.

Proposed comment 30(b)–1 explains that a business day includes the entire 24-hour period ending at midnight, and that a notice required by any section in Subpart B is effective even if given outside of normal business hours. However, the comment clarifies that no section of Subpart B requires that a remittance transfer provider make telephone lines available on a 24-hour basis.

30(c) Designated Recipient

EFTA Section 919(g)(1) provides that a "designated recipient" is "any person located in a foreign country and identified by the sender as the authorized recipient of a remittance transfer to be made by a remittance transfer provider, except that a designated recipient shall not be deemed to be a consumer for purposes of [the EFTA]." The statute uses the term "person," indicating that the statute applies to remittance transfers sent to businesses, as well as to consumers. *See* proposed comment 30(c)–1.

Proposed § 205.30(c) implements EFTA Section 919(g)(1), with edits for clarity. A remittance transfer provider will generally only know the location where funds are to be sent, rather than where a designated recipient is physically located. For instance, although the sender may indicate that funds are to be sent to the recipient in Mexico City, the recipient could actually be in the United States at the time of the transfer. The Board believes that the statutory reference to a "person located in a foreign country" should be read with a view to the location where funds are to be sent. Additionally, the statute references a remittance transfer "to be made by a remittance transfer provider." As discussed below, the definition of remittance transfer requires that it be sent by a remittance transfer provider. Thus, this language is unnecessary. Accordingly, proposed § 205.30(c) states that a designated recipient is any person specified by the sender as an authorized recipient of a remittance transfer to be received at a location in a foreign country.

Proposed comment 30(c)–2 explains that a remittance transfer is received at a location in a foreign country if funds are to be received at a location physically outside of any state, as defined in § 205.2(l). The Board understands that a provider will generally know the location where funds can be picked up or will be deposited as part of its normal operating procedures. However, the Board solicits comment on whether there are instances where a remittance provider may only receive a recipient's email address and therefore be unable to determine the location where funds are to be received.

30(d) Remittance Transfer

30(d)(1) General Definition

EFTA Section 919(g)(2)(A) defines a remittance transfer as an electronic (as defined in Section 106(2) of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7007 *et seq.* ("E–Sign Act")) transfer of funds requested by a sender located in any state to a designated recipient that is sent by a remittance transfer provider. Under the statute, such a transaction is a remittance transfer whether or not the sender holds an account with the remittance transfer provider and whether or not the remittance transfer is also an electronic fund transfer, as defined in EFTA Section 903. The statute thus brings within the scope of the EFTA certain transactions that have traditionally been outside the scope of the EFTA, if those transactions meet elements of the definition of "remittance transfer." Such transactions include cash-based remittance transfers sent through a money transmitter as well as consumer wire transfers. Proposed § 205.30(d) implements the definition of "remittance transfer" in EFTA Section 919(g)(2), with revisions for clarity. The Board is also proposing commentary to provide further guidance on the definition, as well as examples of transactions that are and are not remittance transfers under the rule.

Proposed § 205.30(d)(1) implements the general definition set forth in EFTA Section 919(g)(2)(A). Proposed § 205.30(d)(1) states that a remittance transfer means the electronic transfer of funds requested by a sender to a designated recipient that is sent by a remittance transfer provider. Proposed § 205.30(d)(1) further states that the term applies regardless of whether the sender holds an account with the remittance transfer provider and regardless of whether the transfer is also an electronic fund transfer, as defined in § 205.3(b).

Proposed comments 30(d)–1 through –4 provide further guidance on each of the elements of the proposed definition of "remittance transfer." Proposed comment 30(d)–1 provides that there must be an electronic transfer of funds. The term electronic has the meaning given in Section 106(2) of the E-Sign Act. There may be an electronic transfer of funds if a provider makes an electronic book entry between different settlement accounts to effectuate the transfer. However, the proposed comment explains that where a sender mails funds directly to a recipient, or provides funds to a courier for delivery to a foreign country, there has not been an electronic transfer of funds. Therefore, non-electronic remittance methods are not remittance transfers.

Proposed comment 30(d)–2 provides that the definition of remittance transfer requires a specific sender request that a remittance transfer provider send a remittance transfer. The proposed comment explains that a deposit by a consumer into a checking or savings account does not itself constitute such a request, even if a person in a foreign country is an authorized user on that account, where the consumer retains the ability to withdraw funds in the account.

Proposed comment 30(d)–3 provides that the definition of remittance transfer also requires that the transfer be sent to a designated recipient. As noted above, the definition of "designated recipient" requires a person to be identified by the sender as the authorized recipient of a remittance transfer to be sent by a remittance transfer provider. Proposed comment 30(d)–3 explains that there is no designated recipient unless the sender specifically identifies the recipient of a transfer. Thus, there is a designated recipient if, for example, the sender instructs a remittance transfer provider to send a prepaid card to a specified recipient in a foreign country, and the sender does not retain the ability to draw down funds on the prepaid card. In contrast, there is no designated recipient where the sender retains the ability to withdraw funds, such as when a person in a foreign country is made an authorized user on the sender's checking account, because the remittance transfer provider cannot identify the ultimate recipient of the funds. For instance, a consumer may add his daughter, who is studying abroad, as an authorized user to his account so that the daughter has access to funds while abroad. When the consumer deposits funds to the account,

the consumer's financial institution cannot know whether the purpose of that deposit is to provide funds to the daughter, or is merely a deposit that the consumer will later withdraw himself.

Finally, proposed comment 30(d)–4 provides that the definition of remittance transfer requires that the remittance transfer must be sent by a remittance transfer provider. The proposed comment explains that this means that there must be an intermediary actively involved in sending the transfer of funds. Examples include a person (other than the sender) sending an instruction to a receiving agent in a foreign country to make funds available to a recipient; executing a payment order pursuant to a consumer's instructions; executing a consumer's online bill payment request; or otherwise engaging in the business of accepting or debiting funds for transmission to a recipient and transmitting those funds.

However, the proposed comment explains that a payment card network or other third party payment service that is functionally similar to a payment card network does not send a remittance transfer when a consumer designates a debit or credit card as the payment method to purchase goods or services from a foreign merchant. In such a case, the payment card network or third party payment service is not directly engaged with the sender to send a transfer of funds to a person in a foreign country; rather, the network or third party payment service is merely providing contemporaneous third-party payment processing and settlement services on behalf of the merchant or the remittance transfer provider, rather than on behalf of the sender.[27]

Similarly, where a consumer provides a checking or other account number directly to a merchant as payment for goods or services, the merchant is not acting as a remittance transfer provider when it submits the payment information for processing. Proposed comment 30(d)–5 provides a non-exclusive list of examples of transactions that are, and are not, remittance transfers.

Under proposed § 205.30(d), some transactions that have not traditionally been considered remittance transfers, such as a consumer's online bill payment through his or her financial institution to a recipient abroad, will fall within the scope of the rule. In contrast, other transfer methods specifically marketed for use by a consumer to send remittances, but that do not meet all elements of the definition of remittance transfer, may fall outside the scope of the rule (*e.g.*, a prepaid card where the sender retains the ability to draw down funds). The Board believes that proposed § 205.30(d) implements the statutory definition of "remittance transfer." However, the Board solicits comment on whether it should exempt online bill payments made through the sender's institution, and specifically preauthorized bill payments, from the rule, as it could be challenging for institutions to provide timely disclosures.

30(d)(2) Exception for Small-Value Transfers

EFTA Section 919(g)(2)(B) states that a remittance transfer does not include a transfer described in EFTA Section 919(g)(2)(A) "in an amount that is equal to or lesser than the amount of a small-value transaction determined, by rule, to be excluded from the requirements under section 906(a)" of the EFTA. EFTA Section 906(a) addresses the requirements for electronic terminal receipts. The Board has previously determined, by rule, that financial institutions are not subject to the requirement to provide electronic terminal receipts for small-value transfers of $15 or less. 12 CFR § 205.9(e). Proposed § 205.30(d)(3) incorporates this exception for small-value transfers by providing that remittance transfers do not include transfer amounts of $15 or less.

Application of the EFTA; Relationship to Uniform Commercial Code

As described above, the statute applies to remittance transfers whether or not they are electronic fund transfers. This raises certain issues with respect to traditional cash-based remittance transfers sent through money transmitters, which have not generally been regulated under the EFTA, as well as international wire transfers, which are not EFTs.

During the Board's outreach, some money transmitters asked how and to what extent the EFTA would apply to providers that would ordinarily be outside its scope. The statute outlines the application of the EFTA to remittance transfers that are not electronic fund transfers. Specifically, EFTA Section 919(e)(1) states that a remittance transfer that is not an electronic fund transfer is not subject to any of the provisions of EFTA Sections 905 through 913. For example, a money transmitter sending a remittance transfer would not be subject to the requirement in EFTA Section 906(b), as implemented in 12 CFR 205.9(b), to provide periodic statements to consumers. The transmitter would, however, generally be subject to other provisions of the EFTA, including provisions on liability under EFTA Sections 916 through 918. EFTA Section 919(e)(2)(A) also clarifies that a transaction that would not otherwise be an electronic fund transfer under the EFTA, such as a wire transfer, does not become an electronic fund transfer because it is a remittance transfer under EFTA Section 919.

Prior to the enactment of the Dodd-Frank Act, wire transfers were entirely exempt from the EFTA and instead were governed by state law through state enactment of Article 4A of the Uniform Commercial Code. Among other things, Article 4A primarily governs the rights and responsibilities among the commercial parties to a wire transfer, including payment obligations among the parties and allocation of risk of loss for unauthorized or improperly executed payment orders.

UCC Article 4A–108 provides that Article 4A does not apply "to a funds transfer, *any part of which is governed by the [EFTA]*" (emphasis added). Under EFTA Section 919, wire transfers sent on a consumer's behalf that are remittance transfers will now be governed in part by the EFTA. As a result, it appears that, by operation of Article 4A–108, Article 4A will no longer apply to such consumer wire transfers.[28]

Some institutions have urged the Board to clarify that remittance transfers are not governed by the EFTA for purposes of state law, so that UCC Article 4A will continue to apply to such transfers. However, as noted above, EFTA Section 919(e)(1) explicitly applies the EFTA to remittance transfers that are not electronic fund transfers, except for certain enumerated provisions. Further, the remittance disclosure and error resolution requirements are set forth under the EFTA.

In the alternative, institutions have urged the Board to preempt any provision of state law that prevents a remittance transfer from being treated as a funds transfer under UCC Article 4A based solely upon the inclusion of the remittance transfer provisions in EFTA Section 919. Under this suggested approach, the error resolution provisions of EFTA Section 919(b)(1) would govern remittance transfers as

[27] However, when a consumer uses his or her debit or credit card to send funds to a recipient's debit or credit card, the debit or credit card issuer offering the service could be considered a remittance transfer provider, and the transfer of funds a remittance transfer, under the proposed rule. *See, e.g.,* proposed comment 30(d)–5.

[28] Commercial wire transfers are not affected because a "sender" must be a consumer.

between a sender and a remittance transfer provider, but the remaining provisions in UCC Article 4A would continue to govern the allocation of risk of loss as between the remittance transfer provider and another financial institution that carries out part of the transfer.

Under EFTA Section 921 and § 205.12, the Board may determine whether a state law relating to, among other things, electronic fund transfers is preempted by a provision of the EFTA or Regulation E. However, a provision can only preempt a state law that is inconsistent with the provision and only to the extent of its inconsistency. Moreover, the statute and regulation provide that a state law is not inconsistent with any provision if it is more protective of consumers.

EFTA Section 902(b) states that the primary purpose of the EFTA is the provision of individual consumer rights. In contrast, as discussed above, Article 4A is primarily intended to govern the rights and responsibilities among the commercial parties to a funds transfer, that is, the financial institution that accepts a payment order for a funds transfer and any other financial institutions that may be involved in carrying out the transfer. Thus, because the two statutes focus on different relationships, it is not clear that EFTA Section 919 is inconsistent with UCC Article 4A.

In addition, the Board notes that Congress amended the EFTA's preemption provision to specifically include a reference to state gift card laws when it enacted new EFTA protections for gift cards as part of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit Card Act).[29] By contrast, Congress did not amend the EFTA's preemption provision with respect to state laws relating to remittance transfers, including those that are not electronic fund transfers, when it enacted the Dodd-Frank Act.

The Board recognizes that one consequence of covering remittance transfers under the EFTA could be legal uncertainty for certain remittance transfer providers. Specifically, providers of international wire transfers may no longer be able to rely on UCC Article 4A's rules governing the rights and responsibilities among the parties to a wire transfer. However, because this issue arises from a provision of state law, not federal law, the Board believes that the authority for resolving this uncertainty rests with the states or through the rules applicable to the relevant wire transfer system. The final rule must be issued in final form no later than January 21, 2012, and will be effective at a subsequent date. Thus, before the rule is finalized and becomes effective, states have the opportunity to amend UCC Article 4A to restore its application to consumer international wire transfers, or wire transfer systems could amend their operating rules to incorporate UCC Article 4A.

30(e) Remittance Transfer Provider

Proposed § 205.30(e) implements the definition of "remittance transfer provider" in EFTA Section 919(g)(3). Proposed § 205.30(e) states that a remittance transfer provider (or provider) means any person that provides remittance transfers for a consumer in the normal course of its business, regardless of whether the consumer holds an account with such person. To eliminate redundancy, statutory references to "any person or financial institution" have been revised to state "any person" in the proposed rule, because the term "person" under Regulation E already includes financial institutions. Proposed comment 30(e)–1 clarifies that an agent is not deemed to be a remittance transfer provider by merely providing remittance transfer services on behalf of the remittance transfer provider. The Board solicits comment on whether it should adopt guidance interpreting the phrase "normal course of business" as sending a minimum number of remittance transfers in a given year. If so, the Board solicits comment on what that number should be.

30(f) Sender

Proposed § 205.30(f) implements the definition of "sender" in EFTA Section 919(g)(4) with minor edits for clarity. Under the proposed rule, a sender is a consumer in a state who requests a remittance transfer provider to send a remittance transfer to a designated recipient. Accordingly, the proposed rule does not apply to business-to-consumer or business-to-business transactions.

Section 205.31 Disclosures

The Dodd-Frank Act contains several disclosure requirements relating to remittance transfers. Among these, EFTA Sections 919(a)(2)(A) and (B) require a remittance transfer provider to provide two disclosures to a sender in connection with a remittance transfer. First, a remittance transfer provider must provide a written pre-payment disclosure to a sender with information about the sender's remittance transfer, such as the exchange rate, fees, and the amount to be received by the designated recipient. A remittance transfer provider must also provide a written receipt that includes the information provided on the pre-payment disclosure, as well as additional information, such as the promised date of delivery, contact information for the designated recipient, and information regarding the sender's error resolution rights. EFTA Section 919(a)(5) provides the Board with certain exemption authority, including the authority to permit a remittance transfer provider to provide, in lieu of a pre-payment disclosure and receipt, a single written disclosure to a sender prior to payment for the remittance transfer that accurately discloses all of the information required on both the pre-payment disclosure and the receipt. *See* EFTA Section 919(a)(5)(C). EFTA Section 919(b) also provides that disclosures under Section 919 must be made in English and in each foreign language principally used by the remittance transfer provider, or any of its agents, to advertise, solicit, or market, either orally or in writing, at that office.

Proposed § 205.31(a) sets forth the requirements for the general form of disclosures required under Subpart B. Proposed §§ 205.31(b)(1) and (2) implement the EFTA Section 919(a)(2)(A) and (B) pre-payment disclosure and receipt requirements. Proposed § 205.31(b)(3) sets forth the requirements for providing a combined disclosure, as permitted by EFTA Section 919(a)(5)(C). Proposed § 205.31(b)(4) sets forth disclosure requirements with respect to a sender's error resolution and cancellation rights. Proposed § 205.31(c) sets forth specific format requirements required under Subpart B, including grouping, proximity, prominence and size, and segregation requirements. Proposed § 205.31(d) sets forth the disclosure requirements for providing estimates, to the extent they are permitted by § 205.32. Proposed § 205.31(e) implements the timing requirements of EFTA Sections 919(a)(2) and 919(a)(5)(C). Proposed § 205.31(f) clarifies that the disclosures required by § 205.31(b) must be accurate when payment is made. Finally, proposed § 205.31(g) implements the foreign language requirement in EFTA Section 919(b).

31(a) General Form of Disclosures

31(a)(1) Clear and Conspicuous

Proposed § 205.31(a) sets forth the requirements for the general form of disclosures required under proposed

[29] *See* Credit Card Act § 402, Public Law 111–24, 123 Stat. 1734 (2009).

Subpart B. Pursuant to EFTA Sections 919(a)(3)(A) and (a)(5)(C),[30] proposed § 205.31(a)(1) provides that disclosures required by Subpart B must be clear and conspicuous. These include the disclosures required by proposed § 205.31, as well as disclosures providing a description of the sender's error resolution and cancellation rights under proposed §§ 205.33 and .34, discussed below. Proposed comment 31(a)(1)–1 clarifies that disclosures are clear and conspicuous for purposes of Subpart B if they are readily understandable and, in the case of written and electronic disclosures, the location and type size are readily noticeable to senders. Oral disclosures, to the extent permitted by proposed § 205.31(a)(3) and (4), are clear and conspicuous when they are given at a volume and speed sufficient for a sender to hear and comprehend them.

Proposed § 205.31(a)(1) also provides that disclosures required by Subpart B may contain commonly accepted or readily understandable abbreviations or symbols. Proposed comment 31(a)(1)–2 clarifies that using abbreviations or symbols such as "USD" to indicate currency in U.S. dollars or "MXN" to indicate currency in Mexican pesos is permissible.

31(a)(2) Written and Electronic Disclosures

Proposed § 205.31(a)(2) sets forth the requirements for written and electronic disclosures under Subpart B. Disclosures required by Subpart B generally must be provided to the sender in writing. *See* EFTA Sections 919(a)(2), (a)(5)(C), and (d)(1)(B)(iv). However, EFTA Section 919(a)(5)(D) permits a remittance transfer provider to disclose a pre-payment disclosure electronically if a sender initiates a transaction electronically. The Board believes the intent of this exemption was to permit a remittance transfer provider to give electronic disclosures when a sender electronically requests the provider to send the remittance transfer. *See also* comment 31(e)–1. Therefore, pursuant to the Board's authority in EFTA Section 919(a)(5)(D), proposed § 205.31(a)(2) permits a pre-payment disclosure under § 205.31(b)(1) to be provided to the sender in electronic form, if the sender electronically requests the remittance transfer provider to send a remittance transfer. In such a case, proposed comment 31(a)(2)–1 explains that electronic disclosures required by § 205.31(b)(1) may be provided without regard to the consumer consent and other applicable provisions of the E-Sign Act. Proposed comment 31(a)(2)–1 also clarifies that if a sender electronically requests the remittance transfer provider to send a remittance transfer, receipts required by § 205.31(b)(2) also may be provided to the consumer in electronic form. However, electronic receipts must comply with the consumer consent and other applicable provisions of the E-Sign Act.

Proposed comment 31(a)(2)–2 clarifies that written disclosures may be provided on any size paper, as long as the disclosures are clear and conspicuous. For example, disclosures may be provided on a register receipt or on an 8.5 inch by 11 inch sheet of paper, consistent with current practices in the industry. The Board believes that the required disclosures are sufficiently simple and limited in scope that they may be provided clearly and conspicuously on various paper sizes, as long as a remittance transfer provider complies with the formatting requirements of proposed § 205.31(a) and (c).

In addition, proposed § 205.31(a)(2) provides that the written and electronic disclosures required by Subpart B must be made in a retainable form, pursuant to EFTA Section 919(a)(2) and consistent with the authority provided to the Board in EFTA Section 919(a)(5)(C). Proposed comment 31(a)(2)–3 clarifies that a remittance transfer provider may satisfy the requirement to provide electronic disclosures in a retainable form if it provides an on-line disclosure in a format that is capable of being printed. Electronic disclosures cannot be provided through a hyperlink or in another manner by which the sender can bypass the disclosure. A provider is not required to confirm that the sender has read the electronic disclosures.

The Board requests comment on how the requirement to provide electronic disclosures in a retainable form in proposed § 205.31(a)(2) could be applied to transactions conducted via text messaging or mobile phone application.

31(a)(3) Oral Disclosures for Telephone Transactions

Relying upon the exemption authority in EFTA § 919(a)(5)(B), proposed § 205.31(a)(3) permits pre-payment disclosures required by § 205.31(b)(1) to be disclosed orally if the transaction is conducted entirely by telephone and if the remittance transfer provider complies with the foreign language disclosure requirements of § 205.31(g)(2), discussed below. Proposed comment 31(a)(3)–1 clarifies that, for transactions conducted partially by telephone, disclosures may not be provided orally. For example, a sender may begin a remittance transfer at a remittance transfer provider's dedicated phone in a retail store, and then provide payment in person to a store clerk to complete the transaction. In such cases, the proposed comment clarifies that all disclosures must be provided in writing. The Board believes that by limiting oral disclosures to transactions performed entirely by telephone, Congress did not intend to permit providers to satisfy the disclosure requirements orally for transactions conducted partially by telephone. *See* EFTA Section 919(a)(5)(B). Proposed comment 31(a)(3)–1 clarifies that for such a transaction, a provider complies with the disclosure requirements, for example, by providing the written pre-payment disclosure in person prior to the sender's payment for the transaction, and the written receipt when payment is made for the remittance transfer.

31(a)(4) Oral Disclosures for Certain Error Resolution Notices

Proposed § 205.31(a)(4) permits the report of the results of an investigation of a notice of error required by proposed § 205.33(c)(1) to be provided orally, if the remittance transfer provider determines that an error occurred as described by the sender, and if the remittance transfer provider complies with the foreign language disclosure requirements of § 205.31(g)(2), discussed below. As discussed in § 205.33, below, the Board believes that it is appropriate to permit a remittance transfer provider to orally report its findings that the specified error did occur, alert the sender of the results of the investigation, and facilitate a sender's ability to remedy errors promptly.

In outreach conducted by the Board, some remittance transfer providers suggested that the Board should permit a disclosure made prior to payment to be provided at the point-of-sale either orally or electronically by showing a consumer a computer screen displaying the required disclosures. Alternatively, some remittance transfer providers suggested permitting a disclosure made prior to payment to be provided only upon request of the sender. The providers argued that requiring written disclosures prior to payment would be less convenient and more confusing for

[30] EFTA Section 919(a)(5)(C) incorporates the requirements of EFTA Section 919(a)(3)(A) by reference, including the clear and conspicuous requirement.

consumers, and would create an unnecessary compliance burden.

For point-of-sale transactions, the proposed rule does not permit the pre-payment disclosure required by § 205.31(b)(1) or the combined disclosure required by § 205.31(b)(3), discussed below, to be provided orally or to be shown to a consumer on a computer screen at the point-of-sale prior to payment. As discussed above, EFTA Section 919 requires disclosures to be written and retainable, and only permits oral disclosures in limited circumstances. Therefore, the Board believes that the statute does not permit a remittance transfer provider to provide an oral pre-payment disclosure at the point-of-sale.

Moreover, the statute requires disclosures under EFTA Section 919 to be provided to senders, and not simply made available. Showing a sender the required disclosures on a computer screen at the point-of-sale or providing a written disclosure only upon request of the sender would not comply with the requirement to provide the disclosures to the sender. Therefore, the Board believes that permitting these disclosures to be made available, rather than be provided to a sender, would be inconsistent with the statute.

31(b) Disclosures

Section 205.31(b) sets forth substantive disclosure requirements for remittance transfers. EFTA Sections 919(a)(2)(A) and (B) require a remittance transfer provider to provide to a sender: (1) A written pre-payment disclosure with information applicable to the sender's remittance transfer—specifically, the exchange rate, the amount of transfer and other fees, and the amount that would be received by the designated recipient; and (2) a written receipt that includes the information provided on the pre-payment disclosure, plus the promised date of delivery, contact information for the designated recipient, information regarding the sender's error resolution rights, and contact information for the remittance transfer provider and applicable regulatory agencies. EFTA Section 919(a)(5)(C) also authorizes the Board to permit a remittance transfer provider to provide a single written disclosure to a sender, instead of a pre-payment disclosure and receipt, that accurately discloses all of the information required on both the pre-payment disclosure and the receipt (a "combined disclosure").

Pursuant to EFTA Section 919(a)(2), information on a pre-payment disclosure and a receipt need only be provided to the extent applicable to the transaction. Similarly, the information required on a combined disclosure need only be provided as applicable because the combined disclosure is simply a consolidation of disclosures on the pre-payment disclosure and the receipt. *See* EFTA Section 919(a)(2)(A) and (B). Proposed comment 31(b)-1 clarifies that a remittance transfer provider could choose to omit an inapplicable item provided in § 205.31(b). Alternatively, a remittance transfer provider could disclose a term and state that an amount or item is "not applicable," "N/A," or "None."

For example, if fees or taxes are not imposed in connection with a particular transaction, the provider need not provide the disclosures required by § 205.31(b)(1)(ii) or (b)(1)(vi). Similarly, a Web site need not be disclosed under § 205.31(b)(2)(v) if the provider does not maintain a Web site.

In some instances, a sender may choose to send funds to a designated recipient to be picked up in U.S. dollars or deposited into a dollar-denominated account. For example, El Salvador is a dollarized economy,[31] so remittance transfers to El Salvador may be sent as dollar-to-dollar transactions. Proposed comment 31(b)-1 clarifies that a provider need not provide the exchange rate disclosure required by § 205.31(b)(1)(iv) if a recipient receives currency in U.S. dollars or currency is delivered into an account in U.S. dollars, rather than in another currency.

Section 205.31(b) requires that disclosures be described using the terms set forth in § 205.31(b) or substantially similar terms. The Board developed and tested the terms in consumer testing to ensure that consumers could understand the information disclosed to them. However, the proposed rule provides remittance transfer providers with some flexibility in developing their disclosures. Proposed comment 31(b)-2 clarifies that terms may be more specific than the terms provided in the proposed rule. For example, a remittance transfer provider sending funds to Colombia may describe a tax disclosed under § 205.31(b)(1)(vi) as a "Colombian Tax" in lieu of describing it as "Other Taxes."

As discussed in § 205.31(g) below, disclosures generally must be provided in English and in each of the foreign languages principally used by the remittance transfer provider to advertise, solicit, or market remittance transfers, either orally or in writing, at that office. The Board recognizes that not all words or phrases lend themselves to exact word-for-word translations in a foreign language. Therefore, proposed comment 31(b)–2 also clarifies that foreign language disclosures required under § 205.31(g) must contain accurate translations of the terms, language, and notices required by § 205.31(b).

31(b)(1) Pre-Payment Disclosures

Pursuant to EFTA Section 919(a)(2)(A), proposed § 205.31(b)(1) requires a remittance transfer provider to make specified pre-payment disclosures to a sender, as applicable. Proposed § 205.31(b)(1)(i) requires that the remittance transfer provider disclose the amount that will be transferred to the designated recipient using the term "Transfer Amount" or a substantially similar term. The transfer amount must be provided in the currency in which the funds will be transferred. For example, if the funds will be transferred from U.S. dollars to Mexican pesos, the transfer amount required by § 205.31(b)(1) must be disclosed in U.S. dollars. The Board is proposing the disclosure of the transfer amount pursuant to the Board's authority under EFTA Section 904(a). The Board believes the disclosure of the transfer amount helps demonstrate to a sender how a provider calculates the total amount of the transaction, discussed below.

Proposed § 205.31(b)(1)(ii) requires that a remittance transfer provider disclose any fees and taxes that are imposed on the remittance transfer by the remittance transfer provider, in the currency in which the funds will be transferred. The proposed disclosure must be described using the term "Transfer Fees," "Transfer Taxes," or "Transfer Fees and Taxes," or a substantially similar term. These disclosures are proposed pursuant to EFTA Section 919(a)(2)(A)(ii), which requires a remittance transfer provider to disclose the amount of transfer fees and any other fees charged by the remittance transfer provider for the remittance transfer. The Board believes the statute requires the disclosure of all charges that would affect the cost of a remittance transfer to the sender, including any applicable taxes that are passed on to the sender. *See* proposed comment 31(b)(1)–1.

Proposed comment 31(b)(1)–1 clarifies that taxes imposed by the remittance transfer provider include taxes imposed on the remittance transfer by a state or other governmental body. The proposed comment further clarifies that a remittance transfer provider need only disclose fees or taxes required by §§ 205.31(b)(1)(ii) and (b)(1)(vi), as

[31] *See* U.S. Department of State Consular Information Sheet for El Salvador at *http://travel.state.gov/travel/cis_pa_tw/cis/cis_1109.html.*

applicable. For example, if no transfer taxes are imposed on a remittance transfer, a provider only needs to disclose applicable transfer fees. If both fees and taxes are imposed, the fees and taxes may be disclosed as one disclosure or as separate, itemized disclosures.

Proposed comment 31(b)(1)–1 distinguishes between the fees and taxes required to be disclosed in proposed § 205.31(b)(1)(ii) and those in proposed § 205.31(b)(1)(vi). The fees and taxes required to be disclosed by § 205.31(b)(1)(ii) include all fees and taxes imposed on the remittance transfer by the provider. For example, a provider must disclose a service fee and any state taxes imposed on the remittance transfer. By contrast, as discussed below, the fees and taxes required to be disclosed by § 205.31(b)(1)(vi) include fees and taxes imposed on the remittance transfer by a person other than the provider.

Proposed comment 31(b)(1)–1 also clarifies that the terms used to describe the fees and taxes in proposed §§ 205.31(b)(1)(ii) and (b)(1)(vi) must differentiate between such fees and taxes. For example, the terms used to describe the fees for proposed §§ 205.31(b)(1)(ii) and (b)(1)(vi) may not both be described as "Fees." The Board requests comment on whether a provider should be permitted to describe the disclosures in proposed § 205.31(b)(1)(ii) or (b)(1)(vi) using the term "Fees and Taxes" or a substantially similar term if either only fees or only taxes are being charged, or if a provider should be required to describe the amounts being disclosed more specifically using the term "Fees" or "Taxes" or a substantially similar term.

Proposed § 205.31(b)(1)(iii) requires disclosure of the total amount of the transaction, which is the sum of §§ 205.31(b)(1)(i) and (b)(1)(ii) in the currency in which the funds will be transferred. The total amount of the transaction would be required to be described using the term "Total" or a substantially similar term. Although this total is not required by the statute, the Board believes that it is appropriate to include it in the proposed pre-payment disclosure, so that a sender can understand the total amount to be paid out-of-pocket for the transaction. Some consumer testing participants stated that they would use such a disclosure to ensure that they had the funds necessary to complete the transaction on hand. Therefore, the Board proposes to require the disclosure of the total amount of the transaction pursuant to its authority under EFTA Section 904(a).

Proposed § 205.31(b)(1)(iv) requires the disclosure of any exchange rate used by the provider for the remittance transfer, rounded to the nearest 1/100th of a decimal point, consistent with EFTA Section 919(a)(2)(A)(iii). The exchange rate would be required to be described using the term "Exchange Rate" or a substantially similar term. The proposed rule does not require the disclosure of either the wholesale rate or the spread between the wholesale rate and the exchange rate offered by the provider.

Several outreach participants urged the Board to propose a rule that would permit remittance transfer providers to continue offering "floating rate" remittance transfers. A floating rate remittance transfer is a transfer requested by a sender for which the exchange rate is set when the designated recipient claims the funds. When making a floating rate transfer, the remittance transfer provider does not set or disclose a foreign exchange rate to the sender. It was suggested that the Board permit a remittance transfer provider making a floating rate transfer to disclose terms such as "unknown," "floating," "variable," or "to be determined," instead of a specified exchange rate.

However, the statute requires a remittance transfer provider to disclose to the sender the exchange rate to be used for the remittance transfer to the sender both before and at the time the sender pays for the transaction. This disclosure provides senders with certainty regarding the exchange rate and the amount of currency their designated recipients would receive.

Proposed comment 31(b)(1)(iv)–1 clarifies that if the designated recipient will receive funds in a currency other than the currency in which it will be transferred, a remittance transfer provider must disclose an exchange rate. An exchange rate that is estimated must be disclosed pursuant to the requirements of § 205.32. A remittance transfer provider may not disclose, for example, that an estimated exchange rate is "unknown," "floating," or "to be determined." The Board recognizes that the result of proposed § 205.31(b)(1)(iv) would likely be that providers will no longer offer floating rate products.

Proposed comment 31(b)(1)(iv)–2 clarifies that the exchange rate used by the provider for the remittance transfer must be rounded to the nearest 1/100th of a decimal point. However, an exchange rate need not be expressed to the nearest 1/100th of a decimal point if the amount need not be rounded. For example, if one U.S. dollar exchanges for 11.9483 Mexican pesos, a provider must disclose that the U.S. dollar exchanges for 11.95 Mexican pesos. However, if one U.S. dollar exchanges for 11.9 Mexican pesos, the provider may disclose that "US$1 = 11.9 MXN," instead of "11.90MXN."

Proposed § 205.31(b)(1)(v) requires the disclosure of the transfer amount in § 205.31(b)(1)(i), in the currency in which the funds will be received by the designated recipient, but only if fees or taxes are imposed under proposed § 205.31(b)(1)(vi). The disclosure must be described using the term "Transfer Amount" or a substantially similar term. As discussed above, a remittance transfer provider is always required to disclose the transfer amount, pursuant to proposed § 205.31(b)(1)(i). The proposal would require a remittance transfer provider to repeat the disclosure of the amount transferred, expressed in the currency in which the funds will be received by the designated recipient, if other fees and taxes are charged under proposed § 205.31(b)(1)(vi). As is the case with the transfer amount required to be disclosed by proposed § 205.31(b)(1)(i), the transfer amount required to be disclosed by proposed § 205.31(b)(1)(v) is proposed pursuant to the Board's authority under EFTA Section 904(a).

This disclosure is only required to the extent fees and taxes are imposed by parties other than the remittance transfer provider. When disclosed with such fees and taxes, the Board believes the disclosure of the transfer amount will help demonstrate to the sender how a provider calculates the amount that will ultimately be received by a designated recipient. For example, a sender could request to send $100 to Nigeria. Assuming an exchange rate of 1 U.S. dollar = 150.00 Nigerian naira, and assuming the recipient is charged an additional fee of 100 naira, the amount to be received would be 14,900 naira. By disclosing the transfer amount as 15,000 naira, and the fee as 100 naira, a sender will better understand why the recipient will receive only 14,900 naira in spite of the exchange rate. However, when the amount to be received is not reduced by any third party fees or taxes, the transfer amount under § 205.31(b)(1)(v) and the amount to be received will be the same number, so the disclosure under § 205.31(b)(1)(v) is unnecessary.

The proposed commentary provides more guidance on this requirement. Proposed comment 31(b)(1)–2 clarifies that two transfer amounts are required to be disclosed by §§ 205.31(b)(1)(i) and (b)(1)(v). First, a provider must disclose the transfer amount in the currency in which the funds will be transferred to show the calculation of the total amount of the transaction. Typically, funds will

be transferred in U.S. dollars, so the transfer amount would be expressed in U.S. dollars. However, if funds will be transferred, for example, from a Euro-denominated account, the transfer amount would be expressed in Euros.

Second, a provider must disclose the transfer amount in the currency in which the funds will be made available to the designated recipient. For example, if the funds will be picked up by the designated recipient in Japanese yen, the transfer amount would be expressed in Japanese yen. However, as discussed above, the proposed comment also clarifies that this second transfer amount need not be disclosed if fees and taxes are not imposed for the remittance transfer under proposed § 205.31(b)(1)(vi). In such cases, there is no consumer benefit to the additional information if the transferred amount is not reduced by other fees and taxes.

Finally, proposed § 205.31(b)(1)(v) also requires a remittance transfer provider to use the term "Transfer Amount" or a substantially similar term to describe the disclosure required under this paragraph. Proposed comment 31(b)(1)–2 clarifies that the terms used to describe each transfer amount should be the same.

Proposed § 205.31(b)(1)(vi) requires a remittance transfer provider to disclose any fees and taxes imposed on the remittance transfer by a person other than the provider, in the currency in which the funds will be received by the designated recipient. Such fees and taxes could include lifting fees charged in connection with an international wire transfer, a fee charged by a recipient institution or agent, or a tax imposed by a government in the designated recipient's country. In contrast to fees and taxes paid by the sender to the remittance transfer provider, which are added to the total amount paid by the sender, these fees and taxes typically reduce the amount received by the designated recipient. In many cases, the sender may not be aware of the impact of these fees and taxes. The Board believes that it is critical for senders to be aware of all fees and taxes charged in connection with the transfer, even if not imposed by the remittance transfer provider, because such fees and taxes affect the amount ultimately received by the designated recipient. Therefore, the Board is proposing the disclosure of other fees and taxes pursuant to its authority under EFTA Section 904(a).

The remittance transfer provider would be required to describe the disclosures using the term "Other Transfer Fees," "Other Transfer Taxes," or "Other Transfer Fees and Taxes," or a substantially similar term. As discussed above, proposed comment 31(b)(1)–1 clarifies that the fees and taxes required to be disclosed by proposed § 205.31(b)(1)(vi) must include all fees and taxes that are charged for the remittance transfer by a person other than the remittance transfer provider. For example, a provider would disclose fees imposed by the receiving institution or agency at pick-up, fees imposed by intermediary institutions in connection with an international wire transfer, and taxes imposed by a foreign government.

Proposed comment 31(b)(1)(vi)–1 clarifies that § 205.31(b)(1)(vi) requires the disclosure of fees and taxes in the currency in which the funds will be received by the designated recipient. A fee or tax required by § 205.31(b)(1)(vi) may be imposed in one currency, but the funds may be received by the designated recipient in another currency. In such cases, the remittance transfer provider should calculate the fee or tax to be disclosed using the exchange rate required by § 205.31(b)(1)(iv). For example, an intermediary institution in an international wire transfer may impose a fee in U.S. dollars, but funds are ultimately deposited in the recipient's account in Euros. Here, the provider would disclose the fee to the sender expressed in Euros, calculated using the exchange rate used by the provider for the remittance transfer. This is intended to facilitate the sender's understanding of the calculation of the amount to be received.

Proposed § 205.31(b)(1)(vii) requires a remittance transfer provider to disclose to the sender the amount that will be received by the designated recipient, in the currency in which the funds will be received. *See* EFTA Section 919(a)(2)(A)(i). The disclosures should be described using the term "Total to Recipient" or a substantially similar term. EFTA Section 919(a)(2)(A)(i) requires a remittance transfer provider to disclose the amount received by the designated recipient using the values of the currency into which the funds will be exchanged. As discussed above, the Board believes that the amount to be received by the designated recipient is intended to be the amount net of all fees and taxes that would affect the amount received by the designated recipient. An exchange rate, if one is applied, is just one of the factors that could affect the actual amount received by the designated recipient. Providing a total amount to be received that does not take into account all cost elements would not be consistent with the statute's goal of providing disclosures of the costs of a remittance transfer.

Proposed comment 31(b)(1)(vii)–1 clarifies that the disclosed amount to be received by the designated recipient must reflect all charges that affect the amount received, including the exchange rate and all fees and taxes imposed by the remittance transfer provider, the receiving institution, and any other party in the transmittal route of a remittance transfer. The disclosed amount received must be reduced by the amount of any fee or tax that is imposed by a person other than the provider, even if that amount is imposed or itemized separately from the transaction amount.

31(b)(2) Receipt

Proposed § 205.31(b)(2) requires a remittance transfer provider to disclose a written receipt to a sender when payment is made for the remittance transfer. As with the proposed pre-payment disclosure, the disclosures required to be provided on the receipt may be provided as applicable. Proposed § 205.31(b)(2)(i) requires the same disclosures required in the pre-payment disclosure to be disclosed on the receipt, pursuant to EFTA Section 919(a)(2)(B)(i)(I). Proposed § 205.31(b)(2) also requires disclosure of additional elements on the receipt.

Proposed § 205.31(b)(2)(ii) requires a remittance transfer provider to disclose the date of availability of funds to the designated recipient, using the term "Date Available" or a substantially similar term. EFTA Section 919(a)(2)(B)(i)(II) requires the disclosure of the promised date of delivery to the designated recipient on a receipt. While a transfer may be made available to a designated recipient within a specified time frame at a specified pick-up location, the recipient may not pick up the funds for some period of time. The Board interprets the statute to require disclosure of the date the currency will be available to the designated recipient, not on the date the funds are physically picked up by the designated recipient. Time zone differences may result in a date in the United States being different from the date in the country of the designated recipient. Thus, proposed comment 31(b)(2)–1 clarifies that the date of availability that must be disclosed is the date in the foreign country on which the funds will be available to the designated recipient.

In some instances, it may be difficult to determine the exact date on which a remittance transfer will be available to a designated recipient. For example, an international wire transfer may pass through several intermediary institutions prior to becoming available at the institution of a designated

recipient, and the time it takes to pass through these intermediaries may be difficult to determine. Nonetheless, EFTA Section 919(a)(2)(B)(i)(II) requires disclosure of a single, promised date of delivery of the funds. EFTA Section 919 does not permit a remittance transfer provider to provide an estimate of this promised date. Therefore, proposed comment 31(b)(2)–1 clarifies that a remittance transfer provider may not provide a range of dates that the remittance transfer may be available, nor an estimate of the date on which funds will be available.

As a result, remittance transfer providers will likely disclose the latest date that the funds will be available, even if funds are available sooner most of the time. The Board believes it is appropriate for a remittance transfer provider to indicate that funds may be available sooner than the disclosed date. Thus, proposed § 205.31(b)(2)(ii) permits a provider to include a statement that funds may be available to the designated recipient earlier than the date disclosed, using the term "may be available sooner" or a substantially similar term. For example, if funds may be available on January 3, but are not certain to be available until January 10, then January 10 should be disclosed as the date of availability. However, the provider may disclose "January 10 (may be available sooner)." *See* proposed comment 31(b)(2)–1.

The Board tested various terms in consumer testing for communicating the fact that funds may be available earlier than the date disclosed. Participants generally understood the meaning of the statement that funds "may be available sooner" better than other terms.

Proposed § 205.31(b)(2)(iii) implements EFTA Section 919(a)(2)(B)(i)(III) by requiring a remittance transfer provider to disclose the name and, if provided by the sender, the telephone number and/or address of the designated recipient. The proposed rule would require the remittance transfer provider to describe the disclosure using the term "Recipient" or a substantially similar term.

As discussed in more detail below, EFTA Section 919(d) provides the sender with substantive error resolution and cancellation rights. EFTA Section 919(a)(2)(B)(ii)(I) requires a remittance transfer provider to provide a statement containing information about the rights of the sender regarding the resolution of errors on the receipt or combined disclosure. However, the Board recognizes that a long disclosure routinely provided to the sender may be ineffective at conveying the most important information that a sender would need to resolve an error or cancel a transaction. At the same time, the Board believes a sender must have access to a complete description of the sender's error resolution and cancellation rights in order to effectively exercise those rights. Together, proposed §§ 205.31(b)(2)(iv) and § 205.31(b)(4), discussed below, attempt to balance the interest in providing a sender a concise disclosure with the sender's ability to obtain a full explanation of those rights.

Specifically, proposed § 205.31(b)(2)(iv) would require a remittance transfer provider to include an abbreviated statement about the sender's error resolution and cancellation rights on the receipt and on the combined disclosures using language set forth in Model Form A–37 of Appendix A or substantially similar language. The statement requires a brief disclosure of the sender's error resolution and cancellation rights, and includes a notification that a sender may contact the remittance transfer provider for a written explanation of these rights. Consumer testing participants understood and responded positively to the concise, abbreviated disclosure.

EFTA Section 919(a)(2)(B)(ii)(II) generally requires that the remittance transfer provider disclose appropriate contact information for the remittance transfer provider, its state regulator, and the Board. The Board believes that appropriate contact information includes the name, telephone number, and Web site of these entities, so that senders have multiple options for addressing any issues that may arise with respect to a remittance transfer provider.

Therefore, proposed § 205.31(b)(2)(v) requires the disclosure of the name, telephone number, and Web site of the remittance transfer provider. Proposed § 205.31(b)(2)(vi) requires a statement that the sender can contact the state agency that regulates the remittance transfer provider and the Bureau for questions or complaints about the remittance transfer provider, using language set forth in Model Form A–37 of Appendix A or substantially similar language. The statement must include contact information for these agencies, including the toll-free telephone number of the Bureau established under section 1013 of the Consumer Financial Protection Act of 2010. The proposed paragraph requires the disclosure of the Bureau, rather than the Board, because the Bureau will be the appropriate contact when the rules are issued in final form after the designated transfer date. Consumer testing participants understood the brief disclosure of the contact information, and many stated that they would call one or more of the entities to resolve any problems that the provider did not resolve.

The Board requests comment on whether and how a remittance transfer provider should be required to disclose information regarding a state agency that regulates the remittance transfer provider for remittance transfers conducted through a toll-free telephone number or on-line and, if so, what is the appropriate state agency to disclose to a sender. For example, it may be appropriate to require disclosure of the state agency that regulates the remittance transfer provider in the state in which the sender is located.

The Board also requests comment on whether it is appropriate to disclose the contact information for the Bureau, including the toll-free telephone number, in cases where the Bureau is not the primary Federal regulator for consumer complaints against the remittance transfer provider. For example, under the proposed rule, the contact information of the Bureau would be disclosed to a sender who uses a financial institution to send an international wire transfer. The sender may encounter an error and, based on the disclosure, contact the Bureau for assistance with error resolution. However, the Bureau may not have the authority to investigate such complaints against the financial institution. Therefore, the Board requests comment on whether it is appropriate to require the disclosure of the contact information of the Bureau in all circumstances. The Board further requests comment on whether it is appropriate to instead require the contact information of the appropriate Federal regulator of the remittance transfer provider for consumer complaints.

Finally, the Board requests comment on whether financial institutions that are primarily regulated by federal banking agencies, such as national banks, should be required to disclose state regulatory agency information. The Board requests comment regarding the circumstances in which it might be appropriate to disclose such a state regulatory agency.

31(b)(3) Combined Disclosure

As discussed above, EFTA Section 919(A)(5)(C) grants the Board authority to permit a remittance transfer provider to provide to a sender a single written disclosure instead of the pre-payment disclosure and receipt, if the information disclosed is accurate at the time at which payment is made in connection with the remittance transfer.

The disclosure must include the content provided in the disclosures under EFTA Sections 919(a)(2)(A) and (B).

The Board believes it is appropriate to provide the combined disclosure as a compliance option to give flexibility to remittance transfer providers. The Board determined through consumer testing that participants understood the disclosures provided on the combined disclosure. Moreover, approximately half of the consumers stated that they would prefer to receive the single, combined disclosure rather than the pre-payment disclosure and receipt. Therefore, proposed § 205.31(b)(3) generally permits a remittance transfer provider to provide the disclosures described in proposed §§ 205.31(b)(1) and (b)(2) in a single disclosure prior to payment, as applicable, as an alternative to providing the two disclosures described in proposed §§ 205.31(b)(1) and (b)(2).

Some participants who stated they would prefer to receive a pre-payment disclosure and a receipt expressed concern about receiving the combined disclosure without also receiving proof of payment for the remittance transfer. Particularly if an issue arose with the transaction, these participants felt that they would not have sufficient official documentation to assert an error with the provider. Some participants also expressed concerns about different methods for providing proof of payment with the combined disclosure. For example, some participants believed that stamping the combined disclosure as "paid" constituted sufficient proof of payment, while others believed that it was insufficient because a disclosure could easily be fraudulently stamped as "paid." The Board solicits comment on whether proof of payment should also be required for remittance transfer providers using the combined disclosure and, if so, solicits comment on appropriate methods of demonstrating proof of payment for the combined disclosure.

31(b)(4) Long Form Error Resolution and Cancellation Notice

As discussed above, the Board believes a sender must have access to a complete description of the sender's error resolution and cancellation rights, in addition to an abbreviated statement about the sender's error resolution and cancellation rights on the receipt and combined disclosures required by proposed § 205.31(b)(2)(iv). The Board believes that a sender should have access to a full description of his or her rights in order to effectively exercise those rights. Therefore, proposed § 205.31(b)(4) provides that, upon the sender's request, a remittance transfer provider must provide to the sender a notice providing a description of the sender's error resolution and cancellation rights under §§ 205.33 and .34 using Model Form A–36 of Appendix A or a substantially similar notice.

31(c) Specific Format Requirements

Proposed § 205.31(c) sets forth specific format requirements for the written and electronic disclosures required by this section. The Board's consumer testing indicated that grouping certain disclosures together or in close proximity to one another helped consumers with calculations and facilitated their comprehension of the disclosures, including fees and costs. Therefore, proposed §§ 205.31(c)(1) and (2) set forth grouping and proximity requirements for certain disclosures required under § 205.31. Proposed § 205.31(c)(3) sets forth prominence and size requirements for disclosures required by Subpart B, and proposed § 205.31(c)(4) imposes segregation requirements for disclosures provided under Subpart B, with certain specified exceptions.

31(c)(1) Grouping

Proposed § 205.31(c)(1) provides that the disclosures required by proposed §§ 205.31(b)(1)(i), (ii), and (iii) (transfer amount, transfer fees and taxes, and total amount of transaction) must be grouped together. Grouping these disclosures together would make clear to the sender that the total amount charged is comprised of the transfer amount plus any transfer fees and taxes. Proposed § 205.31(c)(1) also provides that the disclosures required by proposed §§ 205.31(b)(1)(v), (vi), and (vii) (transfer amount in the currency to be made available to the designated recipient, other transfer fees and taxes, and amount received by the designated recipient) must be grouped together. Grouping these disclosures together would make clear to the sender how the total amount to be transferred to the designated recipient, in the currency to be made available to the designated recipient, will be reduced by fees or taxes charged by a person other than the remittance transfer provider.

Proposed comment 31(c)(1)–1 clarifies that information is grouped together for purposes of Subpart B if multiple disclosures are in close proximity to one another and a sender can reasonably determine how to calculate the total amount of the transaction, and the amount that will be received by the designated recipient. Proposed Model Forms A–30 through A–35 in Appendix A, discussed in more detail below, illustrate how information may be grouped to comply with the rule. The proposed comment also clarifies that a remittance transfer provider may group the information in another manner. For example, a provider could provide the grouped information as a horizontal, rather than a vertical, calculation.

31(c)(2) Proximity

Proposed § 205.31(c)(2) provides that the exchange rate required by § 205.31(b)(1)(iv) must be disclosed in close proximity to the other disclosures on the pre-payment disclosure. The Board believes that disclosing the exchange rate in close proximity to both the calculations that demonstrate the total transaction amount, as well as the total amount the recipient will receive, will help a sender understand the effect of the exchange rate on the transaction.

Proposed § 205.31(c)(2) also provides that the error resolution and cancellation disclosures required by § 205.31(b)(2)(iv) must be disclosed in close proximity to the other disclosures on the receipt. The Board determined in consumer testing that providing a brief statement regarding error resolution and cancellation rights in a location that is near the other disclosures effectively communicated these rights to a consumer. Most participants in consumer testing noticed the error resolution statement and liked its brevity and proximity to the other disclosure elements. Therefore, the Board believes that the error resolution and cancellation disclosures should be closely proximate to the other disclosures required under § 205.31(b)(2) to prevent such disclosures from being overlooked by a sender.

The Board believes that many remittance transfer providers currently could comply with the proposed grouping and proximity requirements for written and electronic disclosures. However, as remittance transfer products continue to evolve, providing key disclosures about the terms of a remittance transfer may present new challenges. For example, remittance transfers may, in the future, increasingly be sent from the U.S. via text messaging or mobile phone applications. Therefore, the Board requests comment on how the grouping and proximity requirements in proposed §§ 205.31(c)(1) and (2) could be applied to transactions conducted via text messaging or mobile phone application.

31(c)(3) Prominence and Size

Proposed § 205.31(c)(3) sets forth the requirements regarding the prominence

and size of the disclosures required under Subpart B. The proposed rule provides that written and electronic disclosures required by Subpart B must be made in a minimum eight-point font. The disclosures that the Board developed for consumer testing used eight-point font, consistent with the font size used in a register receipt, and were provided on the front of the page shown to consumer testing participants. Participants in consumer testing generally found that the disclosures were readable, and they were able to locate the different disclosure elements during testing. The Board believes that disclosures provided in a smaller font could diminish the readability and noticeability of the disclosures. The Board solicits comment on whether a minimum font size should be required and, if so, whether an eight-point font size is appropriate.

Proposed § 205.31(c)(3) further provides that written disclosures required by Subpart B must be on the front of the page on which the disclosure is printed. In testing, participants reacted positively to front-of-page disclosures. Proposed § 205.31(c)(3) also provides that each of the written and electronic disclosures required under § 205.31(b) must be in equal prominence to each other. Participants in consumer testing generally responded positively to the model forms, and particularly to the statement regarding error resolution and cancellation, which was displayed in the same font and type size as the other disclosures. For example, some participants specifically contrasted the disclosures to error resolution or cancellation disclosures currently provided by remittance transfer providers that they stated were typically provided in "fine print" or on the back of this disclosure. Given the importance of each of the new disclosures in Subpart B, and particularly the new error resolution and cancellation rights, the Board believes that each of the disclosures should be provided in equal prominence to each other.

The Board requests comment on how the prominence and size requirements in proposed § 205.31(c)(3) could be applied to transactions performed via text messaging or mobile phone application.

31(c)(4) Segregation

Proposed § 205.31(c)(4) provides that written and electronic disclosures required by Subpart B must be segregated from everything else and must contain only information that is directly related to the disclosures required under Subpart B. Proposed comment 31(c)(4)–1 clarifies that disclosures may be segregated from other information in a variety of ways. For example, the disclosures may appear on a separate sheet of paper or may be set off from other information on a notice by outlining them in a box or series of boxes, bold print dividing lines, or a different color background.

Proposed comment 31(c)(4)–2 clarifies that, for purposes of segregation, the following information is directly related information: (i) The date and/or time of the transaction; (ii) the sender's name and contact information; (iii) the location at which the designated recipient may pick up the funds; (iv) the confirmation or other identification code; (v) a company name or logo; (vi) an indication that a disclosure is or is not a receipt or other indicia of proof of payment; (vii) a designated area for signatures or initials; and (viii) a statement that funds may be available sooner, as permitted by § 205.31(b)(2)(ii).

In general, the Board believes that permitting additional information to be included on the disclosure could adversely affect the comprehensibility of the disclosures. Nonetheless, the Board recognizes that certain information not required by the statute or regulation is integral to the transaction, such as the confirmation code that a designated recipient must tender in order to receive the funds, and a remittance transfer provider should be able to communicate this information to a consumer. The Board tested the required disclosures in a segregated format that complies with the requirements of proposed § 205.31(c)(4) and that included most of the additional information discussed above. The Board's testing indicated that the additional information permitted by paragraph (c)(4) was useful to the consumer and did not lead to information overload. Thus, the proposed rule would permit, but would not require, such additional information to be included with the required, segregated disclosures. The Board requests comment on the proposed segregation requirement and whether additional information should be permitted to be included with the required segregated disclosures.

The Board recognizes that the specific formatting requirements set forth in proposed § 205.31(c) are more prescriptive than other disclosures under Regulation E. The Board believes that certain formatting requirements are necessary in order to ensure that consumers notice and understand the disclosures provided under Subpart B. Many of the disclosures required by Subpart B have a mathematical relationship to each other, and presenting this information to consumers in a logical sequence is important for consumer understanding. The Board requests comment, however, on whether certain requirements set forth in proposed § 205.31(c) could be less prescriptive, while still ensuring that consumers are provided with clear and conspicuous disclosures.

31(d) Estimates

Proposed § 205.31(d) provides that estimated disclosures may be provided to the extent permitted by § 205.32. *See* § 205.32, below. The proposed rule would require that such disclosures be described as estimates, using the term "Estimated" or a substantially similar term and in close proximity to the estimated term or terms described. Consumer testing participants generally understood that where the term "estimated" was used in close proximity to the estimated term or terms, the actual amount could vary (for example, the amount of currency to be received could be higher or lower than the amount disclosed). Proposed comment 31(d)–1 provides examples of terms that may be used to indicate that a disclosed amount is estimated. For instance, a remittance transfer provider could describe an estimated disclosure as "Estimated Transfer Amount," "Other Estimated Fees and Taxes," or "Total to Recipient (Est.)."

31(e) Timing

Proposed § 205.31(e) sets forth the timing requirements for the disclosures required by § 205.31 in accordance with the statute. Proposed § 205.31(e)(1) provides that the disclosures required by § 205.31(b)(1) or a combined disclosure provided under § 205.31(b)(3) must be provided to the sender when the sender requests the remittance transfer, but prior to payment for the remittance transfer.

Although current practice generally is to provide written disclosures after payment is made, the Board believes that the statute precludes such an approach with respect to the combined disclosures. Specifically, EFTA Section 919(a)(5)(C) affirmatively requires that the combined disclosure be *accurate at the time at which payment is made* (emphasis added). Such a requirement would be superfluous if the combined disclosure could be provided after payment, because a disclosure provided after payment should accurately reflect the terms of the completed transaction. Therefore, the Board believes the statute requires that the combined disclosure be given prior to payment.

Proposed comment 31(e)–1 clarifies that whether a sender has requested a remittance transfer depends on the facts and circumstances. Under the proposed comment, a sender that asks a provider to send a remittance transfer, and that provides transaction-specific information to the provider in order to send funds to a designated recipient, has requested a remittance transfer. For example, a sender who asks the provider to send money to a recipient in Mexico and provides the sender and recipient information to the provider has requested the remittance transfer provider to send a remittance transfer. In contrast, a sender who solely inquires about that day's rates and fees has not requested the remittance transfer provider to send a remittance transfer.

EFTA Section 919(a)(2)(B) requires that a receipt be provided to a sender at the time at which the sender makes payment in connection with the remittance transfer. The Board believes the statute intends to permit a sender to provide a receipt after the sender pays for a transaction. However, the Board also believes that the statute generally intends the receipt to be provided within a short time period of when the sender pays for the transaction. Therefore, proposed § 205.31(e)(2) provides that a receipt provided under § 205.31(b)(2) must be provided to the sender when payment is made for the transaction. Proposed comment 31(e)–2 provides examples of when a remittance transfer provider may provide the sender a receipt. For example, a provider could give the sender a receipt after the consumer pays for the remittance transfer, but before the sender leaves the counter. A provider could also give the sender a receipt immediately before the sender pays for the transaction.

Proposed § 205.31(e)(2) further states that if a transaction is conducted entirely by telephone, a written receipt may be mailed or delivered to the sender no later than one business day after the date on which payment is made for the remittance transfer. If a transaction is conducted entirely by telephone and involves the transfer of funds from the sender's account held by the provider, the written receipt may be provided on or with the next regularly scheduled periodic statement. *See* EFTA Section 919(a)(5)(B). In some circumstances, a provider conducting such a transfer from the sender's account held by the provider is not required to provide a periodic statement. The Board believes that in such circumstances, it is appropriate to permit the provider to provide a written receipt within a similar period of time as a periodic statement. Therefore, the Board is also proposing in § 205.31(e)(2) that the written receipt may be provided within 30 days after payment is made for the remittance transfer if a periodic statement is not required, pursuant to its authority under EFTA Section 904(c). In order for the written receipt to be mailed or delivered to a sender conducting a transaction entirely by telephone at these later times, however, the remittance transfer provider must comply with the foreign language requirements of § 205.31(g)(3), discussed below.

Proposed comment 31(e)–3 clarifies that a sender may transfer funds from his or her account, as defined by § 205.2(b), that is held by the remittance transfer provider. For example, a financial institution may send an international wire transfer for a sender using funds from the sender's account with the institution. If the sender conducts such a transfer entirely by telephone, the institution may provide a written receipt on or with the sender's next regularly scheduled periodic statement or within 30 days after payment is made for the remittance transfer if a periodic statement is not required.

The Board requests comment on the timing requirements for the disclosures required by § 205.31.

31(f) Accurate When Payment Is Made

Proposed § 205.31(f) provides that disclosures required by § 205.31(b) must be accurate when a sender pays for the remittance transfer, except as permitted by proposed § 205.32. As discussed above in proposed § 205.31(e)(1), a combined disclosure provided under § 205.31(b)(3) must be provided to the sender when the sender requests the remittance transfer, but prior to payment for the remittance transfer. EFTA Section 919 does not require that the information provided in the required disclosures be guaranteed for any period of time. However, EFTA Section 919(a)(5)(C) requires that the combined disclosure must be accurate when payment is made. The Board believes the statute intends to ensure that the information disclosed to senders in the required disclosures reflects the terms of the transaction.

Proposed comment 31(f)–1 clarifies that a remittance transfer provider is not required to guarantee the terms of the remittance transfer in the disclosures required by § 205.31(b) for any specific period of time. However, if any of the disclosures required by § 205.31(b) are not accurate when a sender pays for the remittance transfer, a provider must give new disclosures before receiving payment for the remittance transfer. For example, a sender at a retail store may be provided a pre-payment disclosure under § 205.31(b)(1) at a customer service desk, but the sender may decide to leave the desk to go shopping. Upon the sender's return to the customer service desk an hour later, the sender must be provided a new pre-payment disclosure if any of the information has changed. However, the sender need not be provided a new disclosure if the information has not changed.

31(g) Foreign Language Disclosures

EFTA Section 919(b) provides that disclosures required under EFTA Section 919 must be made in English and in each of the foreign languages principally used by the remittance transfer provider, or any of its agents, to advertise, solicit, or market, either orally or in writing, at that office. Proposed § 205.31(g)(1) implements EFTA Section 919(b) for written or electronic disclosures generally, with the modifications discussed below. In addition, the Board proposes to exempt oral disclosures and written receipts for telephone transactions from the general foreign language disclosure requirements of EFTA Section 919(b) and proposed § 205.31(g)(1). Instead, the Board is proposing different foreign language requirements for those disclosures under proposed §§ 205.31(g)(2) and (g)(3), respectively.

31(g)(1) General

Proposed § 205.31(g)(1) contains the general requirements for foreign language disclosures. Specifically, proposed § 205.31(g)(1) provides that disclosures required under Subpart B, other than oral disclosures and written receipts for telephone transactions, must be made in English and either: (i) In each of the foreign languages principally used by the remittance transfer provider to advertise, solicit, or market remittance transfer services, either orally, in writing, or electronically, at that office; or (ii) if applicable, in the foreign language primarily used by the sender with the remittance transfer provider to conduct the transaction (or for written or electronic disclosures made pursuant to § 205.33, in the foreign language primarily used by the sender with the remittance transfer provider to assert the error), provided that such foreign language is principally used by the remittance transfer provider to advertise, solicit, or market remittance transfer services, either orally, in writing, or electronically, at that office.

Proposed § 205.31(g)(1) generally implements EFTA Section 919(b) with

the following modifications. First, proposed § 205.31(g)(1) only applies to written or electronic disclosures. Oral disclosures are addressed separately in proposed § 205.31(g)(2), discussed below. Second, to simplify the statutory language in EFTA Section 919(b), proposed § 205.31(g)(1) does not incorporate the term "or any of its agents." This is consistent with other sections of Subpart B that reference the remittance transfer provider, where the reference also applies to any of the remittance transfer provider's agents to the extent such agents act for the provider. Third, while EFTA Section 919(b) does not explicitly reference electronic advertising, soliciting, or marketing, proposed § 205.31(g)(1) provides that foreign languages principally used by the remittance transfer provider to advertise, solicit, or market electronically are also triggered.

Fourth, proposed § 205.31(g)(1) is triggered only by foreign language advertisements, solicitations, or marketing of remittance transfer services, and not by foreign language advertisements, solicitations, or marketing of other products or services. Many remittance transfer provider agent offices are located in retail establishments where other financial and non-financial products or services are advertised, solicited, or marketed. For example, an agent of a remittance transfer provider may be located at a grocery store or convenience store. A remittance transfer provider should be able to institute controls on an agent's advertising of the provider's remittance transfer services, but a provider would have little or no control over an agent's advertising practices for any other product or service. Therefore, proposed § 205.31(g)(1) clarifies that only advertisements, solicitations, or marketing of the provider's remittance transfer services trigger foreign language disclosures under the rule.

Finally, proposed § 205.31(g)(1) would allow a remittance transfer provider to fulfill its obligations by providing the consumer with disclosures in English and, if applicable, the one triggered foreign language primarily used by the sender with the remittance transfer provider to conduct the transaction or assert an error in lieu of *each* of the triggered foreign languages. Permitting this flexibility facilitates compliance with the provision, particularly for a remittance transfer provider who advertises, solicits, and markets in several foreign languages. In such cases, the remittance transfer provider may find it cumbersome to provide disclosures in English and in multiple foreign languages. Such flexibility may also benefit consumers because disclosures containing several foreign languages may also be confusing for consumers to read and understand.

As a result, the Board proposes to use its authority under EFTA Section 904(c) to give remittance transfer providers the flexibility to provide senders with written or electronic disclosures in English and either: (i) In each foreign language that the remittance transfer provider principally uses to advertise, solicit, or market remittance transfer services at that office; or (ii) if applicable, in the foreign language primarily used by the sender with the remittance transfer provider to conduct the transaction (or for written disclosures provided pursuant to proposed § 205.33, the foreign language primarily used by the sender with the remittance transfer provider to assert the error), provided that such foreign language is principally used to advertise, solicit, or market remittance transfer services at that office. Proposed §§ 205.31(g)(1)(i) and (ii).

In order to clarify proposed § 205.31(g)(1), the Board also proposes several comments to provide guidance on the terms "principally used," "advertise, solicit, and market," and "at that office."

Principally Used

Proposed comment 31(g)(1)–1 clarifies when a foreign language is principally used. The term "principally used" could be interpreted to mean the foreign language that is used most frequently or most prominently. The Board, however, does not believe this meaning is consistent with the statutory language, which provides that disclosures must be provided "in each of the foreign languages" principally used. Thus, the statute indicates that more than one foreign language may be principally used. Consequently, the term "principally used" does not appear to be limited to the one foreign language that is used most by the remittance transfer provider.

The Board also does not believe that any use of a foreign language by a remittance transfer provider to advertise, solicit, or market should automatically trigger the foreign language disclosure requirement. Such a reading would essentially read out the term "principally" from the statute. Therefore, the Board believes that proper interpretation of the statute requires a reading that is between these two extremes.

The term "principally used" could signify the use of a foreign language in a manner that is not minor or incidental. The Board believes this interpretation may be more consistent with the statute. The Board also believes that whether a foreign language is principally used must be determined based on the facts and circumstances. In the Board's view, factors that contribute to whether a foreign language is principally used include: (i) The frequency with which the remittance transfer provider advertises, solicits, or markets remittance transfers in a foreign language at a particular office; (ii) the prominence of such advertising, soliciting, or marketing in that language at that office; and (iii) the specific foreign language terms used to advertise, solicit, or market remittance transfer services at that office. The Board believes that when a foreign language is used frequently and is featured prominently to advertise, solicit, or market remittance transfer services at a particular office, and when the specific foreign language terms used in such advertisements, solicitations, and marketing convey the availability of remittance transfer services, it may lead a reasonable consumer to expect to receive information on remittance transfer services in that language at that office. In such a case, the Board believes the foreign language has been principally used by the remittance transfer provider to advertise, solicit, or market remittance transfer services at that office.

Proposed comment 31(g)(1)–1 provides guidance on when a foreign language may be principally used to advertise, solicit, or market remittance transfer services and includes examples to illustrate when a foreign language is principally used and when there is incidental use of the language. Specifically, proposed comment 31(g)(1)–1 provides that an advertisement for remittance transfer services, including rate and fee information, that is featured prominently at an office and is entirely in English, except for a sentence advising consumers to "Ask us about our foreign remittance services" in a foreign language, may create an expectation that a consumer could receive information on remittance transfer services in that foreign language. Thus, based on the prominence of the advertisement using the foreign language and the specific terms of the foreign language used in the advertisement inviting a consumer to inquire about remittance transfer services, the foreign language would be considered to be principally used to advertise, solicit, or market remittance transfer services. In contrast, the

proposed comment provides that an advertisement for remittance transfer services, including rate and fee information, that is featured prominently at an office and is entirely in English, except for the incidental use of one word of greeting in a foreign language, may not create an expectation that a consumer could receive information on remittance transfer services in that foreign language, and would, therefore, not trigger the foreign language disclosure requirement, based on the specific foreign language term used.

The Board also considered an objective standard based on whether a foreign language meets a certain percentage threshold of a remittance transfer provider's advertisements at a particular office as an appropriate way to measure if such a language is principally used. However, such a standard would be arbitrary, may be difficult to administer, and may inappropriately exclude instances where a foreign language is principally used to advertise, solicit or market remittance transfers, even if the number of advertisements in the foreign language is nominally low. For these reasons, the Board believes that a facts-and-circumstances approach that considers not only the frequency with which the foreign language is used, but also the prominence with which the foreign language is featured and the specific foreign language terms used in any advertisement, soliciting, or marketing, would best effectuate the statute and protect consumers.

Advertise, Solicit, or Market

Neither the EFTA nor Regulation E defines advertising, soliciting, or marketing.[32] The general concept of advertising, soliciting, or marketing is explained in other Board regulations. *See, e.g.,* Regulation Z, 12 CFR 226.2(a)(2) and associated commentary; Regulation DD, 12 CFR 230.2(b) and 11(b) and associated commentary.

Proposed comment 31(g)(1)–2 provides both positive and negative examples of advertising, soliciting, or marketing in a foreign language. The proposed comment borrows applicable examples from the commentary to §§ 226.2(a)(2) and 230.2(b) regarding the definition of "advertisement," as well as examples related to the promotion of overdrafts under § 230.11(b). The proposed comment includes examples that could apply to a remittance transfer provider's interactions with a consumer.

At That Office

Under EFTA Section 919(b) and proposed § 205.31(g)(1), the requirement that a remittance transfer provider provide foreign language disclosures is based on whether the foreign language is principally used to advertise, solicit, or market "at that office." Proposed comment 31(g)(1)–3 clarifies the meaning of "office" as used in § 205.31(g)(1). The Board believes that an office of a remittance transfer provider includes both physical and non-physical locations where remittance transfer services are offered to consumers. Because transactions may be conducted, and errors may be asserted, by telephone and through the Internet, the proposal states that an office includes any telephone number or Web site through which a consumer can complete a transaction or assert an error. Therefore, a telephone number or Web site that provides general information about the remittance transfer provider, but through which a consumer does not have the ability to complete a transaction or assert an error, is not an office.

Proposed comment 31(g)(1)–3 also clarifies that a location need not exclusively offer remittance transfer services in order to be considered an office for purposes of § 205.31(g)(1). Many agents of remittance transfer providers are located in retail establishments where other financial and non-financial products or services may be sold. The proposed comment includes an example stating that if an agent of a remittance transfer provider is located in a grocery store, the grocery store is considered an office for purposes of § 205.31(g)(1).

Proposed comment 31(g)(1)–4 provides guidance on the term "at that office." Specifically, the proposed comment states that any advertisement, solicitation, or marketing that is posted, provided, or made at a physical office is considered to be advertising, soliciting, or marketing at that office. Moreover, proposed comment 31(g)(1)–4 also provides that advertisements, solicitations, or marketing posted, provided, or made on a Web site of a remittance transfer provider, or during a telephone call with the remittance transfer provider also constitute advertising, soliciting, or marketing at an office of a remittance transfer provider.

The proposed comment also states that for error resolution disclosures provided pursuant to § 205.33, the relevant office is the office in which the sender first asserts the error and not the office where the remittance transfer was conducted. The Board believes the office in which the sender first asserts the error is the appropriate office to determine whether the foreign language advertising disclosure requirement has been triggered because the remittance transfer provider may not know where the disputed remittance transfer was conducted or may not be able to determine whether the foreign language advertising disclosure requirement was triggered at that office.

31(g)(2) Oral Disclosures

As noted above, the Board proposes to exempt oral disclosures from the general foreign language disclosure rule. Instead, proposed § 205.31(g)(2) would require that disclosures permitted to be provided orally under § 205.31(a)(3) for transactions conducted entirely by telephone must be made in the language primarily used by the sender with the remittance transfer provider to conduct the transaction. Proposed § 205.31(g)(2) would also provide that disclosures permitted to be provided orally under proposed § 205.31(a)(4) for error resolution purposes must be made in the language primarily used by the sender with the remittance transfer provider to assert the error.

The Board believes that application of the foreign language disclosure requirement in EFTA Section 919(b) to oral disclosures may not be effective or optimal. First, under EFTA Section 919(b), a foreign language must be principally used by the remittance transfer provider to advertise, solicit, or market remittance transfers at an office in order to be required for disclosures. If this trigger applied to oral disclosures, a sender conducting a transaction or asserting an error in a foreign language that did not meet the foreign language advertising trigger may only receive required oral disclosures in English. Such a result could undermine a sender's ability to comprehend important information related to the transaction. This is especially problematic if the remittance transfer provider conducted the actual transaction or communicated with the sender regarding the error asserted by the sender in a foreign language, then switched to English to disclose the required information under Subpart B. Instead, the Board believes senders would benefit from having the required disclosures provided in the same language primarily used by the sender

[32] Regulation E contains some guidance on whether a card, code, or other device is "marketed or labeled as a gift card or gift certificate" or "marketed to the general public" for purposes of the Board's gift card rule. *See* comments 20(b)(2)–2, 20(b)(2)–3, and 20(b)(4)–1. However, that guidance focuses on a narrow set of circumstances and does not address more broadly what actions generally constitute advertising, soliciting, or marketing.

with the remittance transfer provider to conduct the transaction or assert the error, regardless of whether the language meets the foreign language advertising trigger. As a result, the Board believes foreign language disclosures are especially important in this context.

Second, the Board believes disclosures that are permitted to be provided orally under §§ 205.31(a)(3) and (4) should be provided only in the language primarily used to conduct the transaction or assert the error. EFTA Section 919(b) requires that disclosures be given in English and in each of the triggered foreign languages. Thus, if EFTA Section 919(b) applied to oral transactions, a sender conducting a telephone transaction or receiving the results of an error investigation orally could be given disclosures in English and in every foreign language triggered by the regulation. It is unlikely that providing oral disclosures in two or more languages would be helpful to senders.

For these reasons, the Board proposes to use its authority under EFTA Section 904(c) to exempt oral disclosures from the foreign language requirement under EFTA Section 919(b). At the same time, the Board proposes to use its authority under EFTA Section 919(a)(5)(A) to condition the availability of oral disclosures for transactions conducted entirely by telephone on the remittance transfer provider making such disclosures in the language primarily used by the sender with the remittance transfer provider to conduct the transaction. Furthermore, the Board proposes to use its EFTA Section 904(a) authority to permit oral disclosure of certain error resolution investigation results, as discussed below in the supplementary information to § 205.33(c)(1), provided that the oral disclosure of such error resolution investigation results must be made in the language primarily used by the sender with the remittance transfer provider to assert the error.

31(g)(3) Written Receipt for Telephone Transactions

Proposed § 205.31(g)(3) would require that written receipts required to be provided to the sender after payment under proposed § 205.31(e)(2) for transactions conducted entirely by telephone must be made in English and, if applicable, in the foreign language primarily used by the sender with the remittance transfer provider to conduct the transaction. The Board proposes to implement this provision by using its authority under EFTA Section 904(c) to exempt such written receipts from the foreign language disclosure requirement of EFTA Section 919(b). At the same time, the proposal imposes a new requirement that the remittance transfer provider make such disclosures in English, and if applicable, in the language primarily used by the sender with the remittance transfer provider to conduct the transaction, regardless of whether such foreign language is primarily used by the remittance transfer provider to advertise, solicit, or market remittance transfers. *See* EFTA Section 919(a)(5)(B).

The Board believes that because the pre-payment disclosures will be provided orally in the language primarily used by the sender with the remittance transfer provider to conduct the transaction entirely by telephone under proposed § 205.31(g)(2), the same language should be used in the written receipt provided to the sender under proposed § 205.31(g)(3) for consistency, regardless of whether the language meets the foreign disclosure advertising trigger.

Alternatively, the Board could apply the general rule proposed in § 205.31(g)(1) to the written receipt provided for transactions conducted entirely by telephone. This would mean that a remittance transfer provider would not be obligated to provide the written receipt in a foreign language, even if such foreign language was used to conduct the telephone transaction, unless the foreign language was principally used to advertise, solicit, or market remittance transfers during the telephone call.

In the Board's outreach with industry, remittance transfer providers generally stated that providing written disclosures in a foreign language can be more costly and burdensome than providing oral disclosures in a foreign language. Therefore, the Board requests comment on whether proposed § 205.31(g)(3) might have the unintended consequence of reducing the number of foreign languages remittance transfer providers may offer for telephone transactions.

General Clarifications

The Board also proposes additional commentary to provide general guidance on issues that affect each of the subsections of § 205.31(g) discussed above. Proposed comment 31(g)–1 addresses the number of languages contained in a written or electronic disclosure. EFTA Section 919(b) does not limit the number of languages that may be used on a single disclosure. However, the Board is concerned that too many languages on a single written document may diminish a consumer's ability to read and understand the disclosures. The Board's proposed rule in § 205.31(g)(2) and (g)(3) regarding oral disclosures and written receipts for telephone transactions, as discussed above, limit the number of languages used in the disclosures. For written or electronic disclosures under § 205.31(g)(1), however, there is no stated limit to the number of languages appearing on a disclosure.

Proposed comment 31(g)–1 suggests that a single written or electronic document containing more than three languages is not likely to be helpful to a consumer. The proposed commentary is not a strict limit and leaves open the possibility that a single written or electronic document may contain more than three languages yet still be helpful to a consumer, depending on how the information is presented. The Board seeks comment on whether three languages is an appropriate suggested limit to the number of languages in a single written or electronic document and whether the regulation should strictly limit the number of languages that may be contained in a single written or electronic disclosure.

As discussed above, proposed § 205.31(g)(1) provides flexibility to remittance transfer providers to provide senders with written or electronic disclosures in English and either: (i) In each foreign language that the remittance transfer provider principally uses to advertise, solicit, or market at that office; or (ii) if applicable, in the foreign language primarily used by the sender with the remittance transfer provider to conduct the transaction (or for written or electronic disclosures pursuant to § 205.33, the foreign language primarily used by the sender with the remittance transfer provider to assert the error), provided that the foreign language is principally used to advertise, solicit, or market at that office. Proposed comment 31(g)–1 clarifies that the remittance transfer provider may provide disclosures in a single document with both languages or in two separate documents with one document in English and the other document in the applicable foreign language.

To illustrate this concept, the Board proposes several examples in comment 31(g)–1. If a remittance transfer provider principally uses only Spanish and Vietnamese to advertise, solicit, or market remittance transfer services at a particular office, the proposed comment provides that the remittance transfer provider may provide all of its consumers with disclosures in English, Spanish, and Vietnamese, regardless of the language the consumer uses with the remittance transfer to conduct the transaction or assert the error.

Alternatively, if a sender primarily uses Spanish to conduct the transaction or assert an error, the proposed comment states that the remittance transfer provider may provide the written disclosure in English and Spanish, whether in a single document or two separate documents. If the sender primarily uses English with the remittance transfer provider to conduct the transaction or assert an error, the remittance transfer provider may provide the written or electronic disclosure solely in English. If the sender primarily uses a language with the remittance transfer provider to conduct the transaction or assert an error that the remittance transfer provider does not use to advertise, solicit, or market either orally, in writing, or electronically, at that office, the proposed comment provides that the remittance transfer provider may provide the written or electronic disclosure solely in English.

Proposed comment 31(g)–2 clarifies when a language is primarily used by the sender with the remittance transfer provider to conduct a transaction and assert an error. As discussed above, under proposed § 205.31(g)(1)(ii), remittance transfer providers have the flexibility to provide written or electronic disclosures in English, and if applicable, in the foreign language primarily used by the sender with the remittance transfer provider to conduct the transaction. Proposed § 205.31(g)(1)(ii) also provides that for written or electronic disclosures provided pursuant to § 205.33, remittance transfer providers have the flexibility to provide such disclosures in English, and if applicable, in the foreign language primarily used by the sender with the remittance transfer provider to assert the error. Also, as discussed above, proposed §§ 205.31(g)(2) and (g)(3) require disclosures in the language that is primarily used by the sender with the remittance transfer provider to conduct the transaction or assert an error.

Proposed comment 31(g)–2 provides guidance on determining the language that is primarily used by the sender with the remittance transfer provider to conduct a transaction or assert an error. The proposed comment clarifies that the language primarily used by the sender with the remittance transfer provider to conduct the transaction is the primary language used to convey the information necessary to complete the transaction. Proposed comment 31(g)–2 also states that the language primarily used by the sender with the remittance transfer provider to assert an error is the primary language used by the sender with the remittance transfer provider to provide the information required by § 205.33(b) to assert an error.

The proposed comment also provides examples to clarify this concept. Under one proposed example, a sender initiates a conversation with a remittance transfer provider in English and expresses interest in sending a remittance transfer to Mexico. If, based on that knowledge, the remittance transfer provider offers to communicate in Spanish with the sender, and the sender conveys the other information necessary to complete the transaction in Spanish, including the designated recipient's information and the amount and funding source of the transfer, then Spanish is the language primarily used by the sender with the remittance transfer provider to conduct the transaction. Under a second example, a sender initiates a conversation with the remittance transfer provider and tells the remittance transfer provider that there was a problem with a prior remittance transfer to Vietnam. If, based on that knowledge, the remittance transfer provider offers to communicate in Vietnamese with the sender, and the sender conveys the information required by § 205.33(b) to assert an error in Vietnamese, then Vietnamese is the language primarily used by the sender with the remittance transfer provider to assert the error.

Section 205.32 Estimates

In some instances, a remittance transfer provider will not know the amount of currency that a designated recipient will receive. This may happen because the provider does not know the applicable exchange rate or the applicable fees or taxes that may be deducted from the amount transferred. To address these circumstances, the statute provides two exceptions to the requirement to disclose the amount of currency that will be received by the designated recipient.

The first exception (the "temporary exception") is in EFTA Section 919(a)(4) and states that, subject to rules prescribed by the Board, disclosures regarding the amount of currency that will be received by the designated recipient will be deemed to be accurate so long as the disclosure provides a reasonably accurate estimate of the amount of foreign currency to be received. A remittance transfer provider may use this exception only if: (1) It is an insured depository institution or insured credit union (collectively, an "insured institution" as described in more detail below) conducting a transfer through an account that the sender holds with it; and (2) it is unable to know, for reasons beyond its control, the amount of currency that will be made available to the designated recipient. *See* EFTA Section 919(a)(4). This exception expires five years after the enactment of the Dodd-Frank Act, or July 20, 2015. If the Board determines that expiration of the exception would negatively affect the ability of insured institutions to send remittances to foreign countries, the Board may extend the exception to not longer than ten years after enactment. *See* EFTA Section 919(a)(4)(B).

The second exception (the "permanent exception") is in EFTA Section 919(c). It states that if the Board determines that a recipient country does not legally allow, or the method by which transactions are made in the recipient country do not allow, a remittance transfer provider to know the amount of currency that will be received by the designated recipient, the Board may prescribe rules addressing the issue. EFTA Section 919(c) further states that the Board's rules shall include standards for the remittance transfer provider to provide: (1) A receipt that is consistent with EFTA Sections 919(a) and (b); and (2) a reasonably accurate estimate of the foreign currency to be received. The second exception does not have a sunset date.

The Board proposes § 205.32 to implement the exceptions set forth in EFTA Sections 919(a)(4) and (c). Proposed § 205.32 would permit a remittance transfer provider to disclose estimates if it cannot determine exact amounts for the reasons specified in the statute.

32(a) Temporary Exception for Insured Institutions

Proposed § 205.32(a)(1) implements the temporary exception set forth in EFTA Section 919(a)(4)(A) by permitting estimates to be provided in accordance with proposed § 205.32(c) for the disclosures required by proposed §§ 205.31(b)(1)(iv)–(vii), if: (1) A remittance transfer provider cannot determine exact amounts for reasons beyond its control; (2) a remittance transfer provider is an insured institution; and (3) the remittance transfer is sent from the sender's account with the insured institution. For purposes of proposed § 205.32, the term "insured institution" includes insured depository institutions as defined in Section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) and insured credit unions as defined in Section 101 of the Federal Credit Union Act (12 U.S.C. 1752). *See* proposed § 205.32(a)(3).

EFTA Section 919(a)(4) only addresses estimates for the amount of currency that will be received by a designated recipient. Nonetheless, proposed § 205.32(a) also would permit disclosure of an estimate for the exchange rate, the transfer amount in the currency made available to the designated recipient, the fees imposed by intermediaries in the transmittal route, and taxes imposed in the recipient country that are a percentage of the amount transferred to the designated recipient. These items must be disclosed under proposed § 205.31(b)(1)(iv), (v), and (vi), respectively. The inability to determine the exact amount of one or more of these additional items is the reason why the amount of currency that will be received by the designated recipient must be estimated. The Board believes that, by permitting an estimate of the amount of currency that will be received, Congress intended to permit estimates of the components that determine that amount. Furthermore, the Board believes that permitting estimates of these additional items will help consumers to understand why the amount of currency that will be received is displayed as an estimate.

EFTA Section 919(a)(4) permits the use of an estimate of the amount of foreign currency that will be received by a designated recipient. However, proposed § 205.32(a) permits an insured institution to provide an estimate of the currency that will be received, whether it is in U.S. dollars or foreign currency. Many consumers send remittance transfers which are to be paid to the designated recipient in U.S. dollars. When an insured institution sends a remittance via international wire transfer, fees are sometimes deducted by intermediary institutions in the transmittal route with which the sending institution has no correspondent relationship.[33] Although the insured institution may not know the total amount of these fees in advance, it must disclose them to the sender under proposed § 205.31(b)(1)(vi). The amount of currency that will be received by the designated recipient, whether that currency is U.S. dollars or foreign currency, will be an estimate if fees imposed by intermediaries are estimates. Therefore, the Board is exercising its authority under EFTA Section 904(c) to allow an estimate of the amount of currency that will be received, even if that currency is in U.S. dollars.

The proposed commentary to proposed § 205.32(a)(1) provides further guidance on the temporary exception. Proposed comment 32(a)(1)–1 explains that an insured institution cannot determine exact amounts "for reasons beyond its control" when: (1) The exchange rate required to be disclosed under § 205.31(b)(1)(iv) is set by a person with which the insured institution has no correspondent relationship after the insured institution sends the remittance transfer; or (2) fees required to be disclosed under § 205.31(b)(1)(vi) are imposed by intermediary institutions along the transmittal route and the insured institution has no correspondent relationship with those institutions.

Proposed comment 32(a)(1)–2 provides examples of scenarios that qualify for the temporary exception. For instance, an insured institution cannot determine the exact exchange rate required to be disclosed under § 205.31(b)(1)(iv) for an international wire transfer if the insured institution does not set the exchange rate, and the rate is instead later set by the designated recipient's institution with which the insured institution does not have a correspondent relationship. The insured institution will not know the date on which funds will be deposited into the recipient's account, and will not know the exchange rate that will be applied on that date. Proposed comment 32(a)(1)–2.i. Further, an insured institution cannot determine the exact fees required to be disclosed under § 205.31(b)(1)(vi) if an intermediary institution or the designated recipient's institution, with which the insured institution does not have a correspondent relationship, imposes a transfer or conversion fee. Proposed comment 32(a)(1)–2.ii. Finally, an insured institution cannot determine the exact taxes required to be disclosed under § 205.31(b)(1)(vi) if the insured institution cannot determine the applicable exchange rate or other fees, as described in proposed comments 32(a)(1)–2.i and –2.ii, and the recipient country imposes a tax that is a percentage of the amount transferred to the designated recipient, less any other fees. Proposed comment 32(a)(1)–2.iii.

Proposed comment 32(a)(1)–3 provides several examples of when an insured institution will not qualify for the exception in § 205.32(a). In each case, the insured institution can determine the exact amount for the relevant disclosure. First, the proposed comment explains that an insured institution can determine the exact exchange rate required to be disclosed under § 205.31(b)(1)(iv) if it converts the funds into the local currency to be received by the designated recipient using an exchange rate that it sets. Proposed comment 32(a)(1)–3.i. Second, the proposed comment states that an insured institution can determine the exact fees required to be disclosed under § 205.31(b)(1)(vi) if it has negotiated specific fees with a correspondent institution, and the correspondent institution is the only institution in the transmittal route to the designated recipient's institution. Proposed comment 32(a)(1)–3.ii. Finally, the proposed comment notes that an insured institution can determine the exact taxes required to be disclosed under § 205.31(b)(1)(vi) if the recipient country imposes a tax that is a percentage of the amount transferred to the designated recipient, less any other fees, and the insured institution can determine the exact amount of the applicable exchange rate and other fees. Similarly, the insured institution can determine these taxes if the recipient country imposes a flat tax that is not tied to the amount transferred. Proposed comment 32(a)(1)–3.iii.

If an insured institution can determine the exact exchange rate, fees, and taxes required to be disclosed under proposed § 205.31(b)(1)(iv) and (vi), it can determine the exact amounts to be derived from calculations involving them. For instance, the insured institution could determine both the transfer amount expressed as local currency and the amount in local currency that will be received by the designated recipient required to be disclosed under proposed § 205.31(b)(1)(v) and (vii), respectively.

Proposed § 205.32(a)(2) provides that proposed § 205.32(a)(1) expires on July 20, 2015, consistent with the five-year term set forth in EFTA Section 919(a)(4)(B). EFTA Section 919(a)(4)(B) gives the Board authority to extend the application of proposed § 205.32(a)(2) to July 20, 2020, if it determines that termination of the exception would negatively affect the ability of insured institutions to send remittances to foreign countries. The Board understands that this exception was intended to avoid immediate disruption of remittance transfer services by insured institutions using international wire transfers. The exception gives these financial institutions time to reach agreements and modify systems to provide accurate disclosures.

[33] A correspondent relationship is where one financial institution has a contractual arrangement to hold deposits and provide services to another financial institution, which has limited access to certain financial markets. Such agreements permit the financial institution to provide services to account holders without incurring the expense of setting up a branch in another city or country.

32(b) Permanent Exception for Transfers to Certain Countries

Proposed § 205.32(b) implements the permanent exception set forth in EFTA Section 919(c) by allowing estimates to be provided in accordance with proposed § 205.32(c) for amounts required to be disclosed under proposed § 205.31(b)(1)(iv)–(vii) for transfers to certain countries. Like the temporary exception in EFTA Section 919(a)(4), the permanent exception in EFTA Section 919(c) only addresses estimates for the amount of currency that will be received by a designated recipient. For the reasons described above, proposed § 205.32(b) also permits disclosure of estimates for the exchange rate, the transfer amount in the currency made available to the designated recipient, and taxes imposed in the recipient country that are a percentage of the amount transferred to the designated recipient. These items are required to be disclosed under proposed § 205.31(b)(1)(iv), (v), and (vi), respectively.

32(b)(1) Laws of Recipient Country

Proposed § 205.32(b)(1) allows estimates to be provided in accordance with proposed § 205.32(c) for the disclosures required by proposed § 205.31(b)(1)(iv)–(vii), if a remittance transfer provider cannot determine exact amounts because the laws of the recipient country do not permit such a determination.

The proposed commentary provides guidance on this standard. Specifically, proposed comment 32(b)(1)–1 clarifies that the "laws of the recipient country" do not permit a remittance transfer provider to determine exact amounts when a law or regulation of the recipient country requires the person making funds directly available to the designated recipient to apply an exchange rate that is: (1) Set by the government of the recipient country after the remittance transfer provider sends the remittance transfer; or (2) set when the designated recipient chooses to claim the funds.

Proposed comments 32(b)(1)–2.i and –2.ii provide examples illustrating the application of the exception. Proposed comment 32(b)(1)–2.i explains that the laws of the recipient country do not permit a remittance transfer provider to determine the exact exchange rate required to be disclosed under § 205.31(b)(1)(iv) when, for example, the government of the recipient country sets the exchange rate daily and the funds are made available to the designated recipient in the local currency the day after the remittance transfer provider sends the remittance transfer. Under such circumstances, an estimate for the exchange rate is permitted because the remittance transfer provider cannot determine a rate that a foreign government has yet to set.

In contrast, proposed comment 32(b)(1)–2.ii explains that the laws of the recipient country permit a remittance transfer provider to determine the exact exchange rate required to be disclosed under § 205.31(b)(1)(iv) if, for example, the government of the recipient country pegs the value of its currency to the U.S. dollar.

32(b)(2) Method by Which Transactions Are Made in the Recipient Country

Proposed § 205.32(b)(2) allows estimates to be provided in accordance with proposed § 205.32(c) for the disclosures required by proposed § 205.31(b)(1)(iv)–(vii), if a remittance transfer provider cannot determine exact amounts because the method by which transactions are made in the recipient country does not permit such a determination.

Based on the Board's outreach and interpretation of the statute, the Board believes that the exception for methods by which transactions are made in the recipient country was intended to permit estimates for certain international ACH transactions. Specifically, the Board interprets the exception to apply to remittances sent via international ACH on terms negotiated by the government of the United States and the government of a recipient country where the exchange rate is set after the transfer is sent. Accordingly, proposed comment 32(b)(2)–1 states that the "method by which transactions are made in the recipient country" does not permit a remittance transfer provider to determine exact amounts when transactions are sent via international ACH on terms negotiated between the United States government and recipient country's government, under which the exchange rate is set by the recipient country's central bank after the provider sends the remittance transfer.

Proposed comment 32(b)(2)–2 provides examples illustrating the application of the exception provided under proposed § 205.32(b)(2). Proposed comment 32(b)(2)–2.i provides an example of when a remittance transfer would qualify for the exception. It explains that a transfer would qualify for the exception when sent via international ACH on terms negotiated between the United States government and the recipient country's government, under which the exchange rate is set by the recipient country's central bank on the business day after the provider has sent the remittance transfer. Under such circumstances, the provider cannot determine the exact exchange rate required to be disclosed under § 205.31(b)(1)(iv). Remittance transfers sent via Directo a México currently would qualify for the proposed § 205.32(b)(2) exception.

Proposed comments 32(b)(2)–2.ii and –2.iii provide examples of when a remittance transfer would not qualify for the § 205.32(b)(2) exception. Proposed comment 32(b)(2)–2.ii explains that a remittance transfer provider would not be permitted to provide estimates under the proposed § 205.32(b)(2) exception if it sends a remittance transfer via international ACH on terms negotiated between the United States government and a private-sector entity in the recipient country, under which the exchange rate is set by the institution acting as the entry point to the recipient country's payments system on the next business day. In this case, transactions are made using a method negotiated between the United States and a private entity. Nonetheless, remittance transfers sent using such a method may qualify for the § 205.32(a) temporary exception. In addition, proposed comment 32(b)(2)–2.iii explains that a remittance transfer provider would not qualify for the § 205.32(b)(2) exception if, for example, it sends transfers via international ACH on terms negotiated between the United States government and the recipient country's government, under which the exchange rate is set by the recipient country's central bank before the sender requests a transfer. In such a case, the remittance transfer provider can determine the exchange rate required to be disclosed.

During outreach, several industry members expressed the view that international wire transfers are a method by which transactions are made in a recipient country that does not allow the remittance transfer provider to know the amount of currency that will be received by a designated recipient and should qualify for the permanent exception in EFTA Section 919(c). The Board does not believe that the permanent exception in EFTA Section 919(c) applies to international wire transfers because wire transfers are not a method by which transactions are made that are particular to a specific country or group of countries. Additionally, the application of the permanent exception to international wire transfers would make the temporary exception superfluous. Accordingly, the proposed exception in

§ 205.32(b)(2) does not apply to international wire transfers.

32(c) Bases for Estimates

If a remittance transfer qualifies for either the temporary exception in EFTA Section 919(a)(4) or the permanent exception in EFTA Section 919(c), the statute permits the provider to disclose a reasonably accurate estimate to the sender. The Board believes that providing an exhaustive list of approaches that will result in a reasonably accurate estimate may be more helpful to remittance transfer providers than a less specific standard for calculating estimates. Thus, proposed § 205.32(c) states that estimates provided pursuant to the exceptions in proposed § 205.32(a) and (b) must be based on an approach listed in the regulation for the required disclosure.

Proposed § 205.32(c) further states that if a remittance transfer provider bases an estimate on an approach that is not listed, the provider complies with § 205.32(c) so long as the designated recipient receives the same, or a greater amount, of currency that it would have received had the estimate been based on a listed approach. Thus, use of an approach other than one listed in the proposed rule will not result in a violation, to the extent that the sender is not harmed by such use.

32(c)(1) Exchange Rate

Proposed § 205.32(c)(1) sets forth the approaches that a remittance transfer provider may use as the basis of an estimate of the exchange rate required to be disclosed under proposed § 205.31(b)(1)(iv). Proposed § 205.32(c)(1)(i) states that for remittance transfers qualifying for the § 205.32(b)(2) exception, the estimate must be based on the most recent exchange rate set by the recipient country's central bank and reported by a Federal Reserve Bank. Proposed comment 32(c)(1)(i)–1 clarifies that if the exchange rate for a remittance transfer sent via international ACH that qualifies for the § 205.32(b)(2) exception is set the following business day, the most recent exchange rate available for a transfer will be the exchange rate set for the day that the disclosure is provided, *i.e.,* the current business day's exchange rate.

Proposed § 205.32(c)(1)(ii) provides that, for other transfers, the estimate must be based on the most recent publicly available wholesale exchange rate. Proposed comment 32(c)(1)(ii)–1 provides that publicly available sources of information containing the most recent wholesale exchange rate for a currency include, for example, U.S. news services, such as Bloomberg, the Wall Street Journal, and the New York Times, a recipient country's national news service, and a recipient country's central bank or other government agency.

However, the Board recognizes that U.S. news services do not list the exchange rate for every currency and that some remittance transfer providers may not have access to the national news services or the information provided by the central bank of a recipient country. Therefore, proposed § 205.32(c)(1)(iii) permits use of the most recent exchange rate offered by the person making funds available directly to the designated recipient as the basis for providing an estimate. This may require a provider to contact the designated recipient's institution or payout location to obtain such a rate.

The Board solicits comment on other approaches a remittance transfer provider might use as the basis for an estimate of the exchange when the currency that will be paid to the designated recipient is infrequently traded or when the remittance transfer provider sends transfers to a recipient country infrequently.

32(c)(2) Transfer Amount in the Currency Made Available to the Designated Recipient

Proposed § 205.32(c)(2) states that in disclosing the transfer amount in the currency made available to the designated recipient, as required under proposed § 205.31(b)(1)(v), an estimate must be based upon the estimated exchange rate provided in accordance with § 205.31(c)(1).

32(c)(3) Other Fees Imposed by Intermediaries

Proposed § 205.32(c)(3) provides that one of two approaches must be used to estimate the fees imposed by intermediary institutions in connection with an international wire transfer required to be disclosed under proposed § 205.31(b)(1)(vi). Under the first approach, an estimate must be based on the remittance transfer provider's most recent transfer to an account at the designated recipient's institution. Under the second approach, an estimate must based on the representations of the intermediary institutions along a representative route identified by the remittance transfer provider that the requested transfer could travel. Proposed comment 32(c)(3)(ii)–1 clarifies that a remittance transfer from a sender's account at an insured institution to the designated recipient's institution may take several routes, depending on the correspondent relationships each institution in the transmittal route has with other institutions. Proposed comment 32(c)(3)(ii)–1 further clarifies that, in providing an estimate of the fees required to be disclosed under proposed § 205.31(b)(1)(vi) pursuant to the proposed § 205.32(a) temporary exception, an insured institution may rely upon the representations of the institutions that act as intermediaries in any one of the potential transmittal routes that it reasonably believes a requested remittance transfer may travel.

The Board solicits comment on other approaches that a remittance transfer provider might use as the basis for calculating an estimate of the fees imposed by intermediaries for an international wire transfer when the remittance transfer provider rarely sends transfers to a requested location.

32(c)(4) Other Taxes Imposed in the Recipient Country

Proposed § 205.32(c)(4) states that, in disclosing taxes imposed in the recipient country as required under proposed § 205.31(b)(1)(vi) that are a percentage of the amount transferred to the designated recipient, an estimate must be based on the estimated exchange rate provided in accordance with § 205.32(c)(1) and the estimated fees imposed by institutions that act as intermediaries in connection with an international wire transfer provided in accordance with § 205.32(c)(3). Proposed comment 32(c)(4)–1 clarifies that proposed § 205.32(c)(4) permits a provider to give an estimate only when the taxes imposed in a recipient country are a percentage of the amount transferred to the designated recipient. In other contexts where taxes may be imposed, a remittance transfer provider can determine the exact amount, such as in the case of a flat tax.

32(c)(5) Amount of Currency That Will Be Received by the Designated Recipient

Proposed § 205.32(c)(5) states that, in disclosing the amount of currency that will be received by the designated recipient as required under proposed § 205.31(b)(1)(vii), an estimate must be based on the estimates provided in accordance with §§ 205.32(c)(1), (3), and (4), as applicable.

Storefront and Internet Disclosures

Statutory Requirements

EFTA Section 919(a)(6)(A) states that the Board may prescribe rules to require a remittance transfer provider to prominently post, and timely update, a

notice describing a model remittance transfer for one or more amounts, as the Board may determine, which notice shall show the amount of currency that will be received by the designated recipient, using the values of the currency into which the funds will be exchanged. EFTA Section 919(a)(6)(A) also states that the Board may require the notice prescribed to be displayed in every physical storefront location owned or controlled by the remittance transfer provider. Further, EFTA Section 919(a)(6)(A) states that the Board shall prescribe rules to require a remittance transfer provider that provides remittance transfers via the Internet to provide a notice, comparable to the storefront notice described in the statute, located on the home page or landing page (with respect to such remittance transfer services) owned or controlled by the remittance transfer provider.

EFTA Section 919(a)(6)(B) states that, prior to proposing rules under EFTA Section 919(a)(6)(A), the Board shall undertake appropriate studies and analyses, which shall be consistent with EFTA Section 904(a)(2), to determine whether a storefront notice or Internet notice facilitates the ability of a consumer (1) to compare prices for remittance transfers, and (2) to understand the types and amounts of any fees or costs imposed on remittance transfers. EFTA Section 904(a)(2) requires an economic impact analysis that considers the costs and benefits of a regulation to financial institutions, consumers, and other users, including the extent to which additional paperwork would be required, the effects upon competition in the provision of services among large and small financial institutions, and the availability of services to different classes of consumers, particularly low income consumers.

Summary of the Board's Study and Findings

Consistent with EFTA Section 919(a)(6)(B), the Board has reviewed and analyzed the statute and a variety of independent articles, studies, and Congressional testimony; conducted outreach with industry and consumer advocates; and held focus groups with consumers who send remittance transfers. Based on its findings, discussed in more detail below, the Board is not proposing a rule that would require the posting of model remittance transfer notices at a storefront or on the Internet.

The notice described by the statute would illustrate only one of several costs of a remittance transfer. Thus, the Board believes that the statutory notice would not facilitate a consumer's ability to compare prices or to understand the fees and costs imposed on remittance transfers. In addition, most consumers would be unable to apply the information provided by the statutory notice to their own transfers.

The Board considered alternatives to the type of notice described in the statute. The Board considered requiring the posting of transfer fee information for model send amounts, but believes that this alternative notice would have many of the same limitations as the statutory notice. The Board also considered requiring a notice that would reflect all the costs of a transfer as well as the different variables that affect the total cost of the transaction. A notice with this alternative content could help consumers to obtain a better understanding of the costs and fees imposed on remittance transfers. Nonetheless, the Board believes that the length and complexity of such notices could limit their utility. In addition, the frequent manual updates that would be required for any of these storefront notices raise concerns about accuracy. As described in more detail below, these factors led to the Board to decide against proposing a rule requiring remittance transfer providers to post storefront model remittance transfer notices.

Because the Board is not proposing a rule mandating the posting of storefront notices, it is not proposing a rule mandating the posting of Internet notices. As noted above, EFTA Section 919(a)(6)(A) states that the Board shall prescribe rules to require a remittance transfer provider that provides remittance transfers via the Internet to provide a notice comparable to a storefront notice. The Board understands that the word "shall" could be read as mandating the Board to require model Internet notices regardless of whether it proposes model storefront notices. However, the Board believes that the provision is better read as not requiring Internet notices in the absence of any model storefront notices. The Board believes such a reading is more consistent with the statute as a whole. For instance, because the Board is not requiring a storefront notice, there would be no "comparable" Internet notice. Moreover, the Board's study of model Internet notices indicated that consumers using Internet remittance transfer providers to request remittance transfers would be even less likely to use a model transfer notice than those using providers at a physical location. Most Internet providers currently disclose transaction-specific information prior to the consumer's payment for a transfer. Proposed § 205.31(b)(1) would make this common practice a regulatory requirement.

Discussion

Statutory Notice

First, the Board's study showed that the storefront notice as described by EFTA Section 919(a)(6)(A) would not facilitate a consumer's ability to compare prices or to understand the fees and costs imposed on remittance transfers. The statutory storefront notice would illustrate only one of several costs of a remittance transfer—that is, the exchange rate offered by that remittance transfer provider for the particular model transfer amount. In addition to the exchange rate, the total cost of a remittance transfer includes fees charged by the remittance transfer provider, any intermediary in the transfer, and the receiving entity, and any taxes that may be charged in the sending and receiving jurisdictions (all of which must be disclosed pursuant to proposed § 205.31(b)(1)). Because the statutory storefront notice would not address these fees and taxes, it would not present a complete picture to the consumer of all potential fees and costs for a remittance transfer, even for the "model" send amount.[34]

The participants in the focus groups for the Board's consumer testing generally recognized the limitations of the storefront notice described in the statute. Participants noted that the information provided by the storefront notice would permit a customer to calculate the exchange rate being used by the remittance transfer provider, but that the information did not disclose the remittance transfer provider's transfer fee or specify whether there would be a deduction from the amount to be received by the recipient entity or jurisdiction.

Second, the Board believes that most consumers would be unable to apply the information provided by a statutory storefront notice to their own transfers. The fees, exchange rate, and taxes for a remittance transfer can vary based upon the amount sent, transfer corridor (*i.e.,* the sending location to the receiving location), speed of transfer (*e.g.,* the next day, the same day, or in one hour), method of delivery (*e.g.,* an electronic deposit into a bank account or a cash disbursement), and type of receiving entity (*e.g.,* a bank or a money

[34] A significant number of focus group participants request that their transfers be paid to their designated recipient in U.S. dollars. These participants would not use the exchange rate and local currency amount information provided by a statutory storefront notice.

transmitter's payout partner). Because of these variations, it is unlikely that a storefront notice as described by the statute would contain a model transfer pertinent to the consumer's intended transfer. For example, some remittance transfer providers offer a discount on their exchange rate margin for large send amounts. Therefore, even if the consumer's transfer were identical to the model transfer posted in the storefront notice except for the send amount, the consumer still may be unable to determine the exchange rate that would apply to the consumer's transfer based on the storefront notice.

Focus group participants also recognized these shortcomings of the statutory storefront notices. Participants commented that if they were sending more than the posted send amount, they would need to ask the provider how much local currency would be received because the notice would not necessarily provide the information needed to independently calculate that amount. Some participants indicated that the statutory storefront notice would not help them because it would not show how much money in U.S. dollars they would need to send so that the recipient would receive a specific amount in local currency.

Third, the Board believes consumers may proceed with their transfer requests as planned even with the posting of the statutory storefront notices. A few focus group participants said that they would use the information in the statutory storefront notice to calculate the exchange rate offered by that provider and compare it to the wholesale bank exchange rate published in a national newspaper or the exchange rate offered by other providers when contemplating future transactions. However, most participants stated that if they went to a particular store intending to send money and learned that the exchange rate would result in the delivery of less local currency to the recipient than expected, they would still complete the transaction. Because these participants generally transferred smaller amounts, a slightly lower exchange rate would have little impact on the total amount of local currency received.

Alternative Notices

In light of the concerns raised by the statutory storefront notices, the Board considered proposing two alternative storefront notices. The first alternative notice would have required remittance transfer providers to show the transfer fees imposed by the provider for one or more model send amounts. The second alternative notice would have required remittance transfer providers to show all the cost variables for one or more model send amounts. The cost variables would include: Location of the receiving entity; speed of delivery; fees charged by the remittance transfer provider, any intermediaries, and the recipient entity; taxes imposed by sending and receiving jurisdictions; exchange rate; and amount of currency to be received by the designated recipient.

The Board considered requiring remittance transfer providers to display storefront notices showing the transfer fee charged for one or more model send amounts based on comments made during the focus groups that posted fee information could be useful. A few focus group participants noted that a remittance transfer provider's fee, rather than its exchange rate, accounts for the largest percentage of the total cost for a transfer. One focus group participant said that he currently uses fee information posted by two providers to help him to decide which provider he should use for an upcoming transfer. Another participant said that he would use a storefront notice with fee information to shop among providers.

However, a storefront notice containing information regarding the remittance transfer provider's fees still would not present a complete picture of all potential costs for a transfer. A storefront notice with a provider's fee information would not necessarily disclose the exchange rate, fees imposed by any intermediary in the transfer or the receiving entity, and taxes imposed by the receiving jurisdiction. Participants in the Board's one-on-one consumer interviews universally expressed their wish to know if a recipient would be charged a fee by the receiving entity or would be taxed by the receiving jurisdiction.

The Board believes that many consumers would not be able to apply the fee information provided by an alternative notice to their own transfers. As mentioned above with respect to the statutory storefront notices, the fee charged by the remittance transfer provider also varies based on the transfer corridor, speed of transfer, method of delivery, and type of receiving entity. For example, some providers charge different fees for sending funds to an urban versus a rural area in a particular country. Again, because of these variations, a notice would not necessarily contain a model transfer identical to the consumer's intended transfer. Further, some remittance transfer providers use a tiered pricing structure for their fees that would prevent the consumer from accurately extrapolating the fee for his or her transfer from the information provided, even if the consumer's transfer were identical to the model transfer except for the send amount. Customers who are members of a remittance transfer provider's loyalty program might be eligible for fee discounts that would not be reflected in a storefront notice.

A remittance transfer provider's fee generally changes less frequently than the exchange rate offered for a given transfer, and accordingly would become outdated less frequently. Some remittance transfer providers operate in just one or two corridors and charge a flat fee for transfers under a certain amount within those corridors. Thus, for these providers, a storefront notice with fee information arguably would be less burdensome and costly than the statutory storefront notice to produce, and could ameliorate concerns about the accuracy of posted information. But, a storefront notice with fee information posted by global remittance transfer providers would be long and complex and could be burdensome and costly to produce.

Many focus group participants raised similar concerns when presented with the idea of a storefront notice showing fee information as they did regarding a storefront notice showing the amount of local currency to be received. Thus, the Board believes that, in practice, alternative storefront notices containing fee information would have many of the same limitations as the statutory storefront notices containing information about the amount of currency to be received.

The Board also considered requiring remittance transfer providers to post a notice that would reflect all the costs of a transfer as well as the different variables that affect the total cost of the transaction. However, as described below, the Board believes that the length and complexity of such notices could discourage consumers' use of the notice and prove overly burdensome for industry.

Remittance transfer providers that operate in just one or two corridors with little price variability could produce a storefront notice reflecting all cost variables that is inexpensive and relatively simple in nature although, as discussed below, accuracy would continue to be a concern because currency values frequently fluctuate. A notice with this content could help consumers to obtain a better understanding of the costs and fees imposed on remittance transfers.

However, for other providers, a storefront notice for sending a specified amount to just a single country could contain multiple rows of information to

account for differences in pricing based on the transfer method, timing option, receipt location, and cost permutations described above. Many providers offer remittance transfers to multiple countries, and several locations within each country, which would multiply the number of data points on the notice. The Board believes that a consumer could be overwhelmed by the amount of data appearing in a long, complex storefront notice posted by these providers and, therefore, might not use it. One pilot study on storefront notices containing comprehensive cost information showed that only 37% of bank and money transmitter customers sending remittances checked the posting.[35] Thus, taken as a whole, the Board does not believe this alternative would benefit consumers.

Both the statutory and the more comprehensive alternate storefront notice would become inaccurate whenever the exchange rate for a model transfers changed. As a result, the Board believes a storefront notice could be unhelpful and even misleading to consumers, while creating unnecessary legal risks for remittance transfer providers. In Congressional hearings[36] and during the Board's outreach, industry representatives and others expressed concern that, because currency exchange rates frequently fluctuate, remittance transfer providers would have to update the storefront notice for each send location several times a week, or as frequently as several times a day. These rates could also be different at a single provider's different send locations. Remittance transfer providers would need to distribute the updated notices to each send location and each send location would need to replace the outdated notice just as frequently. Non-exclusive send locations that offer the services of two or more money transmitters would have to post and update the storefront notices for each remittance transfer provider. Compliance concerns are magnified for providers that have a large network of agents where the providers would have to rely on store clerks to update disclosures on a timely basis. Echoing the concerns of industry representatives, focus group participants also questioned the ability of remittance transfer providers to keep the notices up to date.

Finally, the Board is concerned about the effect the storefront notice requirement would have on competition and costs to the consumer. Remittance transfer providers that sell their products through agents have expressed concern that the work involved in posting and updating storefront notices could cause some agents to stop offering remittance transfers. Further, credit unions and small banks that infrequently conduct transfers may find the burden and cost of producing storefront notices prohibitive and discontinue the service. Given the costs and risks associated with posting and updating the storefront notices contemplated by the statute, some providers may exit the market, which could reduce competition among providers and increase costs for consumers. For these reasons, the Board is not proposing to require providers to post model storefront or Internet notices.

Section 205.33 Procedures for Resolving Errors

EFTA Section 919(d) addresses error resolution procedures for errors in connection with remittance transfers, and requires a sender to provide notice of an error within 180 days of the promised date of delivery of a remittance transfer. The notice triggers a remittance transfer provider's duty to investigate the claim and correct any error within 90 days of receiving the notice. Proposed § 205.33 implements the new error resolution requirements for remittance transfers and establishes, where appropriate, error resolution procedures similar to those that apply to a financial institution under § 205.11 with respect to errors involving electronic fund transfers.

33(a) Definition of Error

Proposed § 205.33(a)(1) defines the term "error" for purposes of the error resolution provisions applying to remittance transfers. The proposed definition lists the types of transfers or inquiries that constitute errors. Proposed § 205.33(a)(2) lists types of transfers or inquiries that do not constitute errors. The proposed commentary provides additional guidance illustrating errors under the rule.

Under proposed § 205.33(a)(1)(i), the term "error" includes an incorrect amount paid by a sender in connection with a remittance transfer. The proposed provision is similar to § 205.11(a)(1)(ii), which defines as an error an incorrect EFT to or from a consumer's account. Proposed comment 33(a)–1 clarifies that this provision is intended to cover circumstances in which the amount paid by the sender differs from the total transaction amount stated in the receipt provided under § 205.31(b)(2) or the combined disclosure provided under § 205.31(b)(3). *See also* § 205.31(b)(1)(iii).

Proposed comment 33(a)–1 also states that an error under § 205.33(a)(1)(i) covers incorrect amounts paid by a sender regardless of the form or method of payment tendered by the sender for the transfer, including when a debit, credit, or prepaid card is used to pay an amount in excess of the amount of the transfer requested by the consumer plus applicable fees. For example, if a remittance transfer provider incorrectly charged a sender's credit card account for $150 to send $120 to the sender's relative in a foreign country, plus a transfer fee of $10, and the provider sent only $120, the sender could assert an error with the remittance transfer provider for the incorrect charge. In addition, however, as discussed below under proposed § 205.33(f), the right to assert an error with a remittance transfer provider for incorrect amounts paid in connection with a transfer is independent of any other existing rights that the sender may also have under other applicable law with respect to an incorrect payment amount.

Proposed § 205.33(a)(1)(ii) defines as an error "a computational or bookkeeping error made by a remittance transfer provider relating to a remittance transfer." Similar to an existing error provision for EFTs in § 205.11(a)(iv), an error is intended to include "arithmetical errors, posting errors, errors in printing figures, and figures that were jumbled due to mechanical or electronic malfunction." *See* 44 FR 59480 (Oct. 15, 1979). The proposed error would cover, for example, circumstances in which a remittance transfer provider fails to reflect all fees that will be imposed in connection with the transfer or misapplies the applicable exchange rate in calculating the amount of currency that will be received by the designated recipient. Thus, notwithstanding that the designated recipient may receive the amount of currency stated on the receipt or combined disclosure, an error could be asserted because the provider incorrectly calculated the amount that should have been received.

Proposed § 205.33(a)(1)(iii) provides that an error also generally includes the failure by a remittance transfer provider to make available to a designated recipient the amount of currency identified in the receipt (or combined notice) given to the sender. Proposed comment 33(a)-2 contains guidance regarding the scope of the error under

[35] Appleseed, *Remittance Transparency: Strengthening Business, Building Community* 8 (2009).

[36] *See, e.g.,* Testimony of Mark Thompson, The Western Union Company, in Hearing Before House Subcomm. on Fin. Insts. And Cons. Credit, No. 111–39 (June 3, 2009).

§ 205.33(a)(1)(iii). For example, as discussed above under proposed § 205.31, the amount of currency to be received by the designated recipient stated on the transfer receipt must accurately reflect any third party fees or taxes that may be imposed in the course of the remittance transfer (for example, fees imposed by the recipient agent or bank in the foreign country or by an intermediary institution). Accordingly, if the remittance transfer provider fails to account for such third party fees or taxes, resulting in the designated recipient's receipt of less than the amount disclosed on the transaction receipt, the sender may assert an error (except in the case of an estimate). The proposed definition would also cover circumstances in which the remittance transfer provider initially transmits or sends an amount that differs from the amount requested by the sender.

The proposed definition in § 205.33(a)(1)(iii) does not, however, apply to circumstances in which the amount received by a designated recipient differs from the stated amount of currency where the remittance transfer provider provides an estimate as permitted in proposed § 205.32, discussed above. For example, where the law in the foreign country prohibits the remittance transfer provider from offering a fixed currency exchange rate and the provider gives an estimate of the currency to be received in compliance with § 205.32(c), the fact that the designated recipient received less than the estimated currency amount would not constitute an error under proposed § 205.33(a)(1)(iii).

Proposed comment 33(a)–3 provides examples illustrating circumstances in which an incorrect amount of currency may be received by a designated recipient.

Proposed § 205.33(a)(1)(iv) generally treats as an error a remittance transfer provider's failure to make funds in connection with a remittance transfer available to the designated recipient by the date of availability stated on the receipt (or combined disclosure). *See* proposed § 205.31(b)(2)(ii). Proposed comment 33(a)-4 provides examples of the circumstances that would be errors. These circumstances include the late delivery of a remittance transfer after the stated date of availability or non-delivery of the transfer, and the deposit of a remittance transfer to the wrong account. *See, however,* proposed § 205.33(a)(1)(iv)(B), discussed below. An error could also be asserted if a recipient agent or institution retains the transferred funds after the stated date of availability, rather than making the funds available to the designated recipient.

In addition, an error under § 205.33(a)(1)(iv) includes a circumstance in which a person other than the person identified by the sender as the designated recipient of the transfer fraudulently picks up a remittance transfer in the foreign country. An error would not, however, include circumstances in which a designated recipient picks up a remittance transfer from the provider's agent as authorized, but subsequently has the funds stolen from the recipient's possession.

The proposed approach with respect to the fraudulent pick-up of a remittance transfer is consistent with the scope of unauthorized EFTs under § 205.2(m), which include unauthorized EFTs initiated through fraudulent means. *See* comment 2(m)-3. Moreover, the Board believes it is appropriate to treat these circumstances as errors under the proposed rule because the remittance transfer provider, rather than the sender, is in the best position to ensure that a remittance transfer is picked up only by the person designated by the sender. For example, the provider could establish appropriate policies and procedures for its agents to verify the identity of the recipient of the transfer.

The proposed rule provides two exceptions to the definition of error in § 205.33(a)(1)(iv). First, under proposed § 205.33(a)(1)(iv)(A), the failure to make funds from a remittance transfer available by the stated date of availability does not constitute an error where the failure resulted from circumstances outside the remittance transfer provider's control. As clarified in proposed comment 33(a)–5, the exception is limited to circumstances that are generally referred to under contract law as force majeure, or uncontrollable or extraordinary circumstances that cannot be reasonably anticipated by the remittance transfer provider and that prevent the provider from delivering a remittance transfer, such as war, civil unrest, or a natural disaster. The exception for circumstances beyond a provider's control also covers government actions or restrictions that occur after the transfer has been sent but that could not have been reasonably anticipated by the remittance transfer provider, such as the imposition of foreign currency controls or the garnishment or attachment of funds by a foreign government. Comment is requested regarding whether additional examples or guidance is necessary to illustrate the exception for circumstances outside the remittance transfer provider's control.

Under proposed § 205.33(a)(1)(iv)(B), the failure to make funds from a remittance transfer available on the stated date of availability does not constitute an error if it was caused by the sender providing incorrect information in connection with the remittance transfer to the provider. For example, a transfer may not be delivered by the stated date of delivery as a result of the sender's provision of incorrect information in connection with the transfer if the sender misspells the recipient's name or otherwise incorrectly identifies the designated recipient or account to which the transferred funds are to be deposited. Under these circumstances, however, the provider must give the sender the opportunity to correct the information and resend the transfer at no additional cost in order to avoid triggering the error resolution requirements.

The exception in § 205.33(a)(1)(iv)(B) applies only where funds from a transfer were not made available by the stated date of availability as a result of incorrect information provided by the sender. Accordingly, proposed comment 33(a)–6 clarifies that if the failure to make funds from a transfer available by the stated date of availability occurred due to the provider's miscommunication of information necessary for the designated recipient to pick up the transfer, such as providing the incorrect location where the transfer may be picked up or providing the wrong confirmation number or code for the transfer, such failure would be treated as an error under § 205.33(a)(1)(iv).

Finally, proposed § 205.33(a)(1)(v) includes as an error a sender's request for documentation provided in connection with a remittance transfer or additional information or clarification concerning a remittance transfer. An error under proposed § 205.33(a)(1)(v) would also cover a sender's request to determine whether an error exists under the proposed errors discussed above under proposed §§ 205.33(a)(1)(i) through (a)(1)(iv). The proposal is similar to an existing provision in § 205.11(a)(1)(vii).

Proposed § 205.33(a)(2) lists circumstances that do not constitute errors. Under proposed § 205.33(a)(2)(i), an inquiry about a transfer of $15 or less does not constitute an error, since these small-value transfers do not fall within the scope of the definition of remittance transfer. *See* § 205.30(d)(2), discussed above. Proposed § 205.33(a)(2)(ii) states that an inquiry about the status of a remittance transfer—for example, if the sender calls to ask whether the funds have been made available in the foreign

country—is not an error (unless the funds have not been made available by the stated date of availability). Finally, proposed § 205.33(a)(3)(iii) provides that the term "error" does not include a sender's request for information for tax or other recordkeeping purposes.

The Board solicits comment on all aspects of the proposed definition of error in § 205.33(a), including whether additional circumstances should be treated as errors under the proposed rule and whether additional examples of non-errors are necessary to provide clarity.

33(b) Notice of Error From Sender

Proposed § 205.33(b) sets forth the timing and content requirements for a notice of error provided by a sender in connection with a remittance transfer. Under proposed § 205.33(b)(1)(i), a sender must generally provide a notice of error orally or in writing to the remittance transfer provider no later than 180 days after the date of availability of the remittance transfer stated in the receipt (or combined disclosure). *See* EFTA Section 919(d)(1)(A). Such notice of error must be sufficient to enable the remittance transfer provider to identify the sender's name and telephone number or address; the recipient's name, and if known, the telephone number or address of the recipient; and the remittance transfer to which the notice of error applies. *See* proposed § 205.33(b)(1)(ii). Except for requests for documentation, additional information, or clarification under proposed § 205.33(a)(1)(v), the notice must also indicate why the sender believes the error exists and include to the extent possible the type, date, and amount of the error. *See* proposed § 205.33(b)(1)(iii).

Proposed § 205.33(b)(2) provides that when a notice of error is based on documentation, additional information, or clarification that the sender had previously requested under § 205.33(a)(1)(v), the sender's notice of error is timely if received by the provider no later than 60 days after the provider sends the requested documentation, information, or clarification. The proposed 60-day time frame for the sender to provide a new notice of error following the sender's receipt of documentation, information, or clarification from the remittance transfer provider is consistent with the 60-day time frame established for similar circumstances under the general error resolution provisions in Regulation E, § 205.11(b)(3). The Board believes that under these circumstances, 60 days, rather than the 180-day error resolution time frame generally applicable to remittance transfers, provides sufficient time for a sender to review the additional information provided by the remittance transfer provider and determine whether an error occurred in connection with a transfer.

Proposed comment 33(b)–1 clarifies that the error resolution procedures for remittance transfers apply only when a notice of error is received from the sender of the transfer. Thus, under the proposed rule, a notice of error provided by the designated recipient does not trigger the remittance transfer provider's error resolution obligations. This interpretation is consistent with EFTA Section 919(d)(1)(A), which establishes error resolution obligations for a remittance transfer provider only when a notice is received from the "sender." [37] The proposed comment also clarifies that the error resolution provisions do not apply when the remittance transfer provider itself discovers and corrects an error.

Proposed comment 33(b)–2 provides that a notice of error is effective so long as the remittance transfer provider is able to identify the remittance transfer in question. For example, many remittance transfer providers may use the confirmation number or code given to the sender for the pick-up of a remittance transfer to identify the particular transfer in their tracking systems and records. In those circumstances, if a sender provides the confirmation number or code in the notice of error, or any other identification number or code supplied by the provider in connection with the remittance transfer, such number or code should be sufficient to enable the provider to identify the transfer. Proposed comment 33(b)–3 provides that a remittance transfer provider may request, or the sender may provide, an e-mail address of the sender or the designated recipient, as applicable, instead of a physical address if the e-mail address would be sufficient to enable the provider to identify the remittance transfer to which the notice applies.

Proposed comment 33(b)–4 clarifies that if the sender fails to provide a timely notice of error within 180 days from the stated date of delivery, the remittance transfer provider is not required to comply with the error resolution requirements set forth in the rule. *See, e.g.,* comment 11(b)(1)–7 (providing that a financial institution need not comply with the error resolution provisions of § 205.11 for untimely notices of error).

In many cases, a sender that has a problem or issue with a particular remittance transfer may contact the agent location that the sender used to send the transfer to resolve the problem or issue, rather than notifying the provider directly. Proposed comment 33(b)–5 states that a notice of error from a sender received by a remittance transfer provider's agent is deemed to be received by the provider for purposes of the 180-day time frame for reporting errors under proposed § 205.33(b)(1)(i). The Board believes that it is appropriate to treat notices of error given to the agent as notice to the provider because in most cases, it will be the agent with which the sender has the direct relationship, and not the provider. In addition, treating a notice of error given to the agent as notice to the provider ensures that a sender does not lose his or her error resolution rights merely because the sender was unaware of a need to directly notify the provider.

Proposed comment 33(b)–6 cross-references the disclosure requirements in proposed § 205.31, discussed above, to reiterate that a remittance transfer provider must include an abbreviated notice of the consumer's error resolution rights on the receipt under § 205.31(b)(2) or combined disclosure under § 205.31(b)(3), as applicable. In addition, the remittance transfer provider must make available to a sender upon request, a notice providing a full description of error resolution rights that is substantially similar to the proposed model error resolution and cancellation notice set forth in Appendix A of this regulation (Model Form A–36).

33(c) Time Limits and Extent of Investigation

EFTA Section 919(d)(1)(B) generally provides that a remittance transfer provider must investigate and resolve an error not later than 90 days after receipt of a sender's timely notice of error. EFTA Section 919(d)(1)(B) also specifies certain remedies for errors in connection with a remittance transfer; however, the statute also authorizes the Board to provide "such other remedy" as the Board determines appropriate "for the protection of senders."

Proposed § 205.33(c) implements the statutory time frame for investigating errors and sets forth the procedures for resolving an error, including the applicable remedies. Consistent with the statute, proposed § 205.33(c)(1) requires a remittance transfer provider to promptly investigate a notice of error to determine whether an error occurred

[37] *See also* EFTA Section 919(g)(1) (providing that a designated recipient "shall not be deemed to be a consumer for purposes of this Act").

within 90 days of receiving the sender's notice.

Pursuant to the Board's authority under EFTA Section 904(a), the proposed rule further requires the remittance transfer provider to report the results to the sender within three business days after completing its investigation, which is consistent with the time frame for reporting the results of an error investigation under Regulation E, § 205.11(c)(2)(iv). The report or notice of results must also alert the sender of any remedies available for correcting any error that the provider determines has occurred.

Although EFTA Section 919(d)(1) does not expressly require a notice to be provided to the sender when the provider determines that an error has occurred, the Board believes that a notice is appropriate under these circumstances to alert the sender of the results of the investigation as well as to inform the sender of available remedies. The proposed rule does not require a written notice to a sender that an error occurred because such a requirement could unnecessarily delay a sender's ability to receive an appropriate remedy. Accordingly, proposed comment 33(c)–1 clarifies that if the error occurred as described by the sender, the provider may inform the sender of its findings either orally or in writing. However, if the error did not occur as described, the remittance transfer provider must provide a written notice of its findings under § 205.33(d), discussed below.

Proposed § 205.33(c)(2) establishes the procedures and remedies for correcting an error. The proposed rule implements the two remedies that are specified in the statute and adds a third remedy that would apply if the transfer was not made available to the designated recipient by the stated date of availability under proposed § 205.33(a)(1)(iv). As in the statute, the proposed rule allows the sender to designate the preferred remedy in the event of an error. *See* EFTA Section 919(d)(1)(B). Under proposed § 205.33(c)(2), the sender could choose to obtain a full refund of the amount tendered where the remittance transfer was not properly transmitted, or an amount appropriate to resolve the error. Alternatively, the sender could choose to have the remittance transfer provider send to the designated recipient the amount appropriate to resolve the error, at no additional cost to the sender or the designated recipient. *See* proposed §§ 205.33(c)(2)(i) and (ii).

In addition, if the remittance transfer was not sent or delivered to the designated recipient by the stated date of availability, the remittance transfer provider would be required to refund all fees charged or imposed in connection with the transfer, even if the consumer asks the provider to send the remittance transfer to the designated recipient as the preferred remedy. *See* proposed § 205.33(c)(2)(iii). The Board believes that requiring the provider to refund all fees imposed in connection with the remittance transfer, including the transfer fee, is appropriate under such circumstances because the sender did not receive the contracted service, specifically the availability of funds in connection with the transfer by the stated date. Moreover, in some cases, the sender may have paid an additional fee for expedited delivery of funds. *See* proposed comment 33(c)–4. Of course, in the event that the funds have already been delivered to the recipient, even if on an untimely basis, the sole remedy in such case would be the refund of fees.

Under proposed § 205.33(c)(2), the remittance transfer provider must correct the error within one business day of, or as soon as reasonably practicable after, receiving the sender's instructions regarding the appropriate remedy. The Board expects that in most cases, a remittance transfer provider will correct an error in accordance with the sender's instructions within one business day of receiving the instructions. However, the proposed rule provides additional flexibility to address the limited circumstances where the particular method of sending a remittance transfer may present practical impediments to a provider's ability to correct an error within one business day. For example, as discussed above, a wire transfer sent internationally may go through several intermediary institutions before getting to the designated recipient. In such cases, it may not be practicable to make the amount in error available to the recipient within one business day in accordance with a sender's request. The Board solicits comment on whether the proposed time frame for correcting an error under § 205.33(c)(2) is appropriate.

Proposed comment 33(c)–2 clarifies that the remittance transfer provider may request that the sender designate the preferred remedy at the time the sender provides notice of error. Permitting such requests may enable providers to process error claims more expeditiously without waiting for the sender's subsequent instructions after notifying the sender of the results of the investigation. Nonetheless, if the sender does not indicate the desired remedy at the time of providing a notice of error, the provider would still be required to notify the sender of any available remedies in the report provided under § 205.33(c)(1) if the provider determines an error occurred. *See* proposed comment 33(c)–2.

The Board notes that under the statute and proposed rule, a provider may be unable to promptly correct an error if the consumer fails to designate an appropriate remedy either at the time of providing the notice of error or in response to the provider's notice informing the consumer of its error determination and available remedies. Comment is requested on whether the Board should alternatively permit remittance transfer providers to select a default method of correcting errors, provided that the sender retains the option of selecting a different remedy if appropriate. For example, a sender could choose to automatically refund to senders any amounts necessary to correct the error, but each sender could decide in an individual case to decline the refund and instead request that the provider deliver the appropriate amount to the designated recipient.

Proposed comment 33(c)–3 provides additional guidance regarding the appropriate remedies where the sender has paid an excess amount to send a remittance transfer. Under that circumstance, the sender may request a refund of the amount paid in excess or may request that the remittance transfer provider make that excess amount available to the designated recipient at no additional cost. Proposed comment 33(c)–4 states that fees that must be refunded to a sender for a failure to make funds from a remittance transfer available by the stated date of availability under § 205.33(a)(1)(iv) include all fees imposed for the transfer, regardless of the party that imposed the fee, and are not limited to fees imposed by the provider.

Proposed comment 33(c)–5 clarifies that if an error occurred, whether as alleged or in a different amount or manner, a remittance transfer provider may not impose any charges related to any aspect of the error resolution process, including any charges for documentation or investigation. The Board is concerned that such fees or charges might have a chilling effect on a sender's good faith assertion of errors. *See, e.g.,* comment 11(c)–3. Nothing in this proposed rule, however, would prohibit a remittance transfer provider from imposing a fee for making copies of documentation for non-error-resolution related purposes, such as for tax documentation purposes. *See, e.g.,* proposed § 205.33(a)(2)(iii).

Under proposed comment 33(c)–6, a remittance transfer provider may correct an error, without further investigation,

in the amount or manner alleged by the sender to be in error. However, the provider must otherwise comply with all other applicable requirements of § 205.33, including providing notice of the resolution of the error under § 205.33(c). *See, e.g.,* comment 11(c)–4.

33(d) Procedures if Remittance Transfer Provider Determines No Error or Different Error Occurred

Proposed § 205.33(d) establishes procedures in the event that a remittance transfer provider determines that no error or a different error occurred from that described by the sender. Consistent with EFTA Section 919(d)(1)(B)(iv), proposed § 205.33(d)(1) would require the remittance transfer provider to provide a written explanation of the provider's finding that there was no error or that a different error occurred. Such explanation must respond to the sender's specific complaint and note the sender's right to request the documents that the provider relied on in making its determination. Proposed § 205.33(d)(2) further states that upon the sender's request, the remittance transfer provider must promptly provide copies of such documentation.

Proposed comment 33(d)–1 states that where a remittance transfer provider determines that an error occurred in a manner or amount different from that described by the sender, the provider must comply with applicable provisions of both § 205.33(c) and (d). The proposed commentary also clarifies that in such case, the provider may choose to give the notice of correction of error under § 205.33(c)(1) and the explanation that a different error occurred under § 205.33(d) separately or in a combined form. *See, e.g.,* comment 11(d)–1 (establishing a similar provision for error investigations involving EFTs).

33(e) Reassertion of Error

Under proposed § 205.33(e), a remittance transfer provider that has fully complied with the error resolution requirements with respect to a particular notice of error has no further responsibilities in the event the sender later reasserts the same error, except in the case of an error asserted following the sender's receipt of information provided under § 205.33(a)(1)(v). Proposed comment 33(e)–1 clarifies that the remittance transfer provider has no further error-resolution responsibilities if the sender voluntarily withdraws the notice alleging an error. In such case, however, the sender retains the right to reassert the allegation within the original 180-day period from the stated date of availability unless the remittance transfer provider had already complied with all of the error resolution requirements before the allegation was withdrawn. The proposed provision and comment are modeled on similar provisions under § 205.11(e). Comment is requested on whether additional guidance is necessary regarding the circumstances in which a sender has "voluntarily withdrawn" a notice of error.

33(f) Relation to Other Laws

As noted above under § 205.33(a)(1)(i), the error resolution rights for remittance transfers exist independently from other rights that a consumer may have under other existing federal law. For example, when a sender uses a credit card to pay for a remittance transfer, the sender may have billing error rights under Regulation Z, 12 CFR 226.13, with respect to the extension of credit if there is an incorrect amount charged to the consumer's account for the transfer, in addition to the error resolution rights the sender may assert against the remittance transfer provider. Similarly, a sender may use a debit card to pay for a remittance transfer and thus may have error resolution rights with respect to both the remittance transfer provider and the account-holding institution. Proposed § 205.33(f) contains guidance regarding the interplay between the error resolution provisions for remittance transfers and error resolution rights that may exist under other applicable consumer financial protection laws.

In most cases when a consumer pays for a remittance transfer by means of an electronic fund transfer from his or her checking or savings account (for example, by providing a debit card as payment or authorizing an ACH transfer from the account), the institution providing the remittance transfer service will not be the same institution that holds the debited account. If, however, the sender uses his or her bank or credit union to send a remittance transfer via an international ACH service, the account-holding bank or credit union would also be the remittance transfer provider. In such case, a potential conflict arises between the error resolution time frames and procedures that would apply under EFTA Section 908, implemented in § 205.11, and the error resolution provisions under this proposed rule. For example, under § 205.11(c), a financial institution generally has 10 business days to investigate a consumer's notice of error (and up to 45 calendar days if provisional credit is provided). However, under EFTA Section 919(d)(1)(B) and proposed § 205.33(c), discussed above, a remittance transfer provider has up to 90 calendar days to investigate a sender's notice of error. EFTA Section 919(e)(1) provides that under these circumstances—that is, where a remittance transfer is also an electronic fund transfer—the error resolution provisions for remittance transfers apply to the institution/provider, rather than the error resolution provisions generally applicable to EFTs.

Proposed § 205.33(f)(1) implements EFTA Section 919(e)(1)'s conflict of law provision. The proposed rule provides that if an alleged error in connection with a remittance transfer involves an incorrect EFT to a sender's account and the account is also held by the remittance transfer provider, then the requirements of § 205.33, and its applicable time frames and procedures, govern the error resolution process. However, proposed § 205.33(f)(1) further provides that if the notice of error is asserted with an account-holding institution that is not the same entity as the remittance transfer provider, the error resolution procedures under § 205.11, and not those under § 205.33, apply to the account-holding institution's investigation of the alleged error. In both cases, the electronic fund transfer from a consumer's account may also be a remittance transfer. Nonetheless, the Board believes that as a practical matter, an account-holding institution would be unable to identify a particular EFT as a remittance transfer unless it was also the remittance transfer provider. In the absence of direct knowledge that a particular EFT was used to fund a remittance transfer, the account-holding institution would face significant compliance risk if the error resolution requirements under proposed § 205.33 were deemed to apply to the error. The Board does not believe such an outcome is desirable. Accordingly, proposed § 205.33(f)(1) permits an account-holding institution to comply with the error resolution requirements of § 205.11 when the institution is not also the remittance transfer provider for the transaction in question. Of course, the consumer still has independent error resolution rights against the remittance transfer provider itself under proposed § 205.33.

Proposed comment 33(f)–1 clarifies that the guidance in § 205.33(f)(1) applies only when an error could be asserted under both §§ 205.11 and 205.33 with a financial institution that is also the remittance transfer provider. For example, the proposed comment provides that if the sender asserted an error under § 205.11 with a remittance

transfer provider that holds the sender's account, and the error was not also an error under § 205.33 (such as in the case of an omission of an EFT on a periodic statement), then the error-resolution provisions of § 205.11 would exclusively apply to the error.

Proposed § 205.33(f)(2) addresses circumstances where an alleged error involves an incorrect extension of credit in connection with a remittance transfer, such as when a consumer provides a credit card to pay for a remittance transfer. If the consumer provides a notice of error to the creditor that issued the credit card, the provisions of Regulation Z, 12 CFR 226.13, governing error resolution apply to the creditor, rather than the requirements under § 205.33. However, if the sender instead provides a notice of error asserting an incorrect payment amount involving the use of a credit card to the remittance transfer provider, then the error-resolution provisions of § 205.33 apply to the remittance transfer provider.

In certain circumstances, the creditor issuing a credit card may also act as a remittance transfer provider, for example, when the cardholder sends funds from his or her credit card through a service offered by the creditor to a recipient in a foreign country. In the case of an incorrect extension of credit in connection with the transfer, an error could potentially be asserted under either Regulation Z or the error resolution provisions applicable to remittance transfers in proposed § 205.33. The proposed rule provides that under these circumstances, the error resolution provisions under Regulation Z § 226.13 would apply to the alleged error. Under these circumstances, the Board believes it is reasonable to apply the Regulation Z error resolution provisions because 12 CFR 226.13(d)(1) permits a consumer to withhold disputed amounts while an error is being investigated. Nonetheless, the Board notes that if the error resolution provisions under proposed § 205.33 were instead deemed to apply to the error, then a sender would have 180 days from the stated date of availability for the transfer to assert a notice of error, rather than 60 days from the periodic statement reflecting the error. Accordingly, because the error resolution provisions under 12 CFR 226.13 and proposed § 205.33 each provide greater protection to consumers in different respects, the Board solicits comment on the appropriate standard to apply when an error for an incorrect amount paid arises in connection with a remittance transfer sent by a creditor. Proposed § 205.33(f)(3) provides guidance where a person makes an unauthorized EFT or unauthorized use of a credit card to send a remittance transfer, such as when a stolen debit or credit card is used to send funds to a foreign country. Under such circumstances, the consumer holding the asset account or the credit card account is not the sender of the remittance transfer, and thus the error resolution provisions under § 205.33 do not apply. *See* proposed comment 33(b)–1. However, proposed § 205.33(f)(3) clarifies that the consumer retains existing rights under Regulation E §§ 205.6 and 205.11 in the case of an unauthorized EFT and Regulation Z §§ 226.12(b) and 226.13 in the case of an unauthorized use of a credit card.

As discussed above, in certain cases a consumer may be able to assert error resolution rights in connection with a remittance transfer with both the remittance transfer provider as well as his or her account-holding institution or credit card issuer or creditor. Nonetheless, the Board does not believe that a consumer should be able to receive a windfall that could otherwise arise if the consumer were to successfully assert an error with both the provider and the account-holding institution and/or credit card issuer or creditor. Accordingly, proposed comment 33(f)–2 clarifies that if a sender receives credit to correct an error of an incorrect amount paid in connection with a remittance transfer from either the remittance transfer provider or the sender's account-holding institution (or creditor), and then subsequently asserts the same error with the other party, the other party has no further responsibilities to investigate the error. In such case, the sender has already received sufficient credit to correct the error, thereby extinguishing the second party's error resolution obligations. The proposed comment also clarifies that nothing in this section prevents an account-holding institution or creditor from reversing amounts it has previously credited to correct an error if the consumer receives more than one credit to correct the same error. For example, assume that a sender concurrently files notices of error with his or her account-holding institution and remittance transfer provider for the same error, and the sender receives credit from the account-holding institution for the error. If the remittance transfer provider subsequently provides a credit to the sender for the same error, the account-holding institution may reverse the amounts it had previously credited to the consumer's account even after the 45-day error resolution period set forth in § 205.11.

33(g) Error Resolution Standards and Recordkeeping Requirements

EFTA Section 919(d)(2) directs the Board to establish clear and appropriate standards for remittance transfer providers with respect to error resolution relating to remittance transfers, to protect senders from such errors. The statute specifically provides that such standards must include appropriate standards regarding recordkeeping, including retention of certain error-resolution related documentation. Proposed § 205.33(g) implements the new requirements regarding error resolution standards and recordkeeping requirements.

Proposed § 205.33(g)(1) provides that a remittance transfer provider must develop and maintain written policies and procedures that are designed to ensure compliance with respect to the error resolution requirements applicable to remittance transfers under § 205.33. The proposed rule would also require remittance transfer providers to take steps to ensure that whenever a provider uses an agent to perform any of the provider's error resolution obligations, the agent conducts such activity in accordance with the provider's policies and procedures. This approach is similar to one taken by the federal banking agencies in other contexts. *See, e.g.,* 12 CFR 222.90(e) (requiring that an identity theft red flags program exercise appropriate and effective oversight of service-provider arrangements).

Proposed § 205.33(g)(2) provides that the remittance transfer provider's policies and procedures concerning error resolution must include provisions regarding the retention of documentation related to an error investigation. Consistent with the statute, such provisions must ensure, at a minimum, the retention of any notices of error submitted by a sender, documentation provided by the sender to the provider with respect to the alleged error, and the findings of the remittance transfer provider regarding the investigation of the alleged error. *See* EFTA Section 919(d)(2).

Proposed comment 33(g)–1 states that remittance transfer providers are subject to the record retention requirements under § 205.13, which apply to "any person subject to the [EFTA]." Accordingly, remittance transfer providers must retain documentation, including documentation related to error investigations, for a period of not less than two years from the date a notice of error was submitted to the provider or action was required to be

taken by the provider. However, the proposed comment further clarifies that the record retention requirements do not require a remittance transfer provider to maintain records of individual disclosures of remittance transfers that it has provided to each sender. Instead, a provider need only retain records to ensure that it can comply with a sender's request for documentation or other information relating to a particular remittance transfer under § 205.33(a)(1)(v), including a request for supporting documentation to enable the sender to determine whether an error exists with respect to that transfer.

Section 205.34 Procedures for Cancellation and Refund of Remittance Transfers

EFTA Section 919(d)(3) directs the Board to issue final rules regarding appropriate remittance transfer cancellation and refund policies for consumers within 18 months of the date of enactment of the Dodd-Frank Act. Proposed § 205.34 establishes new cancellation and refund rights for senders of remittance transfers as required by the Dodd-Frank Act.

34(a) Sender Right of Cancellation and Refund

Under proposed § 205.34(a), a remittance transfer provider must comply with a sender's oral or written request to cancel a remittance transfer received no later than one business day from when the sender makes payment in connection with the remittance transfer provider. In determining the appropriate minimum time period for cancelling a remittance transfer, the Board considered a number of factors. Through its outreach, the Board understands that some remittance transfer providers permit a sender to cancel a remittance transfer and obtain a full refund of all funds tendered at any time so long as the transfer has not been picked up in the foreign country by the recipient or deposited into the recipient's account.

In contrast, however, remittance transfers sent by ACH or wire transfer generally cannot be cancelled once the payment order has been accepted by the sending institution. *See, e.g.,* UCC Article 4A–211 (providing that a payment order cannot be cancelled or amended once it has been accepted unless the receiving bank agrees or a funds-transfer system rule allows cancellation or amendment without agreement of the bank). Thus, a prolonged cancellation period would present significant practical difficulties for remittance transfers sent by ACH and wire transfer. Under such circumstances, the bank or credit union would likely wait to execute the payment order until the cancellation period has passed, which could further delay the receipt of the funds in the foreign country.

The Board also considered time frames for cancellation established under state laws applicable to remittance transfers, or money transfers more generally. *See, e.g.,* TX Admin. Code § 278.052 (providing that a consumer may cancel a transfer for any reason within 30 minutes of initiating the transfer provided the customer has not left the premises). Finally, during the Board's consumer testing, a few of the participants that believed that they had a right to cancel a remittance transfer expected that they would have to exercise their right to cancel the same day they requested the transfer be sent. For these reasons, the Board believes that one business day provides a reasonable time frame for a sender to evaluate whether to cancel a remittance transfer after providing payment for the transfer. Nothing in the proposed rule, however, prohibits remittance transfer providers from offering longer cancellation time frames to senders. Comment is requested regarding whether the proposed minimum time period should be longer or shorter than proposed.

The proposed rule contains two conditions on the right to cancel. First, under proposed § 205.34(a)(1), a valid request to cancel a remittance transfer must enable the provider to identify the sender's name and address or telephone number and the particular transfer to be cancelled. Proposed comment 34(a)–1 clarifies that the request to cancel a remittance transfer is valid so long as the remittance transfer provider is able to identify the remittance transfer in question. For example, the sender could provide the confirmation number or code that would be used by the designated recipient to pick up the transfer, or other identification number or code supplied by the provider in connection with the transfer. The proposed comment also permits the provider to request, or the sender to provide, the sender's e-mail address instead of a physical address, so long as the provider can identify the transfer to which the cancellation request applies.

Second, proposed § 205.34(a)(2) provides that a sender's timely request to cancel a remittance transfer is effective so long as the transferred funds have not been picked up by the designated recipient or deposited into an account held by the recipient.[38]

Proposed comment 34(a)–2 cross-references the disclosure requirements in proposed § 205.31 to reiterate that a remittance transfer provider must include an abbreviated notice of the sender's right to cancel a remittance transfer in the receipt or combined pre-payment notice, as applicable. In addition, the remittance transfer provider must make available to a sender upon request, a notice providing a full description of the right to cancel a remittance transfer that is substantially similar to the proposed model error resolution and cancellation notice set forth in Appendix A of this regulation (Model Form A–36).

34(b) Time Limits and Refund Requirements

Proposed § 205.34(b) establishes the time frames and refund requirements applicable to remittance transfer cancellation requests. The proposed rule requires a remittance transfer provider to refund, at no additional cost to the sender, the total amount of funds tendered by the sender in connection with the remittance transfer, including any fees imposed in connection with the requested transfer, within three business days of receiving the sender's valid cancellation request. The Board believes that three business days provides sufficient time for a remittance transfer provider to determine whether a remittance transfer has been picked up in the foreign country or deposited into the recipient's account. Comment is requested regarding the appropriate time period for providing a refund following a sender's request for cancellation.

Proposed comment 34(b)–1 clarifies that a remittance transfer provider may, at the provider's discretion, issue a refund in cash or in the same form of payment that was initially tendered by the sender for the remittance transfer. For example, if the sender originally provided a credit card as payment for the transfer, the remittance transfer provider may issue a credit to the sender's credit card account in the amount of the payment.

Proposed comment 34(b)–2 addresses fees that must be refunded upon a sender's timely request to cancel a

[38] Such accounts need not be accounts held by a financial institution so long as the recipient may access the transferred funds without any restrictions regarding the use of such funds. For example, some Internet-based providers may track consumer funds in a virtual account or wallet and permit the holder of the account or wallet to make purchases or withdraw funds once funds are credited to the account or wallet.

remittance transfer. Under the proposed comment, the remittance transfer provider must refund all funds tendered by the sender in connection with the remittance transfer, including any fees that have been imposed for the transfer, regardless of whether the provider or a third party, such as an intermediary institution, imposed the fee.

The Board solicits comment on any and all aspects of the proposed right to cancel a remittance transfer.

Section 205.35 Acts of Agents

In most cases, remittance transfers are sent through an agent of the remittance transfer provider, such as a convenience store that has contracted with the provider to offer remittance transfer services at that location. EFTA Section 919(f)(1) generally makes remittance transfer providers liable for any violation of EFTA Section 919 by an agent, authorized delegate, or person affiliated with such provider, when such agent, authorized delegate, or affiliate acts for that remittance transfer provider. EFTA Section 919(f)(2) requires the Board to prescribe rules to implement appropriate standards or conditions of liability of a remittance transfer provider, including one that acts through its agent or authorized delegate.[39]

The Board is proposing two alternatives to implement EFTA Section 919(f) with respect to acts of agents. Under the first alternative, a remittance transfer provider would be strictly liable for violations by an agent when such agent acts for the provider. Under the second alternative, a remittance transfer provider would not be liable under the EFTA for violations by an agent acting for the provider where the provider establishes and maintains policies and procedures for agent compliance, including appropriate oversight measures, and the provider corrects any violation, to the extent appropriate. The Board solicits comment on both alternatives.

Alternative A

EFTA Section 919(f)(1) states that remittance transfer providers are liable for any violation of EFTA Section 919 by an agent, authorized delegate, or person affiliated with such provider, when such agent, authorized delegate, or affiliate acts for that remittance transfer provider. Under Alternative A, proposed § 205.35 provides that a remittance transfer provider is liable for any violation of Subpart B by an agent when such agent acts for the provider. Some agents have a non-exclusive arrangement with several remittance transfer providers, so that a sender may choose from among the remittance transfer providers at that location. If a sender chooses to use Provider A to send funds at the agent location, then Provider B would not be liable for the agent's actions in that instance because the agent would be acting for Provider A.

Proposed comment 35–1 explains that remittance transfer providers remain fully responsible for complying with the requirements of this subpart, including, but not limited to, providing the disclosures set forth in proposed § 205.31 and remedying any errors as set forth in proposed § 205.33. This is the case even if a remittance transfer provider performs its functions through an agent, and regardless of whether the provider has an agreement with a third party that transfers or otherwise makes funds available to a designated recipient.

The approach set forth in Alternative A is consistent with EFTA Section 919(f)(1), as well as the approach generally taken in other Board regulations, including Regulation E. For example, under Regulation E's payroll card rules, a financial institution is required to provide initial payroll card disclosures to a payroll account holder. If, by contractual agreement with the institution, a third-party service provider or the employer agrees to deliver these disclosures on the institution's behalf and fails to do so, the issuing financial institution is nonetheless liable for the violation.[40] Similarly, if an agent at a retail establishment fails to provide the disclosures required by proposed § 205.31, under the proposed rule, the remittance transfer provider would be liable.

Even where there is no contractual relationship between a provider and an agent, the proposed rule by its terms requires the remittance transfer provider to make accurate, timely disclosures and to provide error resolution rights to the sender. *See, e.g.,* proposed § 205.31(b). A remittance transfer provider may not always have a contractual relationship with the location that is making funds available or depositing funds into the recipient's account. For example, a financial institution that sends a wire transfer may not have a correspondent relationship or other contractual privity with an institution abroad where the wire transfer is deposited. Nonetheless, if the amount of currency paid to the designated recipient is reduced by an intermediary institution's fee, such that the amount disclosed by the remittance transfer provider (or its agent) is no longer accurate, the remittance transfer is responsible for providing the appropriate remedy under proposed § 205.33. *See* proposed § 205.33(a)(1)(iii).

Alternative B

Remittance transfer providers have expressed concern that, under a strict liability approach, they may be held responsible for their agents' failure to comply with the statute despite the provider's best efforts to monitor and train their agents. As noted previously, the majority of senders send remittances through money transmitters at agent locations. Some providers have a network of thousands, or in some cases, hundreds of thousands of agent locations worldwide to oversee, making frequent on-site inspection of each location impracticable. Providers have expressed particular concern about administrative and civil liability under the EFTA for a single agent's non-compliance.

Alternative B recognizes the unique position of agents in the remittance transfer model, while still making an individual consumer whole for any problems experienced with the remittance transfer. Under Alternative B, proposed § 205.35 provides that a remittance transfer provider is liable for any violation of Subpart B by an agent when such agent acts for that provider, unless it meets two conditions. The first condition is that the remittance transfer provider must establish and maintain written policies and procedures designed to assure compliance with Subpart B by an agent, including policies, procedures and other appropriate oversight measures. *See* proposed § 205.35(a). The second condition is that the remittance transfer provider must correct the violation to the extent appropriate, including complying with the error resolution procedures set forth in proposed § 205.33 and providing the sender the remedies set forth in proposed § 205.33(c)(2). *See* proposed § 205.35(b). A remittance transfer provider that meets these two conditions would not be liable for the acts of its agents. Alternative B is proposed consistent with the Board's authority under EFTA

[39] *See* proposed § 205.30(a), which defines the term agent for purposes of the proposed rule.

[40] 12 CFR 205.18. *See* 71 FR 51437, 51441–42 (August 30, 2006) ("In many cases, the depository institution may use a third-party service provider to perform some or a substantial proportion of the compliance duties (*e.g.,* in a turnkey arrangement), including mailing account terms and conditions and providing error resolution services"; "[P]ayroll card account holders will, at a minimum, be able to assert their Regulation E rights against the depository institution holding their account in all cases * * *").

Section 919(f)(2) to prescribe rules to implement appropriate standards or conditions of liability of a remittance transfer provider, including one that acts through its agent or authorized delegate.

Proposed comment 35–1 states that remittance transfer providers generally remain fully responsible for complying with the requirements of Subpart B, including but not limited to providing the disclosures set forth in proposed § 205.31 and remedying any errors as set forth in proposed § 205.33. As in Alternative A, this is the case even if a remittance transfer provider performs its functions through an agent or other person, and regardless of whether the provider has an agreement with a third party that transfers or otherwise makes funds available to a designated recipient.

Proposed comment 35–2 provides further guidance on proposed § 205.35(a)(1). The proposed comment states that a remittance transfer provider must establish and maintain written policies and procedures for compliance with Subpart B applicable to its agents. Maintenance of policies and procedures includes periodic updates to and administration of such policies and procedures, including appropriate oversight over agents. Further, appropriate oversight measures include regular audits, training, and other measures designed to ensure an agent's compliance with Subpart B. Under these circumstances, a provider will not be liable if an agent fails to follow the policies and procedures in an individual case, and so long as the remittance transfer provider makes the consumer whole for any error resulting from an agent's acts, including as set forth under the error resolution provisions in proposed § 205.33.

Appendix A—Model Disclosure Clauses and Forms

The proposal would add to Appendix A twelve model forms that a remittance transfer provider may use in connection with remittance transfers. Proposed Model Forms A–30 through A–41 are intended to demonstrate several formats a remittance transfer provider may use to comply with the disclosure requirements of proposed § 205.31. The Board is proposing model forms pursuant to its authority under EFTA section 904(a), rather than model clauses pursuant to its authority under EFTA section 904(b), in order to clearly demonstrate the general form and specific format requirements of § 205.31(a) and (c). Proposed Model Forms A–30 through A–32 were developed in consumer testing and reflect a format in which the flow and organization of information effectively communicates the remittance disclosures to most consumers.

The proposed rule amends instruction 2 to Appendix A regarding the use of model forms, which currently only references financial institutions and electronic fund transfers. The instruction is proposed to be revised to include references to remittance transfer providers and remittance transfers. The proposed instruction also updates the numbering of the liability provisions of the EFTA as sections 916 and 917. Thus, the proposed instruction clarifies that the use of the proposed model forms in making disclosures would protect a remittance transfer provider from liability under sections 916 and 917 of the EFTA if they accurately reflect the provider's remittance transfer services.

The proposal also adds instruction 4 to Appendix A to describe how a remittance transfer provider may properly use and alter the model forms. Proposed instruction 4 to Appendix A explains that Model Forms A–30 through A–32 demonstrate how a provider could provide the required disclosures for a remittance transfer exchanged into local currency. Proposed Model Forms A–33 through A–35 demonstrate how a provider could provide the required disclosures for U.S. dollar-to-U.S. dollar remittance transfers. Proposed instruction 4 states that these forms also demonstrate disclosure of the required content, in accordance with the grouping and proximity requirements of § 205.31(c)(1) and (2), in both a register receipt format (as developed in consumer testing) and an 8.5 inch by 11 inch format. Proposed Model Form A–36 provides long-form model error resolution and cancellation disclosures in connection with § 205.31(d), and Model Form A–37 provides short-form model error resolution and cancellation disclosures in connection with § 205.31(b)(2)(iv).

Proposed instruction 4 to Appendix A also explains that a remittance transfer provider could use the language and formatting provided in proposed Forms A–37 through A–41 for disclosures that are required to be provided in Spanish, pursuant to the requirements of proposed § 205.31(g). The Board understands that the majority of remittance transfers from the United States are sent to Mexico and the Caribbean, Central America, and South America.[41] Spanish is the primary language in many of the countries in these regions, so many senders of remittance transfers that remit funds to the countries in these regions speak Spanish. Therefore, the Board believes that it is appropriate to provide model disclosures in Spanish to facilitate compliance. The Board requests comment on the provision of Spanish language disclosures, including whether the language used in the Spanish translation would effectively communicate the remittance transfer disclosures to Spanish-speaking consumers.

The Board recognizes that disclosures may be required to be provided in languages other than English and Spanish. Nonetheless, the Board believes it would be impracticable to provide model forms in every possible language in which remittance transfer disclosures may be provided.

Proposed instruction 4 to Appendix A clarifies that the model forms may contain information that is not required by Subpart B, such as a confirmation code and the sender's name and contact information. The additional information not required by Subpart B is included on the model form to demonstrate one way of displaying this information in compliance with § 205.31(c)(4). The proposed instruction clarifies that any additional information must be presented consistent with a remittance transfer provider's obligation to provide required disclosures in a clear and conspicuous manner.

Proposed instruction 4 to Appendix A further clarifies that use of the model forms is optional. A remittance transfer provider may change the forms by rearranging the format or by making modifications to the language of the forms, without modifying the substance of the disclosures. Proposed instruction 4 to Appendix A clarifies that rearrangement or modification of the format of the model forms is permissible, as long as it is consistent with the form, grouping, proximity, and other requirements of § 205.31(a) and (c). The proposed instruction states that providers making revisions that do not comply with this section will lose the benefit of the safe harbor for appropriate use of proposed model forms A–30 to A–41. The Board recognizes that many remittance transfer providers currently provide disclosures in a variety of forms. The Board intends to provide flexibility to remittance transfer providers in developing disclosure forms that comply with the proposed rule.

Proposed instruction 4 to Appendix A also provides examples of permissible changes a remittance transfer provider may make to the language and format of the model forms without losing the benefit of the safe harbor. The proposed

[41] *See* GAO Report at 7 (Nov. 2005).

instruction clarifies that a remittance transfer provider could substitute the information entered into the model forms that is intended to demonstrate how to complete the information in the model forms—such as names, addresses, and Web sites; dates; numbers; and state-specific contact information—with information applicable to the remittance transfer. A remittance transfer provider could also eliminate disclosures that are not applicable to the transfer, as permitted under proposed § 205.31(b), or provide the required disclosures on a paper size that is different from a register receipt and 8.5 inch by 11 inch formats. The proposed instruction also clarifies that a remittance transfer provider could correct or update telephone numbers, mailing addresses, or Web site addresses that may change over time. This instruction applies to all telephone numbers and addresses on a model form, including the contact information of the provider, the state agency, and the Consumer Financial Protection Bureau. The proposed instruction also clarifies that a provider could provide the required disclosures in a foreign language, or multiple foreign languages, subject to the requirements of proposed § 205.31(g), without losing the benefit of the safe harbor.

The proposed comment also clarifies that an impermissible change would be adding language to a form that is not segregated from the required disclosures, other than as permitted by § 205.31(c)(4).

Proposed instruction 4 to Appendix A further clarifies that adding the term "Estimated" or a substantially similar term and in close proximity to the estimated term or terms, as permitted under proposed § 205.31(d), is a permissible change to the model forms. The Board is not proposing separate forms that demonstrate how estimated content would be presented on the forms, because the disclosures will be the same as the proposed model forms, except for the disclosures that certain information is estimated. The general form and specific formatting will be the same on forms that include estimates as they are in the model forms that are provided.

VI. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) ("RFA") generally requires an agency to publish an initial regulatory flexibility analysis with a proposed rule whenever the agency is required to publish a general notice of proposed rulemaking for a proposed rule. The Board requests public comment on the following areas in connection with its initial regulatory flexibility analysis. The Board will conduct a final regulatory flexibility analysis after considering the comments received during the public comment period.

1. *Statement of the need for, and objectives of, the proposed rule.* The EFTA, as amended by the Dodd-Frank Act, was enacted to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems. The primary objective of the EFTA is the provision of individual consumer rights. 15 U.S.C. 1693. The EFTA authorizes the Board to prescribe regulations to carry out the purpose and provisions of the statute. 15 U.S.C. 1693b(a). The EFTA expressly states that the Board's regulations may contain "such classifications, differentiations, or other provisions . . . as, in the judgment of the Board, are necessary or proper to effectuate the purposes of [the EFTA], to prevent circumvention or evasion [of the EFTA], or to facilitate compliance [with the EFTA]." 15 U.S.C. 1693b(c).

The Board is proposing revisions to Regulation E to implement Section 1073 of the Dodd-Frank Act. The proposal creates new protections for consumers who send remittance transfers from the United States to a designated recipient in a foreign country. The proposal generally requires remittance transfer providers to provide the sender a written pre-payment disclosure containing information about the specific remittance transfer, such as the exchange rate, applicable fees and taxes, and the amount to be received by the designated recipient. The remittance transfer provider generally must also provide a written receipt for the remittance transfer that includes the above information, as well as additional information such as the date of availability and the recipient's contact information. Alternatively, the proposal permits remittance transfer providers to provide the sender a single written pre-payment disclosure containing all of the information required on the receipt.

The proposal also requires remittance transfer providers to furnish the sender with a brief statement of the sender's error resolution and cancellation rights, and requires providers to comply with related recordkeeping, cancellation, and refund policies. The proposed revisions also implement standards of liability for remittance transfer providers, including those that act through an agent.

The Board believes that the revisions to Regulation E discussed above are consistent with the EFTA, as amended by Section 1073 of the Dodd-Frank Act, and within Congress's broad grant of authority to the Board to adopt provisions that carry out the purposes of the EFTA.

2. *Small entities affected by the proposed rule.* The number of small entities affected by this proposal is unknown. Under regulations issued by the Small Business Administration ("SBA"), an entity is considered "small" if it has $175 million or less in assets for banks and other depository institutions, or for other financial businesses, as one whose average annual receipts do not exceed $7 million.[42] Based on estimates compiled by the Board, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision, there are approximately 9,458 depository institutions that could be considered small entities.[43] In addition, the Financial Crimes Enforcement Network (FinCEN) previously estimated that there are approximately 19,000 registered money transmitters, an estimated 95% of which have less than $7 million in gross receipts annually.[44]

Remittance transfer providers will be required to review and potentially revise their disclosures and procedures to ensure that disclosures meet the content, format, timing, and foreign language requirements of the proposed rule, as described above. Remittance transfer providers will also be required to review and potentially update their error resolution and cancellation procedures to ensure compliance with the proposed rule, also as described above. Accordingly, remittance transfer providers that are small entities will incur implementation costs to comply with the rule.

The Board believes that the rule as proposed offers flexibility that will mitigate the impact of the proposed rule on remittance transfer providers that are small entities. Although the proposed disclosure rules do contain certain formatting requirements in order to ensure that senders notice and comprehend the disclosures, the proposed rule also gives remittance

[42] 13 CFR 121.201; SBA, Table of Small Business Size Standards (available at: *http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf*).

[43] The estimate includes 1,459 institutions regulated by the Board, 659 national banks, and 4,099 federally-chartered credit unions, as determined by the Board. The estimate also includes 2,872 institutions regulated by the FDIC and 369 thrifts regulated by the OTS. See 75 FR 36016, 36020 (Jun. 24, 2010).

[44] Notice of Proposed Rulemaking, Cross-Border Electronic Transmittal of Funds, 75 FR 60377, 60392 (Sept. 30, 2010) (estimates based on FinCEN's February 2010 Money Service Business Registration List).

transfer providers some flexibility in drafting their disclosures. For example, disclosures may be provided on a register receipt or 8.5 inches by 11 inches piece of paper, consistent with current practices in the industry. The Board also believes that currently, some remittance transfer providers give the disclosures' required content.

Additionally, EFTA Section 919(a)(5) provides the Board with exemption authority with respect to several statutory requirements. The Board is exercising its exemption authority in the proposed rule in order to reduce providers' compliance burden. For instance, the Board is exercising its authority under EFTA Section 919(a)(5)(C) to permit remittance transfer providers to provide the sender a single written pre-payment disclosure under the conditions described above, instead of both pre-payment and receipt disclosures. Similarly, consistent with EFTA Section 919(a)(5)(A), the proposed rule permits remittance transfer providers to provide pre-payment disclosures orally when the transaction is conducted entirely by telephone.

Other measures intended to provide flexibility to remittance transfer providers are discussed above in this **SUPPLEMENTARY INFORMATION**.

The proposed rule could have a significant economic impact on small financial institutions that are remittance transfer providers for consumer international wire transfers. Specifically, as discussed above, one consequence of covering remittance transfers under the EFTA could be legal uncertainty for financial institutions, as providers of consumer international wire transfers may no longer be able to rely on UCC Article 4A's rules governing the rights and responsibilities among the parties to a wire transfer. As a result, some financial institutions may decide to stop offering international wire transfers to consumer customers. However, unless these international wire transfers constitute a high volume of a financial institution's remittance transfer business, or business in general, such a decision is unlikely to have a significant economic impact on the institution. Based on the Board's understanding that consumers are less likely to send remittance transfers by wire transfer compared to other methods, the Board does not believe that small financial institutions are likely to be significantly impacted by the rule.

Nonetheless, the Board solicits comment on whether the proposed rule will have a significant economic impact on small remittance transfer providers. The Board also solicits comment on any significant alternatives that would reduce the regulatory burden associated with this proposed rule on small entities.

3. *Other federal rules.* The Board has not identified any likely duplication, overlap and/or potential conflict between the proposed rule and any federal rule.

4. *Significant alternatives to the proposed revisions.* The Board solicits comment on any significant alternatives that would reduce the regulatory burden associated with this proposed rule on small entities.

VII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR part 1320 Appendix A.1), the Board reviewed the rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The collection of information that is subject to the PRA by this proposed rule is found in 12 CFR part 205. In addition, as permitted by the PRA, the Board also proposes to extend for three years the current recordkeeping and disclosure requirements in connection with Regulation E. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless the information collection displays a currently valid OMB control number. The OMB control number is 7100–0200.

This information collection is required to provide benefits for consumers and is mandatory. *See* 15 U.S.C. 1693 *et seq.* Since the Board does not collect any information, no issue of confidentiality arises. The respondents/recordkeepers are for-profit financial institutions and entities involved in the remittance transfer business, including small businesses. Respondents are required to retain records for 24 months, but this regulation does not specify types of records that must be retained.

Any entities involved in the remittance transfer business potentially are affected by this collection of information because these entities will be required to provide disclosures containing information about consumers' specific remittance transfers. Disclosures must be provided prior to and at the time of payment for a remittance transfer, or alternatively, in a single pre-transaction disclosure containing all required information. Remittance transfer providers also make available a written explanation of a consumer's error resolution, cancellation and refund rights upon request. Disclosures must be provided in English and in each foreign language principally used to advertise, solicit or market remittance transfers at an office.

Entities subject to the rule will have to review and revise disclosures that are currently provided to ensure that they accurately reflect the disclosure requirements in this proposed rule. Entities subject to the rule may need to develop new disclosures to meet the proposed rule's timing requirements.

The total estimated burden increase, as well as the estimates of the burden increase associated with each major section of the proposed rule as set forth below, represents averages for all respondents regulated by the Federal Reserve. The Federal Reserve expects that the amount of time required to implement each of the proposed changes for a given institution may vary based on the size and complexity of the respondent.

The current annual burden to comply with the provisions of Regulation E is estimated to be 738,600 hours for the 1,133 institutions [45] supervised by the Federal Reserve that are deemed to be respondents for the purposes of the PRA.

The Board estimates that 1,133 respondents regulated by the Federal Reserve would take, on average, 120 hours (three business weeks) to update their systems to comply with the disclosure requirements addressed in § 205.31. This one-time revision would increase the burden by 135,960 hours. On a continuing basis the Board estimates that 1,133 respondents would take, on average, 8 hours (one business day) monthly to comply with the requirements under § 205.31and would increase the ongoing burden by 108,768 hours. In an effort to minimize the compliance cost and burden, particularly for small entities, the proposed rule contains model disclosures in appendix A (Model Forms A–10 through A–20) that may be used to satisfy the statutory requirements.

The Board estimates that on average 825,600 consumers would spend approximately 5 minutes in order to provide a notice of error as required under section 205.33(b). This would increase the total annual burden for this information collection by 68,798 hours.

The Board estimates that 1,133 respondents regulated by the Federal Reserve would take, on average, 1.5 hours (monthly) to address a sender's

[45] The number of Board-supervised respondents was obtained from queries of entities that filed December 2010 Call Reports: 828 State member banks, 243 branches & agencies of foreign banks, three commercial lending companies, and 59 Edge Act or agreement corporations.

notice of error as required by § 205.33(c)(1) and would increase the ongoing burden by 20,349 hours.

The Board estimates that 1,133 respondents regulated by the Federal Reserve would take, on average, 40 hours (one business week) to develop written policies and procedures designed to ensure compliance with respect to the error resolution requirements applicable to remittance transfers under § 205.33. This one-time revision would increase the burden by 45,320 hours. On a continuing basis the Board estimates that 1,133 respondents would take, on average, 8 hours (one business day) annually to maintain the requirements under § 205.33 and would increase the ongoing burden by 9,064 hours.

The Board estimates that 1,133 respondents regulated by the Federal Reserve would take, on average, 40 hours (one business week) to establish policies and procedures for agent compliance as addressed under § 205.35, This one-time revision would increase the burden by 45,320 hours. On a continuing basis the Board estimates that 1,133 respondents would take, on average, 8 hours (one business day) annually to maintain the requirements under § 205.35 and would increase the ongoing burden by 9,064 hours.

The proposed rule would impose a one-time increase in the estimated annual burden 226,600 hours. On a continuing basis the proposed rule would increase in the estimated annual burden by 216,043 hours. Overall the total annual burden is estimated to increase by 442,643 hours, from 738,600 to 1,181,243 hours.

In a September 2010 rulemaking the Department of Treasury estimated that as of February 2010, the number of registered U.S. entities engaged in money transmission was approximately 19,000.[46] Using the Federal Reserve's method the proposed rule would impose a one-time estimated annual burden for such entities of 3,800,000 hours. On a continuing basis the proposed rule would impose an annual burden for such entities of 798,000 hours. Overall the proposed total annual burden for such entities is estimated to be 4,598,000 hours.

The other federal financial agencies[47] are responsible for estimating and reporting to OMB the total paperwork burden for the institutions for which they have administrative enforcement authority. They may, but are not required to, use the Federal Reserve's burden estimation methodology. Using the Federal Reserve's method, the current total estimated annual burden for all persons subject to Regulation E, including Federal Reserve-supervised institutions would be approximately 5,166,413 hours. The above estimates represent an average across all respondents and reflect variations between persons based on their size, complexity, and practices. All covered persons, including depository institutions (of which there are approximately 19,000), potentially are affected by this collection of information, and thus are respondents for purposes of the PRA. The proposed rule would impose a one-time increase in the estimated annual burden for such institutions by 3,800,000 hours. On a continuing basis the proposed rule would increase in the estimated annual burden for such institutions by 798,000 hours. The proposed total annual burden for the respondents regulated by the federal financial agencies is estimated to be 9,764,413 hours.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the Board's functions; including whether the information has practical utility; (2) the accuracy of the Board's estimate of the burden of the proposed information collection, including the cost of compliance; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology. Comments on the collection of information should be sent to Cynthia Ayouch, Acting Federal Reserve Clearance Officer, Division of Research and Statistics, Mail Stop 95–A, Board of Governors of the Federal Reserve System, Washington, DC 20551, with copies of such comments sent to the Office of Management and Budget, Paperwork Reduction Project (7100–0200), Washington, DC 20503.

Text of Proposed Revisions

Certain conventions have been used to highlight the proposed changes to the text of the regulation and staff commentary. New language is shown inside ►bold-faced arrows◄, while language that would be deleted is set off with **[**bold-faced brackets**]**.

List of Subjects in 12 CFR Part 205

Consumer protection, Electronic fund transfers, Federal Reserve System, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons set forth in the preamble, the Board proposes to amend 12 CFR part 205 and the Official Staff Commentary, as follows:

PART 205—ELECTRONIC FUND TRANSFERS (REGULATION E)

1. The authority citation for part 205 continues to read as follows:

Authority: 15 U.S.C. 1693b.

Subpart A—General

2. Add a new Subpart A heading as set forth above, and designate §§ 205.1 through 205.20 under Subpart A.

3. In § 205.3, revise paragraph (a) to read as follows:

§ 205.3 Coverage.

(a) *General.* This part applies to any electronic fund transfer that authorizes a financial institution to debit or credit a consumer's account. Generally, this part applies to financial institutions. For purposes of §§ 205.3(b)(2) and (b)(3), 205.10(b), (d), and (e), and 205.13, this part applies to any person. ►The requirements of Subpart B apply to remittance transfer providers.◄

* * * * *

4. Add Subpart B to part 205 to read as follows:

Subpart B—Requirements for Remittance Transfers

Sec.
205.30 Remittance transfer definitions.
205.31 Disclosures.
205.32 Estimates.
205.33 Procedures for resolving errors.
205.34 Procedures for cancellation and refund of remittance transfers.
205.35 Acts of agents.

Subpart B—Requirements for Remittance Transfers

Authority: 12 U.S.C. 5601; Pub. L. 111–203, 124 Stat. 1376 (2010).

►§ 205.30 Remittance transfer definitions.

For purposes of this subpart, the following definitions apply.

(a) *Agent* means an agent, authorized delegate, or person affiliated with a remittance transfer provider, as defined under state or other applicable law, when such agent, authorized delegate,

[46] 75 FR 60377, 60392 (Sept. 30, 2010).

[47] Appendix B—Federal Enforcement Agencies—of Regulation E lists those federal agencies that enforce the regulation for particular classes of business. The federal financial agencies include: the Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Office of Thrift Supervision, and National Credit Union Administration. The federal non-financial agencies include: Department of Transportation, Securities and Exchange Commission, and Federal Trade Commission.

or affiliate acts for that remittance transfer provider.

(b) *Business day* means any day on which a remittance transfer provider accepts funds for sending remittance transfers.

(c) *Designated recipient* means any person specified by the sender as the authorized recipient of a remittance transfer to be received at a location in a foreign country.

(d) *Remittance transfer*—(1) *General definition.* A remittance transfer means the electronic transfer of funds requested by a sender to a designated recipient that is sent by a remittance transfer provider. The term applies regardless of whether the sender holds an account with the remittance transfer provider, and regardless of whether the transaction is also an electronic fund transfer, as defined in § 205.3(b).

(2) *Exception for small value transactions.* Remittance transfers do not include transfer amounts of $15 or less.

(e) *Remittance transfer provider* or *provider* means any person that provides remittance transfers for a consumer in the normal course of its business, regardless of whether the consumer holds an account with such person.

(f) *Sender* means a consumer in a state who requests a remittance transfer provider to send a remittance transfer to a designated recipient.

§ 205.31 Disclosures.

(a) *General form of disclosures*—(1) *Clear and conspicuous.* Disclosures required by this subpart must be clear and conspicuous. Disclosures required by this subpart may contain commonly accepted or readily understandable abbreviations or symbols.

(2) *Written and electronic disclosures.* Disclosures required by this subpart generally must be provided to the sender in writing. Disclosures required by paragraph (b)(1) of this section may be provided electronically, if the sender electronically requests the remittance transfer provider to send the remittance transfer. Written and electronic disclosures required by this subpart must be made in a retainable form.

(3) *Oral disclosures for telephone transactions.* The information required by paragraph (b)(1) of this section may be disclosed orally if:

(i) The transaction is conducted entirely by telephone; and

(ii) The remittance transfer provider complies with the requirements of paragraph (g)(2) of this section.

(4) *Oral disclosures for certain error resolution notices.* The information required by § 205.33(c)(1) may be disclosed orally if:

(i) The remittance transfer provider determines that an error occurred as described by the sender; and

(ii) The remittance transfer provider complies with the requirements of paragraph (g)(2) of this section.

(b) *Disclosure requirements*—(1) *Pre-payment disclosure.* A remittance transfer provider must disclose to a sender, as applicable:

(i) The amount that will be transferred to the designated recipient, in the currency in which the funds will be transferred, using the term "Transfer Amount" or a substantially similar term;

(ii) Any fees and taxes imposed on the remittance transfer by the provider, in the currency in which the funds will be transferred, using the term "Transfer Fees," "Transfer Taxes," or "Transfer Fees and Taxes," or a substantially similar term;

(iii) The total amount of the transaction, which is the sum of paragraphs (b)(1)(i) and (b)(1)(ii) of this section, in the currency in which the funds will be transferred, using the term "Total" or a substantially similar term;

(iv) The exchange rate used by the provider for the remittance transfer, rounded to the nearest 1/100th of a decimal point, using the term "Exchange Rate" or a substantially similar term;

(v) The amount in paragraph (b)(1)(i) of this section in the currency in which the funds will be received by the designated recipient, but only if fees or taxes are imposed under paragraph (b)(1)(vi) of this section, using the term "Transfer Amount" or a substantially similar term;

(vi) Any fees and taxes imposed on the remittance transfer by a person other than the provider, in the currency in which the funds will be received by the designated recipient, using the term "Other Transfer Fees," "Other Transfer Taxes," or "Other Transfer Fees and Taxes," or a substantially similar term.

(vii) The amount that will be received by the designated recipient, in the currency in which the funds will be received, using the term "Total to Recipient" or a substantially similar term.

(2) *Receipt.* A remittance transfer provider must disclose to a sender, as applicable:

(i) The disclosures described in paragraphs (b)(1)(i) through (b)(1)(vii) of this section;

(ii) The date of availability of funds to the designated recipient, using the term "Date Available" or a substantially similar term. A provider may provide a statement that funds may be available to the designated recipient earlier than the date disclosed, using the term "may be available sooner" or a substantially similar term.

(iii) The name and, if provided by the sender, the telephone number and/or address of the designated recipient, using the term "Recipient" or a substantially similar term;

(iv) A statement about the rights of the sender regarding the resolution of errors and cancellation, using language set forth in Model Form A–37 of Appendix A to this part or substantially similar language;

(v) The name, telephone number, and Web site of the remittance transfer provider; and

(vi) A statement that the sender can contact the state agency that regulates the remittance transfer provider and the Consumer Financial Protection Bureau for questions or complaints about the remittance transfer provider, using language set forth in Model Form A–37 of Appendix A to this part or substantially similar language, and the telephone number and Web site of the state agency that regulates the remittance transfer provider and the telephone number and Web site of the Consumer Financial Protection Bureau, including the toll-free telephone number established under Section 1013 of the Consumer Financial Protection Act of 2010.

(3) *Combined disclosure.* As an alternative to providing the disclosures described in paragraphs (b)(1) and (b)(2) of this section, a remittance transfer provider may provide the disclosures described in paragraph (b)(2) of this section, as applicable, in a single disclosure.

(4) *Long form error resolution and cancellation notice.* Upon the sender's request, a remittance transfer provider must provide to the sender a notice providing a description of the sender's error resolution and cancellation rights under §§ 205.33 and 205.34 using Model Form A–36 of Appendix A to this part or a substantially similar notice.

(c) *Specific format requirements*—(1) *Grouping.* The information required by paragraphs (b)(1)(i), (ii), and (iii) of this section must be grouped together in written and electronic disclosures. The information required by paragraphs (b)(1)(v), (vi), and (vii) of this section must be grouped together in written and electronic disclosures.

(2) *Proximity.* The information required by paragraph (b)(1)(iv) of this section must be disclosed in close proximity to the other information required by paragraph (b)(1) of this section in written and electronic disclosures. The information required by paragraph (b)(2)(iv) of this section

must be disclosed in close proximity to the other information required by paragraph (b)(2) of this section in written and electronic disclosures.

(3) *Prominence and size.* Written disclosures required by this subpart must be provided on the front of the page on which the disclosure is printed. Written and electronic disclosures required by this subpart must be in a minimum eight-point font. Written and electronic disclosures required by paragraph (b) of this section must be in equal prominence to each other.

(4) *Segregation.* Written and electronic disclosures required by this subpart must be segregated from everything else and must contain only information that is directly related to the disclosures required under this subpart.

(d) *Estimates.* Estimated disclosures may be provided to the extent permitted by § 205.32. Estimated disclosures must be described using the term "Estimated" or a substantially similar term and in close proximity to the estimated term or terms.

(e) *Timing.* (1) Disclosures required by paragraph (b)(1) or (b)(3) of this section must be provided to the sender when the sender requests the remittance transfer, but prior to payment for the remittance transfer.

(2) A receipt required by paragraph (b)(2) of this section must be provided to the sender when payment is made for the remittance transfer. If a transaction is conducted entirely by telephone, a written receipt may be mailed or delivered to the sender no later than one business day after the date on which payment is made for the remittance transfer. If a transaction is conducted entirely by telephone and involves the transfer of funds from the sender's account held by the provider, the written receipt may be provided on or with the next regularly scheduled periodic statement or within 30 days after payment is made for the remittance transfer if a periodic statement is not required and must comply with paragraph (g)(3) of this section.

(f) *Accurate when payment is made.* Disclosures required by this section must be accurate when a sender pays for the remittance transfer, except to the extent permitted by § 205.32

(g) *Foreign language disclosures*—(1) *General.* Except as provided in paragraphs (g)(2) and (g)(3) of this section, disclosures required by this subpart must be made in English and either:

(i) In each of the foreign languages principally used by the remittance transfer provider to advertise, solicit, or market remittance transfer services, either orally, in writing, or electronically, at that office; or

(ii) If applicable, in the foreign language primarily used by the sender with the remittance transfer provider to conduct the transaction (or for written or electronic disclosures made pursuant to § 205.33, in the foreign language primarily used by the sender with the remittance transfer provider to assert the error), provided that such foreign language is principally used by the remittance transfer provider to advertise, solicit, or market remittance transfer services, either orally, in writing, or electronically, at that office.

(2) *Oral disclosures.* Disclosures permitted to be provided orally under paragraph (a)(3) of this section for transactions conducted entirely by telephone shall be made in the language primarily used by the sender with the remittance transfer provider to conduct the transaction. Disclosures permitted to be provided orally under paragraph (a)(4) of this section for error resolution purposes shall be made in the language primarily used by the sender with the remittance transfer provider to assert the error.

(3) *Written receipts for telephone transactions.* Receipts required to be provided to the sender after payment under paragraph (e)(2) of this section for transactions conducted entirely by telephone shall be made in English and, if applicable, in the foreign language primarily used by the sender with the remittance transfer provider to conduct the transaction.

§ 205.32 Estimates.

(a) *Temporary exception for insured institutions*—(1) *General.* Estimates may be provided in accordance with paragraph (c) of this section for the amounts required to be disclosed under §§ 205.31(b)(1)(iv) through (vii), if:

(i) A remittance transfer provider cannot determine the exact amounts for reasons beyond its control;

(ii) A remittance transfer provider is an insured institution; and

(iii) The remittance transfer is sent from the sender's account with the institution.

(2) *Sunset date.* Paragraph (a)(1) of this section expires on July 20, 2015.

(3) *Insured institution.* For purposes of this section, the term "insured institution" includes insured depository institutions as defined in Section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) and insured credit unions as defined in Section 101 of the Federal Credit Union Act (12 U.S.C. 1752).

(b) *Permanent exception for transfers to certain countries.* Estimates may be provided in accordance with paragraph (c) of this section for the amounts required to be disclosed under §§ 205.31(b)(1)(iv) through (vii), if a remittance transfer provider cannot determine the exact amounts because

(1) The laws of the recipient country do not permit, or

(2) The method by which transactions are made in the recipient country does not permit, such determination.

(c) *Bases for estimates.* Estimates provided pursuant to the exceptions in paragraph (a) or (b) of this section must be based on the below-listed approach or approaches applicable to the required disclosure. If a remittance transfer provider bases an estimate on an approach that is not listed in this paragraph (c), the provider complies with this paragraph (c) so long as the designated recipient receives the same, or a greater amount, of currency that it would have received had the estimate been based on a listed approach.

(1) *Exchange rate.* In disclosing the exchange rate as required under § 205.31(b)(1)(iv), an estimate must be based on one of the following:

(i) For remittance transfers sent via international ACH that qualify for the exception in paragraph (b)(2) of this section, the most recent exchange rate set by the recipient country's central bank and reported by a Federal Reserve Bank;

(ii) The most recent publicly available wholesale exchange rate; or

(iii) The most recent exchange rate offered by the person making funds available directly to the designated recipient.

(2) *Transfer amount in the currency made available to the designated recipient.* In disclosing the transfer amount in the currency made available to the designated recipient, as required under § 205.31(b)(1)(v), an estimate must be based on the estimated exchange rate provided in accordance with paragraph (c)(1) of this section.

(3) *Other fees imposed by intermediaries.* In disclosing fees imposed by institutions that act as intermediaries in connection with an international wire transfer as required under § 205.31(b)(1)(vi), an estimate must be based on one of the following:

(i) The remittance transfer provider's most recent remittance transfer to the designated recipient's institution, or

(ii) The representations of the intermediary institutions along a representative route identified by the remittance transfer provider that the requested transfer could travel.

(4) *Other taxes imposed in the recipient country.* In disclosing taxes imposed in the recipient country as required under § 205.31(b)(1)(vi) that are

a percentage of the amount transferred to the designated recipient, an estimate must be based on the estimated exchange rate provided in accordance with paragraph (c)(1) of this section and the estimated fees imposed by institutions that act as intermediaries in connection with an international wire transfer provided in accordance with paragraph (c)(3) of this section.

(5) *Amount of currency that will be received by the designated recipient.* In disclosing the amount of currency that will be received by the designated recipient as required under § 205.31(b)(1)(vii), an estimate must be based on the estimates provided in accordance with paragraphs (c)(1), (3), and (4) of this section, as applicable.

§ 205.33 Procedures for resolving errors.

(a) *Definition of error*—(1) *Types of transfers or inquiries covered.* For purposes of this section, the term *error* means:

(i) An incorrect amount paid by a sender in connection with a remittance transfer;

(ii) A computational or bookkeeping error made by the remittance transfer provider relating to a remittance transfer;

(iii) The failure to make available to a designated recipient the amount of currency stated in the disclosure provided to the sender under § 205.31(b)(2) or (b)(3), unless the disclosure stated an estimate of the amount to be received in accordance with § 205.32;

(iv) The failure to make funds in connection with a remittance transfer available to a designated recipient by the date of availability stated in the disclosure provided to the sender under § 205.31(b)(2) or (b)(3), unless the failure to make the funds available resulted from:

(A) Circumstances outside the remittance transfer provider's control; or

(B) The sender providing incorrect information in connection with a remittance transfer to the remittance transfer provider, so long as the provider gives the sender the opportunity to correct the information and send the transfer at no additional cost; or

(v) The sender's request for documentation required by § 205.31 or for additional information or clarification concerning a remittance transfer, including a request a sender makes to determine whether an error exists under paragraph (a)(1)(i) through (iv) of this section.

(2) *Types of transfers or inquiries not covered.* The term *error* does not include:

(i) An inquiry involving a transfer of $15 or less;

(ii) An inquiry about the status of a remittance transfer, except where the funds from the transfer were not made available to a designated recipient by the stated date of availability as described in paragraph (a)(1)(iv) of this section; or

(iii) A request for information for tax or other recordkeeping purposes.

(b) *Notice of error from sender*—

(1) *Timing; contents.* A remittance transfer provider shall comply with the requirements of this section with respect to any oral or written notice of error from a sender that:

(i) Is received by the remittance transfer provider no later than 180 days after the stated date of availability of the remittance transfer;

(ii) Enables the provider to identify:

(A) The sender's name and telephone number or address;

(B) The recipient's name, and if known, the telephone number or address of the recipient; and

(C) The remittance transfer to which the notice of error applies; and

(iii) Indicates why the sender believes an error exists and includes to the extent possible the type, date, and amount of the error, except for requests for documentation, additional information, or clarification described in paragraph (a)(1)(v) of this section.

(2) *Request for documentation or clarification.* When a notice of error is based on documentation, additional information, or clarification that the sender requested under paragraph (a)(1)(v) of this section, the sender's notice of error is timely if received by the remittance transfer provider no later than 60 days after the provider sent the documentation, information, or clarification requested.

(c) *Time limits and extent of investigation*—

(1) *Time limits for investigation and report to consumer of error.* A remittance transfer provider shall investigate promptly and determine whether an error occurred within 90 days of receiving a notice of error. The remittance transfer provider shall report the results to the sender, including notice of any remedies available for correcting any error that the provider determines has occurred, within three business days after completing its investigation.

(2) *Remedies.* If the remittance transfer provider determines an error occurred, the provider shall, within one business day of, or as soon as reasonably practicable after, receiving the sender's instructions regarding the appropriate remedy, correct the error as designated by the sender by:

(i) Refunding to the sender the amount of funds tendered by the sender in connection with a remittance transfer which was not properly transmitted, or the amount appropriate to resolve the error; or

(ii) Making available to the designated recipient, without additional cost to the sender or to the designated recipient, the amount appropriate to resolve the error; and

(iii) In the case of an error asserted under paragraph (a)(1)(iv) of this section, refunding to the sender any fees imposed for the remittance transfer.

(d) *Procedures if remittance transfer provider determines no error or different error occurred.* In addition to following the procedures specified in paragraph (c) of this section, the remittance transfer provider shall follow the procedures set forth in this paragraph (d) if it determines that no error occurred or that an error occurred in a manner or amount different from that described by the sender.

(1) *Explanation of results of investigation.* The remittance transfer provider's report of the results of the investigation shall include a written explanation of the provider's findings and shall note the sender's right to request the documents on which the provider relied in making its determination. The explanation shall also respond to the specific complaint of the sender.

(2) *Copies of documentation.* Upon the sender's request, the remittance transfer provider shall promptly provide copies of the documents on which the provider relied in making its error determination.

(e) *Reassertion of error.* A remittance transfer provider that has fully complied with the error resolution requirements of this section has no further responsibilities under this section should the sender later reassert the same error, except in the case of an error asserted by the sender following receipt of information provided under paragraph (a)(1)(v) of this section.

(f) *Relation to other laws*—(1) *Relation to Regulation E § 205.11 for incorrect EFTs from a sender's account.* If an alleged error involves an incorrect electronic fund transfer from a sender's account in connection with a remittance transfer, and the sender provides a notice of error to the account-holding institution, the account-holding institution shall comply with the requirements of § 205.11 governing error resolution rather than the requirements of this section, provided that the account-holding institution is not also

the remittance transfer provider. If the remittance transfer provider is also the financial institution that holds the consumer's account, then the error-resolution provisions of this section apply when the sender provides such notice of error.

(2) *Relation to Truth in Lending Act and Regulation Z.* If an alleged error involves an incorrect extension of credit in connection with a remittance transfer, and the sender provides a notice of error to the creditor holding the credit card account, the provisions of Regulation Z, 12 CFR 226.13, governing error resolution apply to the creditor, rather than the requirements of this section, even if the creditor is the remittance transfer provider. If the sender instead provides a notice of error to the remittance transfer provider, then the error-resolution provisions of this section apply to the remittance transfer provider.

(3) *Unauthorized remittance transfers.* If an alleged error involves an unauthorized electronic fund transfer for payment in connection with a remittance transfer, §§ 205.6 and 205.11 apply with respect to the account-holding institution. If an alleged error involves an unauthorized use of a credit card for payment in connection with a remittance transfer, the provisions of Regulation Z, 12 CFR 226.12(b) and 226.13, apply with respect to the creditor.

(g) *Error resolution standards and recordkeeping requirements*—(1) *Compliance program.* A remittance transfer provider shall develop and maintain written policies and procedures that are designed to ensure compliance with respect to the error resolution requirements applicable to remittance transfers under this section. The provider must also take steps designed to ensure that an agent of the provider that performs any error resolution obligations on behalf of the provider, conducts such activity in accordance with the remittance transfer provider's policies and procedures.

(2) *Retention of error-related documentation.* The remittance transfer provider's policies and procedures required under paragraph (g)(1) of this section shall include policies and procedures regarding the retention of documentation related to error investigations. Such policies and procedures must ensure, at a minimum, the retention of any notices of error submitted by a sender, documentation provided by the sender to the provider with respect to the alleged error, and the findings of the remittance transfer provider regarding the investigation of the alleged error.

§ 205.34 Procedures for cancellation and refund of remittance transfers.

(a) *Sender right of cancellation and refund.* A remittance transfer provider shall comply with the requirements of this section with respect to any oral or written request to cancel a remittance transfer from the sender that is received by the provider no later than one business day from when the sender makes payment in connection with the remittance transfer if:

(1) The request to cancel enables the provider to identify the sender's name and address or telephone number and the particular transfer to be cancelled; and

(2) The transferred funds have not been picked up by the designated recipient or deposited into an account of the designated recipient.

(b) *Time limits and refund requirements.* A remittance transfer provider shall refund, at no additional cost to the sender, the total amount of funds tendered by the sender in connection with a remittance transfer, including any fees imposed in connection with the remittance transfer, within three business days of receiving a sender's request to cancel the remittance transfer.

§ 205.35 Acts of agents.

Alternative A

A remittance transfer provider is liable for any violation of this subpart by an agent when such agent acts for the provider.

Alternative B

A remittance transfer provider is liable for any violation of this subpart by an agent when such agent acts for the provider, unless:

(a) The remittance transfer provider establishes and maintains written policies and procedures designed to assure compliance with this subpart by its agents, including appropriate oversight practices; and

(b) The remittance transfer provider corrects the violation to the extent appropriate, including complying with the error resolution procedures set forth in § 205.33 and providing the sender the remedies set forth in § 205.33(c)(2). ◄

5. Amend Appendix A to Part 205 as follows:

a. Add Titles A–6 through A–8, and A–30 through A–41, and reserve A–10 through A–29 to the Table of Contents

b. Add Model Forms A–30 through A–41

The additions and revisions read as follows:

Appendix A to Part 205—Model Disclosure Clauses and Forms

Table of Contents

* * * * *

► A–6—Model Clauses for Authorizing One-Time Electronic Fund Transfers Using Information From a Check (§ 205.3(b)(2))
A–7—Model Clauses for Financial Institutions Offering Payroll Card Accounts (§ 205.18(c))
A–8—MODEL CLAUSE FOR ELECTRONIC COLLECTION OF RETURNED ITEM FEES (§ 205.3(b)(3))

* * * * *

A–10 through A–29—(Reserved)
A–30—Model form for pre-payment disclosures for remittance transfers exchanged into local currency (§ 205.31(b)(1))
A–31—Model form for receipts for remittance transfers exchanged into local currency (§ 205.31(b)(2))
A–32—Model form for combined disclosures for remittance transfers exchanged into local currency (§ 205.31(b)(3))
A–33—Model form for pre-payment disclosures for dollar-to-dollar remittance transfers (§ 205.31(b)(1))
A–34—Model form for receipts for dollar-to-dollar remittance transfers (§ 205.31(b)(2))
A–35—Model form for combined disclosures for dollar-to-dollar remittance transfers (§ 205.31(b)(3))
A–36—Model form for error resolution and cancellation disclosures (long) (§ 205.31(b)(4))
A–37—Model form for error resolution and cancellation disclosures (short) (§ 205.31(b)(2)(vi))
A–38—Model form for pre-payment disclosures—Spanish (§ 205.31(b)(1))
A–39—Model form for receipts—Spanish (§ 205.31(b)(2))
A–40—Model form for combined disclosures—Spanish (§ 205.31(b)(3))
A–41—Model form for error resolution and cancellation disclosures (long)—Spanish (§ 205.31(b)(4)) ◄

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BILLING CODE 6210–01–P

A–30—Model form for pre-payment disclosures for remittance transfers exchanged into local currency (§ 205.31(b)(1))

ABC Company
1000 XYZ Avenue
Anytown, Anystate 12345

Today's Date: 3/03/2011

NOT A RECEIPT

Transfer Amount:	$100.00
Transfer Fees and Taxes:	$10.00
Total:	$110.00

Exchange Rate: US$1.00 = 12.27 MXN

Transfer Amount:	1,227.00 MXN
Other Fees and Taxes:	-40.00 MXN
Total to Recipient:	1,187.00 MXN

A–31—Model form for receipts for remittance transfers exchanged into local currency (§ 205.31(b)(2))

ABC Company
1000 XYZ Avenue
Anytown, Anystate 12345

Today's Date: 3/03/2011

RECEIPT

SENDER:
Pat Jones
100 Anywhere Street
Anytown, Anywhere 54321
222-555-1212

RECIPIENT:
Carlos Gomez
123 Calle XXX
Mexico City
Mexico

PICK-UP LOCATION:
ABC Company
65 Avenida YYY
Mexico City
Mexico

Confirmation Code: ABC 123 DEF 456

Date Available: 3/04/2011

Transfer Amount:	$100.00
Transfer Fees and Taxes:	$10.00
Total:	$110.00

Exchange Rate: US$1.00 = 12.27 MXN

Transfer Amount:	1,227.00 MXN
Other Fees and Taxes:	-40.00 MXN
Total to Recipient:	1,187.00 MXN

Problems or questions? Contact us within 180 days at 800-123-4567 or www.abccompany.com. You can contact us for a written explanation of your rights.

You can cancel for a full refund within 1 business day of payment, unless the funds have been picked up/deposited.

For questions or complaints about ABC Company, contact:

State Regulatory Agency
800-111-2222
www.stateregulatoryagency.com

Consumer Financial Protection Bureau
800-555-9999
www.consumerfinance.gov

A–32—Model form for combined disclosures for remittance transfers exchanged into local currency (§ 205.31(b)(3))

ABC Company
1000 XYZ Avenue
Anytown, Anystate 12345

Today's Date: 3/03/2011

SENDER:
Pat Jones
100 Anywhere Street
Anytown, Anywhere 54321
222-555-1212

RECIPIENT:
Carlos Gomez
123 Calle XXX
Mexico City
Mexico

PICK-UP LOCATION:
ABC Company
65 Avenida YYY
Mexico City
Mexico

Confirmation Code: ABC 123 DEF 456

Date Available: 3/04/2011

Transfer Amount:	$100.00
Transfer Fees and Taxes:	$10.00
Total:	$110.00

Exchange Rate: US$1.00 = 12.27 MXN

Transfer Amount:	1,227.00 MXN
Other Fees and Taxes:	-40.00 MXN
Total to Recipient:	1,187.00 MXN

Problems or questions? Contact us within 180 days at 800-123-4567 or www.abccompany.com. You can contact us for a written explanation of your rights.

You can cancel for a full refund within 1 business day of payment, unless the funds have been picked up/deposited.

For questions or complaints about ABC Company, contact:

State Regulatory Agency
800-111-2222
www.stateregulatoryagency.com

Consumer Financial Protection Bureau
800-555-9999
www.consumerfinance.gov

A–33—Model form for pre-payment disclosures for dollar-to-dollar remittance transfers (§ 205.31(b)(1))

ABC Company
1000 XYZ Avenue
Anytown, Anystate 12345

Today's Date: 3/03/2011

NOT A RECEIPT

Transfer Amount:	$100.00
Transfer Fees and Taxes:	$10.00
Total:	$110.00

Transfer Amount:	$100.00
Other Fees and Taxes:	-$5.00
Total to Recipient:	$95.00

A–34—Model form for receipts for dollar-to-dollar remittance transfers (§ 205.31(b)(2))

ABC Company
1000 XYZ Avenue
Anytown, Anystate 12345

Today's Date: 3/03/2011

RECEIPT

SENDER: Pat Jones 100 Anywhere Street Anytown, Anywhere 54321 301-555-1212	RECIPIENT: Carlos Gomez 106 Calle XXX Mexico City Mexico PICK-UP LOCATION: ABC Company 65 Avenida YYY Mexico City Mexico
Confirmation Code:	ABC 123 DEF 456
Date Available:	3/04/2011
Transfer Amount:	$100.00
Transfer Fees and Taxes:	$10.00
Total:	$110.00
Transfer Amount:	$100.00
Other Fees and Taxes:	-$5.00
Total to Recipient:	$95.00

Problems or questions? Contact us within 180 days at 800-123-4567 or www.abccompany.com. You can contact us for a written explanation of your rights.

You can cancel for a full refund within 1 business day of payment, unless th funds have been picked up/deposited.

For questions or complaints about ABC Company, contact:

State Regulatory Agency
800-111-2222
www.stateregulatoryagency.com

Consumer Financial Protection Bureau
800-555-9999
www.consumerfinance.gov

A–35—Model form for combined disclosures for dollar-to-dollar remittance transfers (§ 205.31(b)(3))

ABC Company
1000 XYZ Avenue
Anytown, Anystate 12345

Today's Date: 3/03/2011

SENDER:	RECIPIENT:
Pat Jones	Carlos Gomez
100 Anywhere Street	106 Calle XXX
Anytown, Anywhere 54321	Mexico City
301-555-1212	Mexico
	PICK-UP LOCATION:
	ABC Company
	65 Avenida YYY
	Mexico City
	Mexico

Confirmation Code:	ABC 123 DEF 456
Date Available:	3/04/2011

Transfer Amount:	$100.00
Transfer Fees and Taxes:	$10.00
Total:	$110.00

Transfer Amount:	$100.00
Other Fees and Taxes:	-$5.00
Total to Recipient:	$95.00

Problems or questions? Contact us within 180 days at 800-123-4567 or www.abccompany.com. You can contact us for a written explanation of your rights.

You can cancel for a full refund within 1 business day of payment, unless the funds have been picked up/deposited.

For questions or complaints about ABC Company, contact:

State Regulatory Agency
800-111-2222
www.stateregulatoryagency.com

Consumer Financial Protection Bureau
800-555-9999
www.consumerfinance.gov

A–36—Model form for error resolution and cancellation disclosures (long) (§ 205.31(b)(4))

What To Do If You Think There Has Been An Error or Problem:

If you think there has been an error or problem with your remittance transfer:

- Call us at [insert telephone number][; or]
- Write us at [insert address][; or]
- [E-mail us at [insert electronic mail address].

You must contact us within 180 days of the date we promised to you that funds would be made available to the recipient. When you do, please tell us:

(1) Your name and address [or telephone number];

(2) The error or problem with the transfer, and why you believe it is an error or problem;

(3) The name of the person receiving the funds, and if you know it, his or her telephone number or address; [and]

(4) The dollar amount of the transfer; [and

(5) The confirmation code or number of the transaction.]

We will determine whether an error occurred within 90 days after you contact us and we will correct any error promptly. We will tell you the results within three business days after completing our investigation. If we decide that there was no error, we will send you a written explanation. You may ask for copies of any documents we used in our investigation.

What To Do If You Want To Cancel A Remittance Transfer:
You have the right to cancel a remittance transfer and obtain a refund of all funds paid to us, including any fees. In order to cancel, you must contact us at the [phone number or e-mail address] above within one business day of payment for the transfer.

When you contact us, you must provide us with information to help us identify the transfer you wish to cancel, including the amount and location where the funds were sent. We will refund your money within three business days of your request to cancel a transfer as long as the funds have not already been picked up or deposited into a recipient's account.

A–37—Model form for error resolution and cancellation disclosures (short) (§ 205.31(b)(2)(vi))

Problems or questions? Contact us within 180 days at 800-123-4567 or www.abccompany.com. You can contact us for a written explanation of your rights.

You can cancel for a full refund within 1 business day of payment, unless the funds have been picked up/deposited.

For questions or complaints about ABC Company, contact:

A–38—Model form for pre-payment disclosures—Spanish (§ 205.31(b)(1))

```
          ABC Company
        1000 XYZ Avenue
     Anytown, Anystate 12345

Fecha:                      3/03/2011

      NO ES UN RECIBO

Cantidad de Envío:          $100.00
Tarifas e Impuestos:         $10.00
Total:                      $110.00

Tasa de Cambio:    US$1.00 = 12.27 MXN

Cantidad de Envío:        1,227.00 MXN
Otras Tarifas e Impuestos:  -40.00 MXN
Total a Destinatario:     1,187.00 MXN
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A–39—Model form for receipts—Spanish (§ 205.31(b)(2))

ABC Company
1000 XYZ Avenue
Anytown, Anystate 12345

Fecha: 3/03/2011

RECIBO

REMITENTE:
Pat Jones
100 Anywhere Street
Anytown, Anywhere 54321
222-555-1212

DESTINATARIO:
Carlos Gomez
123 Calle XXX
Mexico City
Mexico

RETIRAR EN:
ABC Company
65 Avenida YYY
Mexico City
Mexico

Código de Confirmación:ABC 123 DEF 456

Fecha Disponible: 3/04/2011

Cantidad de Envío:	$100.00
Tarifas e Impuestos:	$10.00
Total:	$110.00

Tasa de Cambio: US$1.00 = 12.27 MXN

Cantidad de Envío:	1,227.00 MXN
Otras Tarifas e Impuestos:	-40.00 MXN
Total a Destinatario:	1,187.00 MXN

¿Problemas o preguntas? Contáctenos dentro de 180 días a 800-123-4567 o www.abccompany.com. Puede contactarnos para una explicación escrita de sus derechos.

Puede cancelar para un reembolso total dentro de un día hábil del pago, a no ser que los fundos han sido retirados o depositados.

Para preguntas o presentar una queja en ABC Company, contacte a:

State Regulatory Agency
800-111-2222
www.stateregulatoryagency.com

Consumer Financial Protection Bureau
800-555-9999
www.consumerfinance.gov

A–40—Model form for combined disclosures—Spanish (§ 205.31(b)(3))

ABC Company
1000 XYZ Avenue
Anytown, Anystate 12345

Fecha: 3/03/2011

REMITENTE:
Pat Jones
100 Anywhere Street
Anytown, Anywhere 54321
222-555-1212

DESTINATARIO:
Carlos Gomez
123 Calle XXX
Mexico City
Mexico

RETIRAR EN:
ABC Company
65 Avenida YYY
Mexico City
Mexico

Código de Confirmación:ABC 123 DEF 456

Fecha Disponible: 3/04/2011

Cantidad de Envío:	$100.00
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Para preguntas o presentar una queja en ABC Company, contacte a:

State Regulatory Agency
800-111-2222
www.stateregulatoryagency.com

Consumer Financial Protection Bureau
800-555-9999
www.consumerfinance.gov

A–41—Model form for error resolution and cancellation disclosures (long) —Spanish (§ 205.31(b)(4))

Lo Que Usted Debe Hacer Si Cree Que Haya Un Error O Problema:

Si cree que haya un error o problema con su envío de dinero:

- Llámenos a [inserte número de teléfono][; o]
- Escribanos a [inserte dirección][; o]
- [Mándenos un e-mail a [inserte dirección de correo electrónico].

Debe contactarnos dentro de 180 días de la fecha que se le prometió que los fundos estarían disponibles al destinatario. Cuando se comunique con nosotros, por favor provee la siguiente información:

(1) Su nombre y dirección [o número de teléfono];

(2) El error o problema con su envío de dinero, y porque cree que haya un error o problema;

(3) El nombre del destinatario, y si lo sabe, su número de teléfono o dirección; [y]

(4) El monto a enviar en dólares; [y

(5) El código de confirmación o el número de la transacción.]

Nosotros determinaremos si haya un error dentro de 90 días después de usted nos contacta y corrigiéremos el error rápidamente. Le diremos los resultados dentro de tres días hábiles después de terminar nuestra investigación. Si decidimos que no había un error, le mandaremos a usted una explicación escrita. Puede pedir copias de los documentos que usamos en nuestra investigación.

Lo Que Usted Debe Hacer Si Quiere Cancelar Un Envío De Dinero:
Tiene el derecho de cancelar un envío de dinero y obtener un reembolso de todo el dinero, incluyendo tarifas o gastos que usted nos pagó. Para cancelar, debe contactarnos al [número de teléfono o dirección de correo electrónico] que se encuentra arriba dentro de un día hábil del pago para el envío de dinero.

Cuando nos contacte, debe proveernos con información que nos ayudará a identificar el envío de dinero que quiere cancelar, inclusivo la cantidad del envió y el lugar donde fue enviado. Le reembolsamos su dinero dentro de tres días hábiles de su petición de cancelar a no ser que los fundos han sido retirados o depositados en la cuenta del destinatario.

BILLING CODE 6210–01–C

6. In Supplement I to part 205:

a. Add new Commentary for Sections 205.30, 205.31, 205.32, 205.33, 205.34, and 205.35.

b. Under subheading Appendix A, paragraph (2) *Use of forms* is revised and paragraph (4) is added.

The revision and additions read as follows:

Supplement I to Part 205—Official Staff Interpretations

* * * * *

► Section 205.30—Remittance Definitions

30(b) Business Day

1. *General.* With respect to Subpart B, a business day includes the entire 24-hour period ending at midnight, and a notice required by any section of Subpart B is effective even if given outside of normal business hours. No section of Subpart B requires that a remittance transfer provider make telephone lines available on a 24-hour basis.

30(c) Designated Recipient

1. *Person.* A designated recipient can be either a natural person or a business. *See* § 205.2(j) (definition of person).

2. *Located in a foreign country.* A remittance transfer is received at a location in a foreign country if funds are to be received at a location physically outside of any state, as defined in § 205.2(l).

30(d) Remittance Transfer

1. *Electronic transfer of funds.* The definition of remittance transfer requires an electronic transfer of funds. The term electronic has the meaning given in Section 106(2) of the Electronic Signatures in Global and National Commerce Act. There may be an electronic transfer of funds if a provider makes an electronic book entry between different settlement accounts to effectuate the transfer. However, where a sender mails funds directly to a recipient, or provides funds to a courier for delivery to a foreign country, there has not been an electronic transfer of funds. Therefore, non-electronic remittance methods are not remittance transfers.

2. *Request by a sender.* The definition of remittance transfer requires a specific sender request that a remittance transfer provider send a remittance transfer. A deposit by a consumer into a checking or savings account does not itself constitute such a request, even if a person in a foreign country is an authorized user on that account, where the consumer retains the ability to withdraw funds in the account.

3. *To a designated recipient.* The definition of remittance transfer requires that the transfer be sent to a designated recipient. *See* comment 30(c)–1. There is no designated recipient unless the sender specifically identifies the recipient of a transfer. A transfer is sent to a designated recipient if, for example, the sender instructs a remittance transfer provider to send a prepaid card to a specified recipient in a foreign country, and the sender does not retain the ability to draw down funds on the prepaid card. In contrast, there is no designated recipient where the sender retains the ability to withdraw funds, such as when a person in a foreign country is made an authorized user on the sender's checking account, because the remittance transfer provider cannot identify the ultimate recipient of the funds.

4. *Sent by a remittance transfer provider.* i. The definition of remittance transfer requires that a transfer must be "sent by a remittance transfer provider." This means that there must be an intermediary actively involved in sending the transfer of funds. Examples include:

A. A person (other than the sender) sending an instruction to a receiving agent in a foreign country to make funds available to a recipient;

B. Executing a payment order pursuant to a consumer's instructions;

C. Executing a consumer's online bill payment request; or

D. Otherwise engaging in the business of accepting or debiting funds for transmission to a recipient and transmitting those funds.

ii. However, a payment card network or other third party payment service that is functionally similar to a payment card network does not send a remittance transfer when a consumer designates a debit or credit card as the payment method to purchase goods or services from a foreign merchant. In such a case, the payment card network or third party payment service is not directly engaged with the sender to send a transfer of funds to a person in a foreign country; rather, the network or third party payment service is merely providing contemporaneous third-party payment processing and settlement services on behalf of the merchant or the remittance transfer provider, rather than on behalf of the sender. Similarly, where a consumer provides a checking or other account number directly to a merchant as payment for goods or services, the merchant is not acting as a remittance transfer provider when it submits the payment information for processing.

5. *Examples of remittance transfers.*

i. Examples of remittance transfers include:

A. Transfers where the sender provides cash or another method of payment to a money transmitter or financial institution that directs funds to be sent to a specified payout location or account in a foreign country.

B. Consumer wire transfers, where a financial institution executes a payment order upon a sender's request to wire money from the sender's account to a designated recipient.

C. A sender's addition of funds to a prepaid card, which the prepaid card issuer sends or has previously sent to a designated recipient, if the sender does not retain the ability to withdraw such funds.

D. International ACH transactions sent by the sender's financial institution at the sender's request.

E. Online bill payments to foreign merchants made by the sender's financial institution at the sender's request.

ii. The term remittance transfer does not include:

A. A consumer's purchase of goods or services from a merchant in a foreign country with a credit or debit card.

B. A consumer's deposit of funds to his or her checking or savings account that can be withdrawn by an authorized user located in a foreign country, but where the consumer retains the ability to withdraw funds in the account.

C. Online bill payments made through the Web site of a merchant located in a foreign country.

30(e) Remittance Transfer Provider

1. *Agents.* An agent is not deemed to be a remittance transfer provider by merely providing remittance transfer services on behalf of the remittance transfer provider.

Section 205.31—Disclosures

31(a) General Form of Disclosures

Paragraph 31(a)(1)—Clear and Conspicuous

1. *Clear and conspicuous standard.* Disclosures are clear and conspicuous for purposes of Subpart B if they are readily understandable and, in the case of written and electronic disclosures, the location and type size are readily noticeable to senders. To the extent permitted by §§ 205.31(a)(3) and (4), oral disclosures are clear and conspicuous when they are given at a volume and speed sufficient for a sender to hear and comprehend them.

2. *Abbreviations and symbols.* Disclosures may contain commonly accepted or readily understandable abbreviations or symbols, such as "USD" to indicate currency in U.S. dollars or "MXN" to indicate currency in Mexican pesos.

Paragraph 31(a)(2)—Written and Electronic Disclosures

1. *E-Sign Act requirements.* If a sender electronically requests the remittance transfer provider to send a remittance transfer, pre-payment disclosures required by § 205.31(b)(1) may be provided to the sender in electronic form without regard to the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*). If a sender electronically requests the provider to send a remittance transfer, receipts required by § 205.31(b)(2) may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the E-Sign Act. *See* § 205.4(a)(1).

2. *Paper size.* Written disclosures may be provided on any size paper, as long as the disclosures are clear and

conspicuous. For example, disclosures may be provided on a register receipt or on an 8.5 inch by 11 inch sheet of paper.

3. *Retainable electronic disclosures.* A remittance transfer provider may satisfy the requirement to provide electronic disclosures in a retainable form if it provides an on-line disclosure in a format that is capable of being printed. Electronic disclosures may not be provided through a hyperlink or in another manner by which the sender can bypass the disclosure. A provider is not required to confirm that the sender has read the electronic disclosures.

Paragraph 31(a)(3)—Oral Disclosures for Telephone Transactions

1. *Transactions conducted partially by telephone.* For transactions conducted partially by telephone, disclosures may not be provided orally. For example, a sender may begin a remittance transfer at a remittance transfer provider's dedicated telephone in a retail store, and then provide payment in person to a store clerk to complete the transaction. In such cases, all disclosures must be provided in writing. A provider complies with this requirement, for example, by providing the written pre-payment disclosure in person prior to the sender's payment for the transaction, and the written receipt when the sender pays for the transaction.

31(b) Disclosure Requirements

1. *Disclosures provided as applicable.* Disclosures required by § 205.31(b) need only be provided to the extent applicable. A remittance transfer provider may choose to omit an item of information required by § 205.31(b) if it is inapplicable to a particular transaction. Alternatively, a provider may disclose a term and state that an amount or item is "not applicable," "N/A," or "None." For example, if fees or taxes are not imposed in connection with a particular transaction, the provider need not provide the disclosures required by § 205.31(b)(1)(ii) or (b)(1)(vi). Similarly, a Web site need not be disclosed under § 205.31(b)(2)(v) if the provider does not maintain a Web site. A provider need not provide the exchange rate disclosure required by § 205.31(b)(1)(iv) if a recipient receives currency in U.S. dollars or currency is delivered into an account in U.S. dollars, rather than in another currency.

2. *Substantially similar terms, language, and notices.* Some disclosures required by § 205.31(b) must be described using the terms set forth in § 205.31(b) or substantially similar terms. Terms may be more specific than those provided. For example, a remittance transfer provider sending funds to Colombia may describe a tax under § 205.31(b)(1)(vi) as a "Colombian Tax" in lieu of describing it as "Other Taxes." Foreign language disclosures required under § 205.31(g) must contain accurate translations of the terms, language, and notices required by § 205.31(b).

Paragraph 31(b)(1)—Pre-Payment Disclosures

1. *Fees and taxes.* i. Taxes imposed by the remittance transfer provider include taxes imposed on the remittance transfer by a state or other governmental body. A provider need only disclose fees or taxes required by § 205.31(b)(1)(ii) and (vi), as applicable. For example, if no transfer taxes are imposed on a remittance transfer, a provider would only disclose applicable transfer fees. *See* comment 31(b)–1. If both fees and taxes are imposed, the fees and taxes may be disclosed as one disclosure or as separate, itemized disclosures.

ii. The fees and taxes required to be disclosed by § 205.31(b)(1)(ii) include all fees and taxes imposed on the remittance transfer by the provider. For example, a provider must disclose a service fee and any state taxes imposed on the remittance transfer. In contrast, the fees and taxes required to be disclosed by § 205.31(b)(1)(vi) include fees and taxes imposed on the remittance transfer by a person other than the provider. For example, a provider must disclose fees imposed by the receiving institution or agent at pick-up, fees imposed by intermediary institutions in connection with an international wire transfer, and taxes imposed by a foreign government. The terms used to describe the fees and taxes in § 205.31(b)(1)(ii) and (b)(1)(vi) must differentiate between such fees and taxes. For example, the terms used to describe fees disclosed under § 205.31(b)(1)(ii) and (b)(1)(vi) may not both be described as "Fees."

2. *Transfer amount.* Sections 205.31(b)(1)(i) and (b)(1)(v) require two transfer amount disclosures. First, under § 205.31(b)(1)(i), a provider must disclose the transfer amount in the currency in which the funds will be transferred to show the calculation of the total amount of the transaction. Typically, funds will be transferred in U.S. dollars, so the transfer amount would be expressed in U.S. dollars. However, if funds will be transferred, for example, from a Euro-denominated account, the transfer amount would be expressed in Euros. Second, under § 205.31(b)(1)(v), a provider must disclose the transfer amount in the currency in which the funds will be made available to the designated recipient. For example, if the funds will be picked up by the designated recipient in Japanese yen, the transfer amount would be expressed in Japanese yen. However, this second transfer amount need not be disclosed if fees and taxes are not imposed on the remittance transfer under § 205.31(b)(1)(vi). The terms used to describe each transfer amount should be the same.

Paragraph 31(b)(1)(iv)—Exchange Rate

1. *Applicable exchange rate for estimates.* If the designated recipient will receive funds in a currency other than the currency in which it will be transferred, a remittance transfer provider must disclose an exchange rate. An exchange rate that is estimated must be disclosed pursuant to the requirements of § 205.32. A remittance transfer provider may not disclose, for example, that an estimated exchange rate is "unknown," "floating," or "to be determined."

2. *Rounding.* The exchange rate used by the provider for the remittance transfer is required to be rounded to the nearest 1/100th of a decimal point. However, an exchange rate need not be expressed to the nearest 1/100th of a decimal point if the amount need not be rounded. For example, if one U.S. dollar exchanges for 11.9483 Mexican pesos, a provider must disclose that the U.S. dollar exchanges for 11.95 Mexican pesos. However, if one U.S. dollar exchanges for 11.9 Mexican pesos, the provider may disclose that "US$1 = 11.9 MXN" in lieu of "US$1 = 11.90 MXN."

Paragraph 31(b)(1)(vi)—Fees and Taxes Imposed by a Person Other than the Provider

1. *Fees and taxes disclosed in the currency in which the funds will be received.* Section 205.31(b)(1)(vi) requires the disclosure of fees and taxes in the currency in which the funds will be received by the designated recipient. A fee or tax required by § 205.31(b)(1)(vi) may be imposed in one currency, but the funds may be received by the designated recipient in another currency. In such cases, the remittance transfer provider should calculate the fee or tax to be disclosed using the exchange rate required by § 205.31(b)(1)(iv). For example, an intermediary institution in an international wire transfer may impose a fee in U.S. dollars, but funds are ultimately deposited in the recipient's account in Euros. Here, the provider would disclose the fee to the sender expressed in Euros, calculated using the exchange rate used by the provider for the remittance transfer.

Paragraph 31(b)(1)(vii)—Amount Received

1. *Amount received.* The remittance transfer provider is required to disclose the amount that will be received by the designated recipient in the currency in which the funds will be received. The amount received must reflect all charges that affect the amount received, including the exchange rate and all fees and taxes imposed by the remittance transfer provider, the receiving institution, and any other party in the transmittal route of a remittance transfer. The disclosed amount received must be reduced by the amount of any fee or tax that is imposed by a person other than the provider, even if that amount is imposed or itemized separately from the transaction amount.

Paragraph 31(b)(2)—Receipt

1. *Date of availability.* The date of availability of funds to the designated recipient is the date in the foreign country on which the funds will be available to the designated recipient. A remittance transfer provider does not comply with the requirements of § 205.31(b)(2)(ii) if it provides a range of dates that the remittance transfer may be available or an estimate of the date on which funds will be available. If a provider does not know the exact date on which funds will be available, the provider may disclose the latest date on which the funds will be available. For example, if funds may be available on January 3, but are not certain to be available until January 10, then January 10 should be disclosed as the date of availability. However, a remittance transfer provider may also disclose that funds "may be available sooner" or use a substantially similar term to inform senders that funds may be available to the designated recipient on a date earlier than the date disclosed. For example, a provider may disclose "January 10 (may be available sooner)."

31(c) Specific Format Requirements

Paragraph 31(c)(1)—Grouping

1. *Grouping.* Information is grouped together for purposes of Subpart B if multiple disclosures are in close proximity to one another and a sender can reasonably determine how to calculate the total amount of the transaction, and the amount that will be received by the designated recipient. Model Forms A–30 through A–35 in Appendix A illustrate how information may be grouped to comply with the rule, but a remittance transfer provider may group the information in another manner. For example, a provider could provide the grouped information as a horizontal, rather than a vertical, calculation.

Paragraph 31(c)(4)—Segregation

1. *Segregation.* Disclosures may be segregated from other information in a variety of ways. For example, the disclosures may appear on a separate sheet of paper or may be set off from other information on a notice by outlining them in a box or series of boxes, bold print dividing lines, or a different color background.

2. *Directly related.* For purposes of § 205.31(c)(4), the following is directly related information:

i. The date and/or time of the transaction;

ii. The sender's name and contact information;

iii. The location at which the designated recipient may pick up the funds;

iv. The confirmation or other identification code;

v. A company name or logo;

vi. An indication that a disclosure is or is not a receipt or other indicia of proof of payment;

vii. A designated area for signatures or initials; and

viii. A statement that funds may be available sooner, as permitted by § 205.31(b)(2)(ii).

31(d) Estimates

1. *Terms.* A remittance transfer provider may provide estimates of the amounts required by § 205.31(b), to the extent permitted by § 205.32. An estimate must be described using the term "Estimated" or a substantially similar term and in close proximity to the term or terms described. For example, a remittance transfer provider could describe an estimated disclosure as "Estimated Transfer Amount," "Other Estimated Fees and Taxes," or "Total to Recipient (Est.)."

31(e) Timing

1. *Request to send a remittance transfer.* Pre-payment and combined disclosures are required to be provided to the sender when the sender requests the remittance transfer, but prior to payment for the remittance transfer. Whether a sender has requested a remittance transfer depends on the facts and circumstances. A sender that asks a provider to send a remittance transfer, and provides transaction-specific information to the provider in order to send funds to a designated recipient, has requested a remittance transfer. For example, a sender who asks the provider to send money to a recipient in Mexico and provides the sender and recipient information to the provider has requested a remittance transfer. A sender who solely inquires about that day's rates and fees, however, has not requested the provider to send a remittance transfer.

2. *When payment is made.* A receipt required by § 205.31(b)(2) is required to be provided to the sender when payment is made for the remittance transfer. For example, a remittance transfer provider could give the sender a receipt after the consumer pays for the remittance transfer, but before the sender leaves the counter. A provider could also give the sender a receipt immediately before the sender pays for the transaction.

3. *Telephone transfer from an account.* A sender may transfer funds from his or her account, as defined by § 205.2(b), that is held by the remittance transfer provider. For example, a financial institution may send an international wire transfer for a sender using funds from the sender's account with the institution. If the sender conducts such a transfer entirely by telephone, the institution may provide a written receipt on or with the sender's next regularly scheduled periodic statement or within 30 days after payment is made for the remittance transfer if a periodic statement is not required.

31(f) Accurate When Payment Is Made

1. *No guarantee of disclosures provided before payment.* Disclosures required by § 205.31(b) are required to be accurate when a sender pays for the remittance transfer. A remittance transfer provider is not required to guarantee the terms of the remittance transfer in the disclosures required by § 205.31(b) for any specific period of time. However, if any of the disclosures required by § 205.31(b) are not accurate when a sender pays for the remittance transfer, a provider must give new disclosures before receiving payment for the remittance transfer.

31(g) Foreign Language Disclosures

1. *Number of foreign languages used in written disclosure.* Section 205.31(g)(1) does not limit the number of languages that may be used on a single document, but a single written document containing more than three languages is not likely to be helpful to a consumer. Section 205.31(g)(3), however, does limit the languages that may be used on the written receipts provided to the sender to English and, if applicable, the foreign language primarily used by the sender with the remittance transfer provider to conduct the transaction. *See* comment 31(g)–2 for guidance on the language a sender

primarily uses with the remittance transfer provider to conduct the transaction. Under § 205.31(g)(1), a remittance transfer provider may, but need not, provide the consumer with a written or electronic disclosure that is in English and in each foreign language that the remittance transfer provider principally uses to advertise, solicit, or market either orally, in writing, or electronically, at that office. Alternatively, the remittance transfer provider may provide the disclosure solely in English and, if applicable, the foreign language primarily used by the sender with the remittance transfer provider to conduct the transaction or assert an error, provided such language is principally used by the remittance transfer provider to advertise, solicit, or market either orally, in writing, or electronically, at that office. If the remittance transfer provider chooses the alternative method, it may provide disclosures in a single document with both languages or in two separate documents with one document in English and the other document in the applicable foreign language. The following examples illustrate this concept.

i. A remittance transfer provider principally uses only Spanish and Vietnamese to advertise, solicit, or market remittance transfer services at a particular office. The remittance transfer provider may provide all of its consumers with disclosures in English, Spanish, and Vietnamese, regardless of the language the sender uses with the remittance transfer provider to conduct the transaction or assert an error.

ii. Same facts as i. If a sender primarily uses Spanish with the remittance transfer provider to conduct a transaction or assert an error, the remittance transfer provider may provide a written or electronic disclosure in English and Spanish, whether in a single document or two separate documents. If the sender primarily uses English with the remittance transfer provider to conduct the transaction or assert an error, the remittance transfer provider may provide a written or electronic disclosure solely in English. If the sender primarily uses a foreign language with the remittance transfer provider to conduct the transaction or assert an error that the remittance transfer provider does not use to advertise, solicit, or market either orally, in writing, or electronically, at that office, the remittance transfer provider may provide a written or electronic disclosure solely in English.

2. *Primarily used.* The language primarily used by the sender with the remittance transfer provider to conduct the transaction is the primary language used by the sender with the remittance transfer provider to convey the information necessary to complete the transaction. Similarly, the language primarily used by the sender with the remittance transfer provider to assert the error is the primary language used by the sender with the remittance transfer provider to provide the information required by § 205.33(b) to assert an error. For example:

i. A sender initiates a conversation with a remittance transfer provider with a word of greeting in English and expresses interest in sending a remittance transfer to Mexico in English. If, based on that knowledge, the remittance transfer provider offers to communicate with the sender in Spanish and the sender conveys the other information needed to complete the transaction, including the designated recipient's information and the amount and funding source of the transfer, in Spanish, then Spanish is the language primarily used by the sender with the remittance transfer provider to conduct the transaction.

ii. A sender initiates a conversation with the remittance transfer provider with a word of greeting in English and states in English that there was a problem with a prior remittance transfer to Vietnam. If, based on that knowledge, the remittance transfer provider offers to communicate with the sender in Vietnamese and the sender uses Vietnamese to convey the information required by § 205.33(b) to assert an error, then Vietnamese is the language primarily used by the sender with the remittance transfer provider to assert the error.

Paragraph 31(g)(1)—General

1. *Principally used.* i. All relevant facts and circumstances determine whether a foreign language is principally used by the remittance transfer provider to advertise, solicit, or market under § 205.31(g)(1). Generally, whether a foreign language is considered to be principally used by the remittance transfer provider to advertise, solicit, or market is based on:

A. The frequency with which the foreign language is used in advertising, soliciting, or marketing of remittance transfer services at that office;

B. The prominence of the advertising, soliciting, or marketing of remittance transfer services in that foreign language at that office; and

C. The specific foreign language terms used in the advertising soliciting, or marketing of remittance transfer service at that office.

ii. For example, an advertisement for remittance transfer services, including rate and fee information, that is featured prominently at an office and is entirely in English, except for a sentence advising consumers to "Ask us about our foreign remittance services" in a foreign language, may create an expectation that a consumer could receive information on remittance transfer services in the foreign language used in the advertisement. The foreign language used in such an advertisement would be considered to be principally used at that office based on the prominence of the advertising and the specific foreign language terms inviting consumers to inquire about remittance transfer services. In contrast, an advertisement for remittance transfer services, including rate and fee information, that is featured prominently at an office and is entirely in English, except for one word of greeting in a foreign language, may not create an expectation that a consumer could receive information on remittance transfer services in the foreign language used for such greeting. The foreign language used in such an advertisement is not considered to be principally used at that office based on the incidental specific foreign language term used.

2. *Advertise, solicit, or market.* i. Any commercial message in a foreign language, appearing in any medium, that promotes directly or indirectly the availability of remittance transfer services constitutes advertising, soliciting, or marketing in such foreign language for purposes of § 205.31(g)(1). Examples illustrating when a foreign language is used to advertise, solicit, or market include:

A. Messages in a foreign language in a leaflet or promotional flyer at an office.

B. Announcements in a foreign language on a public address system at an office.

C. On-line messages in a foreign language, such as on the Internet.

D. Printed material in a foreign language on any exterior or interior sign at an office.

E. Point-of-sale displays in a foreign language at an office.

F. Telephone solicitations in a foreign language.

ii. Examples illustrating when a foreign language is not principally used to advertise, solicit, or market include:

A. Communicating in a foreign language (whether by telephone, electronically, or otherwise) about remittance transfer services in response to a consumer-initiated inquiry.

B. Making disclosures in a foreign language that are required by Federal or other applicable law.

3. *Office.* An office includes any physical location, telephone number, or Web site of a remittance transfer provider where remittance transfer services are offered to consumers. The location need not exclusively offer remittance transfer services. For example, if an agent of a remittance transfer provider is located in a grocery store, the grocery store is considered an office for purposes of § 205.31(g)(1).

4. *At that office.* Any advertisement, solicitation, or marketing is considered to be made at that office if such advertisement, solicitation, or marketing is posted, provided, or made: at a physical office of a remittance transfer provider; on a Web site of a remittance transfer provider; or during a telephone call with the remittance transfer provider. For disclosures provided pursuant to § 205.33 for error resolution purposes, the relevant office is the office in which the sender first asserts the error, not the office where the transaction was conducted.

Section 205.32—Estimates

32(a) Temporary Exception for Insured Institutions

Paragraph 32(a)(1)—General

1. *For reasons beyond its control.* An insured institution cannot determine exact amounts "for reasons beyond its control" when:

i. The exchange rate required to be disclosed under § 205.31(b)(1)(iv) is set by a person with which the insured institution has no correspondent relationship after the insured institution sends the remittance transfer; or

ii. Fees required to be disclosed under § 205.31(b)(1)(vi) are imposed by intermediary institutions along the transmittal route and the insured institution has no correspondent relationship with those institutions.

2. *Examples of scenarios that qualify for the temporary exception.* The following examples illustrate when an insured institution cannot determine an exact amount "for reasons beyond its control" and, thus, would qualify for the temporary exception.

i. *Exchange rate.* An insured institution cannot determine the exact exchange rate required to be disclosed under § 205.31(b)(1)(iv) for an international wire transfer if the insured institution does not set the exchange rate, and the rate is instead later set by the designated recipient's institution with which the insured institution does not have a correspondent relationship. The insured institution will not know the date on which funds will be deposited into the recipient's account, and will not know the exchange rate that will be applied on that date.

ii. *Other fees.* An insured institution cannot determine the exact fees required to be disclosed under § 205.31(b)(1)(vi) if an intermediary institution or the designated recipient's institution, with which the insured institution does not have a correspondent relationship, imposes a transfer or conversion fee.

iii. *Other taxes.* An insured institution cannot determine the exact taxes required to be disclosed under § 205.31(b)(1)(vi) if the insured institution cannot determine the applicable exchange rate or fees as described in i. and ii. above, and the recipient country imposes a tax that is a percentage of the amount transferred to the designated recipient, less any other fees.

3. *Examples of scenarios that do not qualify for the temporary exception.* The following examples illustrate when an insured institution can determine exact amounts and, thus, would not qualify for the temporary exception.

i. *Exchange rate.* An insured institution can determine the exact exchange rate required to be disclosed under § 205.31(b)(1)(iv) if it converts the funds into the local currency to be received by the designated recipient using an exchange rate that it sets.

ii. *Other fees.* An insured institution can determine the exact fees required to be disclosed under § 205.31(b)(1)(vi) if it has negotiated specific fees with a correspondent institution, and this correspondent institution is the only institution in the transmittal route to the designated recipient's institution.

iii. *Other taxes.* An insured institution can determine the exact taxes required to be disclosed under § 205.31(b)(1)(vi) if:

A. The recipient country imposes a tax that is a percentage of the amount transferred to the designated recipient, less any other fees, and the insured institution can determine the exact amount of the applicable exchange rate and other fees; or

B. The recipient country imposes a tax that is a flat amount that is not tied to the amount transferred.

32(b) Permanent Exception for Transfers to Certain Countries

Paragraph 32(b)(1)

1. *Laws of the recipient country.* The "laws of the recipient country" do not permit a remittance transfer provider to determine exact amounts required to be disclosed when a law or regulation of the recipient country requires the person making funds directly available to the designated recipient to apply an exchange rate that is:

i. Set by the government of the recipient country after the remittance transfer provider sends the remittance transfer, or

ii. Set when the designated recipient claims the funds.

2. *Examples illustrating application of the "laws of the recipient country" exception.*

i. The "laws of the recipient country" do not permit a remittance transfer provider to determine the exact exchange rate required to be disclosed under § 205.31(b)(1)(iv) when, for example, the government of the recipient country sets the exchange rate daily and the funds are made available to the designated recipient in the local currency the day after the remittance transfer provider sends the remittance transfer.

ii. In contrast, the "laws of the recipient country" permit a remittance transfer provider to determine the exact exchange rate required to be disclosed under § 205.31(b)(1)(iv) when, for example, the government of the recipient country pegs the value of its currency to the U.S. dollar.

Paragraph 32(b)(2)

1. *Method by which transactions are made in the recipient country.* The "method by which transactions are made in the recipient country" does not permit a remittance transfer provider to determine exact amounts required to be disclosed when transactions are sent via international ACH on terms negotiated between the United States government and the recipient country's government, under which the exchange rate is set by the recipient country's central bank after the provider sends the remittance transfer.

2. *Examples of illustrating application of the "methods" exception.*

i. The "method by which transactions are made in the recipient country" does not permit a remittance transfer provider to determine the exact exchange rate required to be disclosed under § 205.31(b)(1)(iv) when the provider sends a remittance transfer via international ACH on terms negotiated between the United States government and the recipient country's government, under which the exchange rate is set by the recipient country's central bank on the business day after the provider has sent the remittance transfer.

ii. In contrast, a remittance transfer provider would not qualify for the § 205.32(b)(2) "methods" exception if it sends a remittance transfer via international ACH on terms negotiated

between the United States government and a private-sector entity or entities in the recipient country, under which the exchange rate is set by the institution acting as the entry point to the recipient country's payments system on the next business day. However, a remittance transfer provider sending a remittance transfer using such a method may qualify for the § 205.32(a) temporary exception.

iii. A remittance transfer provider would not qualify for the § 205.32(b)(2) "methods" exception if, for example, it sends a remittance transfer via international ACH on terms negotiated between the United States government and the recipient country's government, under which the exchange rate is set by the recipient country's central bank before the sender requests a transfer.

32(c) Bases for Estimates

Paragraph 32(c)(1)(i)

1. *Most recent exchange rate for qualifying international ACH transfers.* If the exchange rate for a remittance transfer sent via international ACH that qualifies for the § 205.32(b)(2) exception is set the following business day, the most recent exchange rate available for a transfer will be the exchange rate set for the day that the disclosure is provided, *i.e.* the current business day's exchange rate.

Paragraph 32(c)(1)(ii)

1. *Publicly available.* Examples of publicly available sources of information containing the most recent wholesale exchange rate for a currency include U.S. news services, such as Bloomberg, the Wall Street Journal, and the New York Times, a recipient country's national news services, and a recipient country's central bank or other government agency.

Paragraph 32(c)(3)(ii)

1. *Potential transmittal routes.* A remittance transfer from the sender's account at an insured institution to the designated recipient's institution may take several routes, depending on the correspondent relationships each institution in the transmittal route has with other institutions. In providing an estimate of the fees required to be disclosed under § 205.31(b)(1)(vi) pursuant to the § 205.32(a) temporary exception, an insured institution may rely upon the representations of the institutions that act as intermediaries in any one of the potential transmittal routes that it reasonably believes a requested remittance transfer may travel.

Paragraph 32(c)(4)

1. *Other taxes imposed in a recipient country that are a percentage.* Section 205.32(c)(4) sets forth the basis for providing an estimate of only those taxes imposed in a recipient country that are a percentage of the amount transferred to the designated recipient because a remittance transfer provider can determine the exact amount of other taxes, such as a flat tax.

Section 205.33—Procedures for Resolving Errors

33(a) Definition of Error

1. *Incorrect amount of currency sent.* Section 205.33(a)(1)(i) covers circumstances in which a sender pays an amount that differs from the total transaction amount, including fees imposed in connection with the transfer, stated in the receipt or combined disclosure provided under § 205.31(b)(2) or (b)(3). Such error may be asserted by a sender regardless of the form or method of payment tendered, including when a debit, credit, or prepaid card is used to fund the transfer and an excess amount is paid. For example, if a remittance transfer provider incorrectly charged a sender's credit card account for $150 to send $120 to the sender's relative in a foreign country, plus a transfer fee of $10, and the provider sent only $120, the sender could assert an error with the remittance transfer provider for the incorrect charge under § 205.33(a)(1)(i).

2. *Incorrect amount of currency received—coverage.* Section 205.33(a)(1)(iii) covers circumstances in which the designated recipient receives an amount of currency that differs from the amount of currency identified on the disclosures provided to the sender, except where the disclosure stated an estimate of the amount of currency to be received in accordance with § 205.32. A designated recipient may receive an amount of currency that differs from the amount of currency disclosed, for example, if an exchange rate other than the disclosed rate is applied to the remittance transfer or if the provider fails to account for fees or taxes that may be imposed by the provider or a third party before the transfer is picked up by the designated recipient or deposited into the recipient's account in the foreign country. Section 205.33(a)(1)(iii) also covers circumstances in which the remittance transfer provider transmits an amount that differs from the amount requested by the sender.

3. *Incorrect amount of currency received—examples.* For purposes of the following examples illustrating the error for an incorrect amount of currency received under § 205.33(a)(1)(iii), assume that none of the circumstances permitting an estimate under § 205.32 apply (unless otherwise stated).

i. A consumer requests to send funds to a relative in Mexico to be received in local currency. Upon receiving the sender's payment, the remittance transfer provider provides a receipt indicating that the amount of currency that will be received by the designated recipient will be 1180 Mexican pesos, after fees and taxes are applied. However, when the relative picks up the transfer in Mexico a day later, he only receives 1150 Mexican pesos because the exchange rate applied by the recipient agent in Mexico was lower than the exchange rate disclosed on the receipt. Because the designated recipient has received less than the amount of currency disclosed on the receipt, an error has occurred.

ii. A consumer requests to send funds to a relative in Colombia to be received in local currency. The remittance transfer provider provides the sender a receipt stating an amount of currency that will be received by the designated recipient, which does not reflect additional foreign taxes that will be imposed in Colombia on the transfer. Because the designated recipient will receive less than the amount of currency disclosed on the receipt, an error has occurred.

iii. Same facts as in ii., except that the receipt provided by the remittance transfer provider does not reflect additional fees that are imposed by the receiving agent in Colombia on the transfer. Because the designated recipient will receive less than the amount of currency disclosed on the receipt, an error has occurred.

iv. A consumer requests to send US$250 to a relative in India to an U.S. dollar-denominated account held by the relative at an Indian bank. Instead of the US$250 disclosed on the receipt as the amount to be sent, the remittance transfer provider sends US$200, resulting in a smaller deposit to the designated recipient's account than was disclosed as the amount to be received after fees and taxes. Because the designated recipient received less than the amount of currency that was disclosed, an error has occurred.

v. A consumer requests to send US$100 to a relative in Brazil to be received in local currency. The remittance transfer provider provides the sender a receipt that discloses an estimated exchange rate, other taxes, and amount of currency that will be received due to Brazilian law requiring that the exchange rate be set by the

Brazilian central bank. When the relative picks up the remittance transfer, the relative receives less currency than the estimated amount disclosed to the sender on the receipt. Because § 205.32(b) permits the remittance transfer provider to disclose an estimate of the amount of currency to be received, no error has occurred unless the estimate was not based on an approach set forth under § 205.32(c).

4. *Failure to make funds available by stated date of availability—coverage.* Section 205.33(a)(1)(iv) generally covers disputes about the failure to make funds available in connection with a remittance transfer to a designated recipient by the stated date of availability. The following are examples of errors for failure to make funds available by the stated date of availability (assuming that neither of the exceptions in § 205.33(a)(1)(iv)(A) or (B) apply).

i. Late or non-delivery of a remittance transfer;

ii. Delivery of funds to the wrong account;

iii. The fraudulent pick-up of a remittance transfer in a foreign country by a person other than the designated recipient;

iv. The recipient agent or institution's retention of funds in connection with a remittance transfer, instead of making the funds available to the designated recipient.

5. *Extenuating circumstances.* Under § 205.33(a)(1)(iv)(A), a remittance transfer provider's failure to deliver or transmit a remittance transfer by the stated date of availability is not an error if such failure was caused by circumstances beyond the provider's control. Examples of circumstances beyond a remittance transfer provider's control under § 205.33(a)(1)(iv)(A) include circumstances such as war or civil unrest, natural disaster, and government actions or restrictions that could not have been reasonably anticipated by the remittance transfer provider, such as the imposition of foreign currency controls or garnishment or attachment of funds after the transfer is sent.

6. *Incorrect information provided for transfer.* Under § 205.33(a)(1)(iv)(B), a remittance transfer provider's failure to make funds in connection with a remittance transfer available to a designated recipient by the stated date of availability is not an error if such failure occurred because the sender provided incorrect information in connection with the transfer, such as by erroneously identifying the designated recipient or the recipient's account number, provided that the remittance transfer provider also gives the sender the opportunity to correct the information and send the transfer at no additional cost. However, an error may be asserted under § 205.33(a)(1)(iv) if the failure to make funds available was caused by the provider's miscommunication of information necessary for the designated recipient to pick up the transfer. For example, an error under § 205.33(a)(1)(iv) could occur if the provider discloses the incorrect location where the transfer may be picked up or gives the wrong confirmation number/code for the transfer.

33(b) Notice of Error From Sender

1. *Person asserting or discovering error.* The error resolution procedures of this section apply only when a notice of error is received from the sender, and not when a notice of error is received from the designated recipient or when the remittance transfer provider itself discovers and corrects an error.

2. *Content of error notice.* The notice of error is effective so long as the remittance transfer provider is able to identify the remittance transfer in question. For example, the sender could provide the confirmation number or code that would be used by the designated recipient to pick up the transfer, or other identification number or code supplied by the remittance transfer provider in connection with the transfer, if such number or code is sufficient for the remittance transfer provider to identify the transfer.

3. *Address on notice of error.* A remittance transfer provider may request, or a sender may provide, the sender's or designated recipient's e-mail address, as applicable, instead of a physical address, on a notice of error if such e-mail address would be sufficient to enable the provider to identify the remittance transfer to which the notice applies.

4. *Effect of late notice.* A remittance transfer provider is not required to comply with the requirements of this section for any notice of error from a sender that is received by the provider more than 180 days from the stated date of availability of the remittance transfer to which the notice of error applies.

5. *Notice of error provided to agent.* A notice of error provided by a sender to an agent of the remittance transfer provider is deemed to be received by the provider under § 205.33(b)(1)(i) when received by the agent.

6. *Consumer notice of error resolution rights.* Section 205.31 requires a remittance transfer provider to include an abbreviated notice of the consumer's error resolution rights on the receipt or combined notice given under § 205.31(b)(2) or (b)(3). In addition, the remittance transfer provider must make available to a sender upon request, a notice providing a full description of the sender's error resolution rights that is substantially similar to the model error resolution and cancellation notice set forth in Appendix A of this part (Model Form A–36).

33(c) Time Limits and Extent of Investigation

1. *Notice to sender of finding of error.* If the remittance transfer provider determines during its investigation that an error occurred as described by the sender, the remittance provider may inform the sender of its findings either orally or in writing. However, if the provider determines that no error or a different error occurred, the provider must provide a written explanation of its findings under § 205.33(d)(1).

2. *Designation of requested remedy.* Under § 205.33(c)(2), the sender may choose to obtain a refund of the amount of funds that was not properly transmitted or delivered to the designated recipient or request redelivery of the amount appropriate to correct the error at no additional cost. Upon receiving the sender's request, the remittance transfer provider shall correct the error within one business day or as soon as reasonably practicable, applying the same currency rate and fees stated in the disclosure provided under § 205.31(b)(2) or (b)(3), if the sender requests delivery of the amount appropriate to correct the error. The remittance transfer provider may also request that the sender indicate the preferred remedy at the time the sender provides notice of the error. However, if the sender does not indicate the desired remedy at the time of providing notice of error, the remittance transfer provider must notify the sender of any available remedies in the report provided under § 205.33(c)(1) if the provider determines an error occurred.

3. *Remedies for incorrect amount paid.* If an error asserted under § 205.33(a)(1)(i) occurred as alleged by the sender, the sender may request a refund of the amount necessary to resolve the error from the remittance provider under § 205.33(c)(2)(i) or that the remittance transfer provider make that amount available to the designated recipient at no additional cost under § 205.33(c)(2)(ii).

4. *Correction of an error if funds not available by stated date.* If the remittance transfer provider determines an error occurred as asserted under § 205.33(a)(1)(iv), it must correct the error including refunding any fees

imposed for the transfer, whether the fee was imposed by the provider or a third party involved in sending the transfer, such as an intermediary bank involved in sending a wire transfer or the institution from which the funds are picked up.

5. *Charges for error resolution.* If an error occurred, whether as alleged or in a different amount or manner, the remittance transfer provider may not impose a charge related to any aspect of the error resolution process (including charges for documentation or investigation).

6. *Correction without investigation.* A remittance transfer provider may correct an error, without investigation, in the amount or manner alleged by the sender, or otherwise determined, to be in error, but must comply with all other applicable requirements of § 205.33.

33(d) Procedures if Remittance Transfer Provider Determines no Error or Different Error Occurred

1. *Error different from that alleged.* When a remittance transfer provider determines that an error occurred in a manner or amount different from that described by the sender, it must comply with the requirements of both §§ 205.33(c) and (d), as applicable. The provider may give the notice of correction and the explanation separately or in a combined form.

33(e) Reassertion of Error

1. *Withdrawal of error; right to reassert.* The remittance transfer provider has no further error-resolution responsibilities if the sender voluntarily withdraws the notice alleging an error. A sender who has withdrawn an allegation of error has the right to reassert the allegation unless the remittance transfer provider had already complied with all of the error resolution requirements before the allegation was withdrawn. The sender must do so, however, within the original 180-day period from the stated date of availability.

33(f) Relation to Other Laws

1. *Concurrent error obligations.* Section 205.33(f)(1) applies only when an error may be asserted under both §§ 205.11 and 205.33 with a financial institution that is also the remittance transfer provider. For example, if a sender asserts an error under § 205.11 with a remittance transfer provider that holds the sender's account, and the error is not also an error under § 205.33 (such as in the case of the omission of an EFT on a periodic statement), then the error-resolution provisions of § 205.11 exclusively apply to the error.

2. *Assertion of same error with multiple parties.* If a sender receives credit to correct an error of an incorrect amount paid in connection with a remittance transfer from either the remittance transfer provider or account-holding institution (or creditor), and subsequently asserts the same error with another party, that party has no further responsibilities to investigate the error because the sender has received sufficient credit to correct the error. For example, assume that a sender initially asserts an error with a remittance transfer provider with respect to a remittance transfer alleging that $130 was debited from his checking account, but the sender only requested a remittance transfer for $100, plus a $10 transfer fee. If the remittance transfer provider refunds $20 to the sender to correct the error, and the sender subsequently asserts the same error with his account-holding institution, the account-holding institution has no error resolution responsibilities under Regulation E because the consumer sender has already received sufficient credit to correct the error. In addition, nothing in this section prevents an account-holding institution or creditor from reversing amounts it has previously credited to correct an error if a consumer receives more than one credit to correct the same error. For example, assume that a sender concurrently files notice of error with his or her account-holding institution and remittance transfer provider for the same error, and the sender receives credit from the account-holding institution for the error within 45 days of the notice of error. If the remittance transfer provider subsequently provides a credit to the sender for the same error, the account-holding institution may reverse the amounts it had previously credited to the consumer's account even after the 45-day error resolution period under § 205.11.

33(g) Error Resolution Standards and Recordkeeping Requirements

1. *Record retention requirements.* Remittance transfer providers are subject to the record retention requirements under § 205.13, and must retain documentation, including documentation related to error investigations, for a period of not less than two years from the date a notice of error was submitted to the provider or action was required to be taken by the provider. A remittance transfer provider need not maintain records of individual disclosures that it has provided to each sender; it need only retain records that ensure that it can comply with a sender's request for documentation or other information relating to a particular remittance transfer, including a request for supporting documentation to enable the sender to determine whether an error exists with respect to that transfer.

Section 205.34—Procedures for Cancellation and Refund of Remittance Transfers 34(a) Sender Right of Cancellation and Refund

1. *Content of cancellation request.* A request to cancel a remittance transfer is valid so long as the remittance transfer provider is able to identify the remittance transfer in question. For example, the sender could provide the confirmation number or code that would be used by the designated recipient to pick up the transfer or other identification number or code supplied by the remittance transfer provider in connection with the transfer, if such number or code is sufficient for the remittance transfer provider to identify the transfer. A remittance transfer provider may also request, or the sender may provide, the sender's e-mail address instead of a physical address, so long as the remittance transfer provider is able to identify the transfer to which the request to cancel applies.

2. *Consumer notice of cancellation right.* Section 205.31 requires a remittance transfer provider to include an abbreviated notice of the consumer's right to cancel a remittance transfer on the receipt or combined disclosure given under § 205.31(b)(2) or (b)(3). In addition, the remittance transfer provider must make available to a sender upon request, a notice providing a full description of the right to cancel a remittance transfer that is substantially similar to the model error resolution and cancellation notice set forth in Appendix A of this part (Model Form A–36).

34(b) Time Limits and Refund Requirements

1. *Form of refund.* At its discretion, a remittance transfer provider may issue a refund in cash or in the same form of payment that was initially tendered by the sender for the remittance transfer. For example, if the sender originally provided a credit card as payment for the transfer, the remittance transfer provider may issue a credit to the sender's credit card account in the amount of the payment.

2. *Fees refunded.* If a sender provides a timely request to cancel a remittance transfer, a remittance transfer provider must refund all funds tendered by the sender in connection with the remittance transfer, including any fees that have been imposed for the transfer, whether the fee was assessed by the

provider or a third party, such as an intermediary institution or the receiving agent or bank.

Section 205.35—Acts of Agents

Alternative A

1. *General.* Remittance transfer providers must comply with the requirements of this subpart, including, but not limited to, providing the disclosures set forth in § 205.31 and providing any remedies as set forth in § 205.33, even if a remittance transfer provider performs its functions through an agent, and regardless of whether the provider has an agreement with a third party that transfers or otherwise makes funds available to a designated recipient.

Alternative B

1. *General.* Remittance transfer providers generally must comply with the requirements of this subpart, including, but not limited to, providing the disclosures set forth in § 205.31 and remedying any errors as set forth in § 205.33, even if a remittance transfer provider performs its functions through an agent, and regardless of whether the provider has an agreement with a third party that transfers or otherwise makes funds available to a designated recipient.

2. *Policies and procedures.* Under § 205.35(a), a remittance transfer provider that performs its functions through an agent must establish and maintain written policies and procedures for compliance with this subpart applicable to its agents. Maintenance of policies and procedures includes periodic review of and, as needed, updates to such policies and procedures. Appropriate oversight practices include, for example, regular audits, training, and other measures designed to ensure an agent's compliance with this subpart. Under these circumstances, a provider has not violated its obligations under Subpart B if its agent fails to follow the policies and procedures in an individual case, so long as the remittance transfer provider makes the consumer whole for any error resulting from an agent's acts, including as set forth under the error resolution provisions in § 205.33.◀

Appendix A—Model Disclosure Clauses and Forms

* * * * *

2. *Use of forms.* The appendix contains model disclosure clauses for optional use by financial institutions ►and remittance transfer providers◀ to facilitate compliance with the disclosure requirements of sections 205.5(b)(2) and (b)(3), 205.6(a), 205.7, 205.8(b), 205.14(b)(1)(ii), 205.15(d)(1) and (d)(2), [and] 205.18(c)(1) and (c)(2)►, and § 205.31(b)◀. The use of appropriate clauses in making disclosures will protect a financial institution ►and a remittance transfer provider◀ from liability under sections [915 and] 916 ►and 917◀ of the act provided the clauses accurately reflect the institution's EFT services ►and the provider's remittance transfer services, respectively◀.

* * * * *

►4. *Altering the model forms for remittance transfers.* This appendix contains twelve model forms for use in connection with remittance transfers. These model forms are intended to demonstrate several formats a remittance transfer provider may use to comply with the requirements of § 205.31(b). Model Forms A–30 through A–32 demonstrate how a provider could provide the required disclosures for a remittance transfer exchanged into local currency. Model Forms A–33 through A–35 demonstrate how a provider could provide the required disclosures for dollar-to-dollar remittance transfers. These forms also demonstrate disclosure of the required content, in accordance with the grouping and proximity requirements of §§ 205.31(c)(1) and (2), in both a register receipt format and an 8.5 inch by 11 inch format. Model Form A–36 provides long-form model error resolution and cancellation disclosures required by § 205.31(d), and Model Form A–37 provides short-form model error resolution and cancellation disclosures required by § 205.31(b)(2)(iv). Model Forms A–38 through A–41 provide language for Spanish language disclosures.

i. The model forms contain information that is not required by Subpart B, such as a confirmation code and the sender's name and contact information. Additional information not required by Subpart B may be presented on the model forms as permitted by § 205.31(c)(4). Any additional information must be presented consistent with a remittance transfer provider's obligation to provide required disclosures in a clear and conspicuous manner.

ii. Use of the model forms is optional. A remittance transfer provider may change the forms by rearranging the format or by making modifications to the language of the forms, in each case without modifying the substance of the disclosures. Any rearrangement or modification of the format of the model forms must be consistent with the form, grouping, proximity, and other requirements of §§ 205.31(a) and (c). Providers making revisions that do not comply with this section will lose the benefit of the safe harbor for appropriate use of Model Forms A–30 to A–41.

iii. Permissible changes to the language and format of the model forms include, for example:

A. Substituting the information entered into the model forms intended to demonstrate how to complete the information in the model forms—such as names, addresses, and Web sites; dates; numbers; and state-specific contact information—with information applicable to the remittance transfer.

B. Eliminating disclosures that are not applicable to the transfer, as permitted under § 205.31(b).

C. Correcting or updating telephone numbers, mailing addresses, or Web site addresses that may change over time.

D. Providing the disclosures on a paper size that is different from a register receipt and 8.5 inch by 11 inch formats.

E. Adding a term substantially similar to "estimated" in close proximity to the specified terms in §§ 205.31(b)(1) and (b)(2), as permitted under § 205.31(d).

F. Providing the disclosures in a foreign language, or multiple foreign languages, subject to the requirements of § 205.31(g).

iv. Changes to the model forms that are not permissible include, for example, adding information that is not segregated from the required disclosures, other than as permitted by § 205.31(c)(4).◀

By order of the Board of Governors of the Federal Reserve System, May 11, 2011.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2011–12019 Filed 5–20–11; 8:45 am]

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Part IV

Department of Health and Human Services

45 CFR Part 154

Rate Increase Disclosure and Review; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 154

[CMS–9999–FC]

RIN 0938–AQ68

Rate Increase Disclosure and Review

AGENCY: Center for Consumer Information and Insurance Oversight, Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule with comment period.

SUMMARY: This final rule with comment period implements requirements for health insurance issuers regarding disclosure and review of unreasonable premium increases under section 2794 of the Public Health Service Act. The final rule establishes a rate review program to ensure that all rate increases that meet or exceed a specified threshold are reviewed by a State or CMS to determine whether they are unreasonable and that certain rate information be made public.

DATES: *Effective date.* This rule is effective on July 18, 2011.

Comment date. We will consider comments on § 154.102 regarding the definitions of "individual market" and "small group market" that are received at one of the addresses provided in the **ADDRESSES** section of this rule no later than 5 p.m. EST on July 18, 2011.

ADDRESSES: In commenting please refer to file code CMS–9999–FC. 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 instructions under the "More Search Options" tab.

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–9999–FC, P.O. Box 8010, Baltimore, MD 21244–8010.

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–9999–FC, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* Alternatively, you may deliver (by hand or courier) your written comments only to the following addresses prior to the close of comment period:

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) 786–9994 in advance to schedule your arrival with one of our staff members.

Comments erroneously mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

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://regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will be also 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 4:00 p.m. To schedule an appointment to view public comments, phone (800) 743–3591.

FOR FURTHER INFORMATION CONTACT: Sally McCarty, (301) 492–4489 (or by e-mail: *ratereview@hhs.gov*).

SUPPLEMENTARY INFORMATION: *Comment Subject Areas:* We will consider comments on how individual and small group coverage sold through associations should be treated under the rate review process as discussed in this final rule with comment period that are received by the date and time indicated in the **DATES** section of this final rule with comment period.

I. Background

The Patient Protection and Affordable Care Act (Pub. L. 111–148) was enacted on March 23, 2010; the Health Care and Education Reconciliation Act (Pub. L. 111–152) was enacted on March 30, 2010. In this preamble, we refer to the two statutes collectively as the Affordable Care Act. The Affordable Care Act reorganizes, amends, and adds to the provisions of Part A of title XXVII of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets.

Section 1003 of the Affordable Care Act adds a new section 2794 of the PHS Act which directs the Secretary of the Department of Health and Human Services (the Secretary), in conjunction with the States, to establish a process for the annual review of "unreasonable increases in premiums for health insurance coverage." The statute provides that this process shall require health insurance issuers to submit to the Secretary and the applicable State justifications for unreasonable premium increases prior to the implementation of the increases.

On December 23, 2010, we published a proposed rule entitled "Rate Increase Disclosure and Review." Sixty comments were received by the end of the comment period. Commenters included several State insurance regulators; the National Association of Insurance Commissioners ("NAIC"); many consumer, retiree, and patient organizations; health care providers; health insurance issuers and related trade associations (collectively, "industry"); an organization representing the actuarial profession; and others.

II. Provisions of the Proposed Rule and Responses to Comments

In this section of the preamble, we summarize each section of the proposed rule, discuss the public comments received on each section (if any), and provide responses to the comments.

A. Subpart A—General Provisions

1. Basis and Scope (§ 154.101)

Section 154.101 of the proposed rule indicated that this rule would implement section 2794 of the PHS Act. Specifically, the rule would establish

disclosure requirements on health insurance issuers offering health insurance coverage in the small group or individual markets concerning rate increases that are above a specific threshold and designated as subject to review. The rule proposed to establish the process by which such increases are reviewed to determine whether they are unreasonable.

Comment: One consumer commenter expressed concern that the proposed rule did not include authority for CMS to require an issuer to rescind an unreasonable rate or otherwise impose penalties on such issuer for proposing an unreasonable rate.

Response: Section 2794 of the PHS Act only provides CMS with the authority to require justification and disclosure of proposed rate increases. However, if an issuer fails to comply with the requirements set forth in this final rule, CMS could seek a court order against the issuer to enforce compliance.

Some States have the authority to deny proposed rate increases, and the grants awarded under section 2794(b) of the PHS Act provided supplemental performance funding for States that have or seek such authority. In addition, States receiving grants under section 2794(b) of the PHS Act will be required to make recommendations to State Exchanges regarding whether issuers should be excluded from participation in the Exchanges based on patterns or practices of excessive or unjustified premium increases. Section 1311(e)(2) of the Affordable Care Act requires Exchanges to take the States' recommendations into consideration when determining whether to make health plans available through the Exchanges.

2. Definitions (§ 154.102)

Certain key definitions in § 154.102 of the proposed rule are discussed below.

a. Individual Market and Small Group Market. The proposed rule would have defined "individual market" and "small group market" as they are defined under the applicable State rate filing laws, if the State laws included such definitions. Under the proposed rule, if a State rate filing law did not include definitions for the individual market or the small group market, the definitions under the PHS Act would be used, with the exception that a small group would be defined to include employers with 50 or fewer employees.

Comment: State regulators, industry, and other commenters agreed that CMS generally should defer to State rate filing laws concerning the definitions for the individual market and the small group market. One State regulator commenter requested clarification as to whether short-term limited duration coverage was required to be included in the proposed rule's definition of individual market, if the State excluded such coverage from its own definition.

Response: The final rule continues to defer to State rate filing law definitions for individual market and small group market including in cases in which the State definition of individual market excludes short-term limited duration coverage. This rule, therefore, does not require that a State with an Effective Rate Review Program review proposed rate increases for short-term limited duration coverage if the State's rate filing law does not consider short-term limited duration coverage to be individual market coverage.

Comment: Five commenters specifically expressed concern that the proposed rule, as drafted, would not cover association coverage sold to individuals and small employers in some States and recommended that the final rule include them in its scope.

One State regulator commented that a large percentage of small employers purchase health insurance coverage through associations in her State. Under that State's law, small employers purchasing through an association are considered one large group not subject to the provisions of State law that apply to small group coverage. However, the commenter noted that rate increases are based on each small employer's own experience, and not that of the entire association, so that rate-setting for association coverage sold to small groups is not the same as that for large employer coverage. She recommended that association coverage be treated consistently for purposes of section 2794 of the PHS Act and other PHS Act provisions. As CMS Insurance Standards Bulletin Transmittal Nos. 02–02 and 02–03 makes clear, PHS Act requirements generally apply to individual market and small group market coverage sold through associations in the same manner as they apply to other individual market and small group market coverage sold directly to consumers and small employers.

Another State regulator voiced similar concerns, noting that his State had more small employers with association coverage than small employers with coverage in the traditional small group market. This State regulator urged that the final rule categorize individual and small employer coverage based on the purchasers of such coverage.

A major trade association representing issuers found the proposed rule ambiguous concerning the regulation of product filings in the individual and small group markets offered through out-of-state associations and group trusts. The commenter noted that in some cases, a group policy is issued in one State, with certificates being issued to individuals or small groups in other States. Since many States only review rates for policies issued in their States, their rate review laws would not apply to coverage sold through out-of-state associations and group trusts.

Similarly, one large issuer noted that CMS's deference to State rate filing law definitions could result in some individual market products sold through associations and group trusts not receiving any review by States or CMS. This commenter recommended that consistent filing requirements and rate review standards be applied to all products marketed to individuals, regardless of the technical insurance arrangement that might be involved, and that CMS review rates for individual market products sold through associations and group trusts in cases where States did not. The commenter thought this approach would ensure uniform consumer protection and advance competition by subjecting all issuers to the same rules.

Lastly, one consumer commenter stated that all coverage marketed to individuals and small employers should be subject to the same review, regardless of whether the coverage was marketed directly to consumers or through associations.

Response: Given the fact that we did not include a discussion on the association health plan issue in the proposed rule, we are not making a determination regarding this issue in this final rule, but instead are seeking comments and additional data on the definitions of "individual market" and "small group market" in § 154.102 of this final rule in relation to whether to provide that individual and small employer policies sold through associations are to be included in the rate review process, even if the State excludes such coverage from its definitions of individual and small group market coverage. Given the comments received and our policy goals with regard to rate review, we are inclined to amend the definitions of individual market and small group market in § 154.102 to include coverage sold to individuals and small groups through associations in all cases. However, as indicated above, we are interested in receiving further comments on § 154.102 for future consideration. If we were to amend the definitions of "individual market" and "small group market" in § 154.102 to

include individual coverage and small employer coverage sold through associations in the rate review process, the amendment will only be applied prospectively.

We recognize that some States may be unable to review proposed rate increases for coverage sold through associations in circumstances in which such association coverage is viewed as large group coverage under State law and State law does not provide for review of rate increases in the large group market, or the State otherwise lacks legal authority to review such rates. In that case, CMS could review the proposed increases for those products. Whether or not a State does or may be unable to review rate increases for association coverage is not a criteria for determining whether it has an Effective Rate Review Program.

In addition, we are seeking comments to address the following questions:

1. Do States currently review rate increases for association and out-of-State trust coverage sold to individuals and small groups, regardless of whether the policies are sitused in or outside of their States?

2. How many such rate filings do States receive for association and out-of-State trust coverage?

3. How prevalent are association and out-of-State trust coverage arrangements? What percentage of individual market and small group market business is sold through associations and out-of-State trusts?

4. In which States is association and out-of-State trust coverage commonly purchased by individuals and small groups? Where are out-of-State trusts typically sitused?

5. Why do some individuals and small employers purchase coverage through associations and out-of-State trusts rather than the traditional markets? Are there particular groups of individuals or types of small employers that typically purchase coverage through associations and out-of-State trusts? What organizations (other than issuers) typically sponsor, endorse, or market association and out-of-State trust arrangements?

6. How do rate increases for association and out-of-State trust coverage sold to individuals and small groups compare to rate increases in the traditional market? What explains the differences (if any) between rate increases for association and out-of-State trust coverage and traditional market coverage?

Once we receive and review the comments, we will make a determination on whether to amend § 154.102 of the rule to include individual and small employer health insurance coverage sold through associations in the rate review process. Meanwhile, nothing prohibits a State from reviewing rates of coverage sold through associations if it already does so or amends its laws in the future to do so.

b. Product. The proposed rule would define "product" as a package of health insurance coverage benefits with a discrete set of rating and pricing methodologies offered in a State.

Comment: Several industry commenters raised concerns that the definition of product was not consistent with State definitions and urged CMS to defer to such State definitions. Some commenters further contended that it would be administratively cumbersome to develop a new Federal product classification system that did not align with existing State classification systems.

Response: While we have not modified the proposed rule's definition of product in this final rule, we believe that the definition is sufficiently flexible to accommodate existing State definitions, and that, as a practical matter, issuers will not have to reclassify their products to comply with the rate review process. Further, this definition is intended to track closely with the definition of health insurance product for purposes of the web portal, 45 CFR 159.110. We expect that in most cases issuers will be able to use their existing identification numbers for health insurance products under the Health Insurance Oversight System (HIOS) for reporting rate increases to CMS.

c. Rate Increase. The proposed rule would define "rate increase" as an increase in the rates of a specific product in the individual or small group market.

Comment: Several industry commenters supported CMS' decision to base the threshold standards on rates, rather than premiums. They noted that the distinction between premiums and rates was explained in the proposed rule's preamble and recommended that this discussion be incorporated into the final rule itself.

Response: We do not believe it is necessary to repeat the discussion in the proposed rule, as we are adopting the proposal described in that discussion, and that discussion applies to this final rule.

d. State. The proposed rule would define "State" using the definition provided in section 2791(d)(14) of the PHS Act.

Note: We note that the definition in 2791(d)(14) of the PHS Act includes the States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and Northern Mariana Islands.

3. Applicability (§ 154.103)

The proposed rule generally would be applicable to all health insurance issuers offering coverage in the small group or individual markets in a State. The proposed rule would not apply to grandfathered health plan coverage, as defined in 45 CFR 147.140, and to insurance coverage that meets the "excepted benefits" definition set forth in section 2791(c) of the PHS Act.

Comment: State regulators, industry, and employers generally agreed that the large group market should not be subject to the final rule, noting that large employers are sophisticated purchasers, that rates generally are based on each large employer's own experience, and that the proposed rule's filing requirements were not aligned with State large group market practices. In contrast, some provider commenters and a labor organization recommended that the large group market be subject to the final rule, noting the rate increases that large groups have faced and the consolidation that has occurred in the health insurance industry. Lastly, one State regulator noted that rates for mid-sized employers (that is, those with 51 to 99 employees) are only partially experience-rated and that a rate review process could be warranted for them, as well.

Response: We understand that many employer groups at the smaller end of the large group spectrum are only partially experience-rated, but we have not included them in the scope of the final rule because few States review rates for large groups. However, we will monitor rate increases in that market segment using a variety of sources including data from the rate review grant program and assess whether future amendments to the final rule may be warranted.

Comment: One commenter suggested that grandfathered plans be included within the scope of the final rule.

Response: Section 1251 of the Affordable Care Act provides that section 2794 of the PHS Act does not apply to coverage that was in effect on March 23, 2011 and retains grandfather status. If coverage loses its grandfather status, then PHS Act section 2794 of the PHS Act will apply.

Comment: One provider commenter recommended that dental and vision plans be included within the scope of the final rule. The commenter stated that rates for these products have increased significantly due to lack of

regulation and noted the importance of such coverage to children.

Response: We have maintained the exclusion for excepted benefits (including limited scope dental and vision benefits) as defined under section 2791(c) of the PHS Act because we believe Federal and State resources are most effectively focused on increases that affect the affordability of basic medical coverage. We do not believe that rate increases for excepted benefit plans such as limited scope dental and vision benefits have the same impact on individuals and small employers as rate increases for basic medical coverage that includes benefits for hospital and physician services. States may review these rates if permitted under State law.

Comment: One commenter recommended that retiree-only plans be included within the scope of the final rule when current or former employees pay for substantial portions of the premium increases.

Response: While it is possible that some State filing laws may apply to such coverage, we have not required that health insurance coverage provided to retiree-only plans be subject to this rule. We note that many retiree-only plans are self-funded and thus would not constitute health insurance coverage subject to section 2794 of the PHS Act.

B. Subpart B—Disclosure and Review Provisions

1. Rate Increases Subject to Review (§ 154.200)

Under the proposed rule, CMS or the applicable State would review those rate increases that meet or exceed specified thresholds to determine if they are unreasonable. (We understand that many States review all rate increases in the applicable markets; nothing in this rule affects State laws or practices with respect to rate increases below the relevant threshold.) Rate increases would be subject to review if they are 10 percent or more and either: (1) are filed in a State on or after July 1, 2011; or (2) are in a State that does not require rate increases to be filed, and are effective on or after July 1, 2011. For rate increases filed in a State during calendar year 2012 and thereafter, or effective in calendar year 2012 and thereafter in a State that does not require rate increases to be filed, rate increases that meet or exceed State-specific thresholds determined by the Secretary for the applicable calendar year (or 10 percent if applicable State-specified thresholds are not determined by the Secretary) would be subject to review. The State-specific thresholds would be published in the **Federal Register** no later than the September 15th prior to each calendar year to which they apply.

To determine whether the specified threshold is met or exceeded, the weighted average increase for all enrollees subject to the rate increase would be used. Rate increases during the 12 month period that precedes the date on which a rate increase is effective are aggregated to determine whether the specified threshold is met or exceeded.

Comment: Some State regulator and industry commenters believed that the proposed rule underestimated the number of rate increases that would be above the 10 percent threshold, with some commenters claiming that virtually all proposed rate increases would be captured under that threshold. Industry commenters contended that the 10 percent threshold did not represent a fair balance of capturing a reasonable number of proposed rate increases and did not track with recent rate increase trends. Some State regulator and industry commenters noted that section 2794 of the PHS Act called for the review of "unreasonable" increases, and that increases above 10 percent are not necessarily unreasonable. Other industry commenters asserted that the threshold was arbitrary and low. They claimed this threshold would stigmatize actuarially appropriate rates, bias State review, deluge consumers with confusing information, and place significant administrative burdens on issuers. Industry commenters recommended that the threshold be based on a broader range of factors including medical cost inflation, adverse selection, deductible leveraging, and required benefit changes, among others.

Consumer, provider, and some State regulator commenters, in contrast, argued that the 10 percent threshold was too high. Commenters listed numerous concerns including: (1) The threshold did not consider the cumulative impact of increases from multiple years and could encourage issuers to target just below the threshold; (2) many rate increases below 10 percent could be problematic from an actuarial perspective; and (3) a threshold designed to be above medical trend would not pressure issuers into taking steps to moderate growth in medical costs. In addition, some commenters recommended that all proposed increases be subject to review.

Response: We believe that 10 percent continues to be an appropriate initial threshold for determining which rates will be subject to review based on the analysis of the trend in health care costs and rate increases provided in the preamble to the proposed rule. The 10 percent transitional threshold balances the need to provide more disclosure to consumers while avoiding undue administrative burdens on other stakeholders. This threshold should not cause consumers to be overwhelmed with information since they likely will only review rate information concerning their current plans or those which they are considering buying. With respect to the commenter focusing on the word "unreasonable" in section 2794, we believe that to identify and review unreasonable rates prior to implementation, it is necessary to review potentially unreasonable rates to assess their reasonableness. Lastly, we note that the 10 percent threshold is intended to be transitional, until State-specific thresholds are put in place.

Comment: Several commenters suggested that the proposed July 1, 2011 effective date for the rate review program did not provide States and health insurance issuers with adequate time to come into compliance with a final rule. Many State regulator commenters suggested that the proposed effective date be delayed until January 1, 2012 and noted that later effective dates would allow the rate review program to begin with State-specific thresholds rather than the 10 percent threshold. One State regulator commenter suggested that the effective date be 6 months after promulgation of the final rule. One industry commenter proposed that the effective date be July 1, 2012, expressing concern that there would not be enough time between issuance of the final rule and a July 1, 2011 effective date for issuers to develop and implement necessary system changes. Several industry commenters stated that they currently are in the process of developing rates for July 1, 2011 effective dates and recommended that the proposed rule not apply to those rates in States without current rate filing requirements.

Response: In response to these comments, we have moved the effective date in this final rule from July 1, 2011 to September 1, 2011 and maintained the initial, transitional 10 percent threshold. This effective date is intended to ensure that proposed 2012 rate increases meeting or exceeding the 10 percent threshold will be reviewed by either CMS or the applicable State. Further delay could mean that many rate increases for 2012 will not be subject to review. We do not deem further delay in starting the rate review program to be desirable given that stakeholders now have been able to provide us with valuable feedback concerning the program's design and we

are prepared to initiate the program. We note that issuers will not be required to provide data beyond what the majority of States already require to be filed in support of proposed rate increases. We will be offering further guidance and training to assist issuers in complying with their obligations under the program.

Comment: State regulator and industry commenters generally expressed support for State-specific thresholds. Some consumer commenters expressed concern that use of State-specific thresholds would reward inefficient insurance markets with higher thresholds. They recommended either the use of a national threshold or the lower of a national or State-specific threshold. Alternatively, some consumer commenters recommended that CMS apply downward adjustments to State-specific thresholds in inefficient insurance markets. State regulator commenters recommended that States be able to establish their own review thresholds, or that, at a minimum, CMS consult with States in developing the State-specific thresholds. State regulator commenters also recommended that the final rule provide more detail on CMS's process for determining State-specific thresholds and include a process by which States could ask CMS to reconsider State-specific thresholds they considered inappropriate. Industry commenters generally were supportive of more State involvement in developing State-specific thresholds.

Many commenters provided recommendations on the methodology for establishing the State-specific thresholds applicable to 2012. Industry commenters raised concerns that a threshold tracking loosely with medical trend, but not other factors, would not sufficiently account for expected rate increases and emphasized that the threshold's underlying factors should have an appropriate actuarial basis. Additionally, some industry commenters said that the threshold should take into account possible impacts from the Affordable Care Act on proposed increases. As noted, many consumer and provider commenters stated that the 10 percent threshold was too high and recommended that CMS use lower thresholds in 2012. Some consumer commenters stated that the threshold should be based solely on medical trends, while others recommended that it be based on multiple factors, including adjustments for inefficient insurance markets and issuers' medical loss ratios.

Many commenters urged CMS to act quickly to develop the State-specific thresholds for 2012, noting that health insurance issuers were already developing their proposed rates and that even if the State-specific thresholds were released by September 15, 2011, most of the 2012 increases would be missed. Several commenters noted the need to monitor State-specific thresholds closely on an ongoing basis to keep up with market trends and address potentially unintended consequences (for example, under- or over-inclusive thresholds).

Response: As noted earlier, the 10 percent threshold is intended to be transitional and we believe that this initial phase of the rate review program will enable CMS and the States to gather information that will be helpful in developing the State-specific thresholds. CMS will immediately begin work with the States and the NAIC to develop a process and identify data and methodologies for setting State-specific thresholds, so that the first State-specific thresholds can be effective for the twelve-month period beginning on September 1, 2012. We plan to update the State-specific thresholds annually, although the 10 percent threshold will apply in a State if a State-specific threshold has not been established for that State. We will publish a notice concerning the applicable thresholds no later than June 1 of each year beginning in 2012.

Comment: Commenters offered various interpretations concerning how rate increases should be calculated and how the weighting concept should work under the proposed rule, while others asked for clarification on these issues. Specifically, one commenter understood the proposed rule to mean that rate increases would be calculated as the overall average percentage increase between the old premium and the new premium, while another believed that rate increases would be calculated as the percentage change between the old revenue and the new projected revenue. With respect to weighting, some commenters interpreted the proposed rule to mean that the increase percentage be weighted by the number of policies, arguing that a subgroup with a lower premium should not be treated the same as another subgroup with a larger premium but an equal percentage increase.

Response: We have modified the final rule to clarify the issues raised by these comments. We believe that the rule's method for calculating a rate increase (that is, the average increase over all policies weighted by premium volume) is arithmetically identical to calculating the rate increase as the overall average percentage increase between the old premium and the new premium. In addition, the rule's method for calculating a rate increase could be applied such that it is the same as calculating the rate increase as the percentage change between the old revenue and the new projected revenue. With respect to weighting, we note that weighting should not be done based on the number of policies; rather, premium volume is the appropriate weighting factor.

2. Unreasonable Rate Increase (§ 154.205)

The proposed rule would set three criteria that CMS would use in determining whether a rate increase is excessive, unjustified, or unfairly discriminatory, and, therefore, unreasonable. First, an increase would be considered excessive if it causes the premium to be unreasonably high in relation to benefits. In making this determination, CMS would consider whether: (1) The rate increase would result in a projected medical loss ratio below the applicable Federal standard; (2) one or more of the assumptions is not supported by substantial evidence; and (3) the choice of assumptions (or combination thereof) is unreasonable. Second, an increase would be considered unjustified if the issuer provides data or documentation that is incomplete, inadequate, or otherwise does not provide a basis to determine whether the increase is reasonable. Third, an increase would be considered unfairly discriminatory if it results in premium differences between insureds with similar risks that are not permitted under State law or, if there is no applicable State law, does not reasonably correspond to expected differences in costs.

Comment: Commenters representing State regulators, industry, and a professional association expressed concern that the definition of "unreasonable rate increase" in the proposed rule did not include a prong related to the adequacy of the proposed rates.

Response: We acknowledge that inadequate rate increases can be problematic. For example, inadequate rate increases can lead to larger increases for consumers in subsequent years or even have a negative impact on an issuer's overall financial condition. Section 2794 of the PHS Act is not primarily concerned with rate increases that are too low and does not identify adequacy among the criteria to be considered when determining unreasonableness. Therefore, we did not include adequacy as a prong of the unreasonableness test that we will use when reviewing rates under the final

rule. We note that many States do explicitly consider the adequacy of rates during their reviews, and nothing in this regulation prevents or prohibits a State from continuing to consider this factor in their review in the future.

3. Review of Rate Increases Subject to Review by CMS or by a State (§ 154.210)

The proposed rule sets forth the factors that would be used by CMS to determine whether CMS would review rate increases subject to review or whether CMS would adopt the determinations made by a State. To the extent that a State had an Effective Rate Review Program in a given market, as determined by CMS, and provided to CMS its final determinations whether an increase is unreasonable, CMS would adopt that State's determinations. A State's final determination would need to include an explanation of its analysis and be provided to CMS within five business days following its determination. In all other situations, CMS would review rate increases subject to review.

Comment: One commenter argued that since section 2794 of the PHS Act requires CMS to establish a rate review process "in conjunction with States," CMS lacked authority to review rates in those States that did not have Effective Rate Review Programs. In contrast, a commenter representing business groups expressed support for the proposed rule's approach to CMS establishing a rate review program in conjunction with the States.

Response: We interpret the requirement that the rate review program be established "in conjunction with States" as requiring that it defer to rate review in the States to the extent consistent with the goals of the Affordable Care Act. The rate review program established by this rule defers to State law and provides that, for States with Effective Rate Review Programs, CMS will adopt their determinations as to whether rate increases are unreasonable. We do not view this requirement as barring CMS from reviewing rates or collecting any information in those States that do not have Effective Rate Review Programs.

4. Submission of Disclosure to CMS for Rate Increases Subject to Review (§ 154.215)

The proposed rule would require health insurance issuers to submit a "Preliminary Justification" for all rate increases subject to review. Parts I (rate increase summary) and II (written description justifying the rate increase) would be provided to CMS and the applicable State (if the State receives such submissions). In addition, Part III (rate filing documentation) would be provided to CMS when it is reviewing the rate increase. Health insurance issuers may submit a combined Preliminary Justification for rate increases affecting multiple products if their claims experience is aggregated and the rate increases are the same across all of the aggregated products.

Part I of the Preliminary Justification would be required to include: (1) Historical and projected claims experience; (2) trend projections related to utilization and service or unit cost; (3) any claims assumptions related to benefit changes; (4) allocation of the overall rate increase to claims and non-claims costs; (5) per enrollee per month allocation of current and projected premium; (6) current loss ratio and projected loss ratio; (7) three-year history of rate increases for the product associated with the rate increase; and (8) employee and executive compensation data from the health insurance issuer's annual financial statements.

Part II would include a simple, brief narrative describing the data and assumptions used to develop the rate increase, including the rating methodology, the most significant factors causing the increase, and a brief description of the policies' overall experience.

Part III, submitted in cases where CMS is reviewing a rate increase, would be required to include the following elements: (1) Description of the type of policy, benefits, renewability, general marketing method, and issue age limits; (2) scope and reason for the rate increase; (3) average annual premium per policy, before and after the rate increase; (4) past experience and any other alternative or additional data used; (5) a description of how the rate increase was determined, including the general description and source of each assumption used; (6) the cumulative loss ratio and a description of how it was calculated; (7) the projected future loss ratio and a description of how it was calculated; (8) the projected lifetime loss ratio that combines cumulative and future experience and a description of how it was calculated; (9) the Federal medical loss ratio standard in the applicable market to which the rate increase applies, accounting for any adjustments allowable under Federal law; and (10) if the projected future loss ratio is less than the applicable Federal medical loss ratio, a justification for this outcome. CMS would accept a copy of a rate filing submitted to a State that included each of these elements. CMS would request additional information from health insurance issuers if their Part III submissions lacked sufficient information for CMS to determine whether rate increases were unreasonable. Issuers would have five business days to supply the additional information. The data which issuers are required to provide in the Preliminary Justification contains less detail and therefore will be less burdensome for issuers than what is called for in the NAIC Model for Individual Health Insurance Rate Filings. This data is readily available to issuers and is generally included in rate filings which they make today.

CMS would promptly make Parts I and II of the Preliminary Justifications available through the healthcare.gov Web site. In addition, in cases where CMS receives Part III, CMS would post on the CCIIO Web site any information not designated as "confidential," as defined under CMS's Freedom of Information Act regulations, 45 CFR 5.65. CMS would review information designated as "confidential" and would post it only if CMS determined that such information was, in fact, subject to disclosure under 45 CFR 5.65. Lastly, the healthcare.gov Web site would include a prominent disclaimer that stated: "The Preliminary Justification is the initial summary information regarding the rate increase subject to review and does not represent a determination that the rate increase subject to review is an unreasonable rate increase."

Comment: Consumer commenters recommended strengthening the proposed rule's disclosure requirements by requiring additional information in Part I, II, and III of the Preliminary Justifications concerning average rate increases, historical rate increases, medical price and utilization changes, provider reimbursement and contracts, administrative costs (including costs related to medical management, marketing, lobbying, travel and association dues), and transfers of funds to affiliated companies. Provider commenters recommended similar disclosures concerning rate increases and administrative costs. One consumer commenter also suggested that sample rates be provided for persons with the same ages and family composition so that consumers could see how rate increases compared between health insurance issuers. Some State regulator commenters recommended that certain elements of the Preliminary Justification be revised or omitted to conform more closely to current reporting requirements imposed on issuers. One State regulator commenter recommended that executive compensation information not be

included in the Preliminary Justification, or, alternatively, that CMS explain how this information would help States evaluate a proposed increase.

Many industry commenters argued that much of the information required in the Preliminary Justification would not be useful to consumers and could cause them unfairly to view the proposed rates as unreasonable. For example, they asserted that rate increase history and employee compensation generally were not taken into account during actuarial reviews. They also expressed concern that a large proportion of consumers would receive a confusing deluge of information concerning rates subject to review, given their estimates on the volume of proposed increases that would exceed the thresholds.

Response: We generally believe that Parts I and II of the Preliminary Justification will provide consumers with sufficient detail concerning the factors influencing proposed rate increases, without being unduly confusing to consumers. Accordingly, the final rule continues to provide that Part I and II will be publicly posted. We have modified or eliminated certain reporting elements in the final rule as recommended by State regulator commenters. In Part I, medical loss ratio data has been removed because it can be computed from remaining Part I elements and therefore was redundant. (We note that medical loss ratio data continues to be a distinct reporting requirement for Part III.) The requirement to report executive and employee compensation data was also removed because these amounts would represent only a very small proportion of an overall rate increase when allocated by product and member month, and, consequently, would not be helpful to consumers in showing the primary rate increase drivers. We also added the phrase "as determined by the Secretary" in § 154.215(e) to allow HHS discretion in the future to respond to changes in the market and input from stakeholders as to what elements in Part I are most helpful to consumers. Finally, we removed the explanation of the rating methodology from Part II in order to keep Part II brief, non-technical, and understandable to consumers.

Comment: Some industry commenters recommended that CMS allow issuers to aggregate and report multiple products at the same level of aggregation as permitted under State law, without requiring that the same rate increase be applied to all of the aggregated products. These commenters stated it would be administratively burdensome for CMS to adopt an aggregation standard that differed from current State requirements. Many consumer and provider commenters expressed concern that allowing aggregated filings for products would mask rate increase variations between different products.

Response: Our understanding is that some States review rate filings at a product level, while other States review rate filings on an aggregated product basis, particularly in community-rated environments. The final rule maintains the proposed rule's standard, which accommodates both State approaches. Where filings are made on an aggregated product basis, the same claim experience must have been used to develop the increases and the proposed increases must be the same for each of the different products to ensure that issuers cannot mask high increases for certain products within the combined filings. To the extent that this approach represents a change for some issuers, the burden should be minimal since the rule merely requires that they report existing information in a different fashion. We believe that this aggregation standard appropriately balances the need for increased transparency with current State rate filing requirements and actuarial practices.

Comment: Many consumer commenters urged that Part III of the Preliminary Justification not be given confidential treatment, reasoning that the public's right to information concerning rate increases outweighed issuers' proprietary interests in such information. One commenter noted that, for example, issuers potentially could designate actuarial memoranda and risk-based capital information as confidential, thereby leaving consumers without important information needed to scrutinize proposed rate increases. Another consumer commenter recommended that issuers be required to submit data on provider reimbursement and contracts and that issuers not be permitted to designate such data as confidential. While provider commenters generally recommended that as much information as possible from the Preliminary Justification be publicly released, they expressed concern about maintaining the confidentiality of provider reimbursement rates. Industry commenters were concerned about the impact of disclosing market sensitive information and generally recommended that the information in Part III be kept confidential and not disclosed. Industry commenters requested that CMS provide additional information on how the "confidential" information exemption under the Freedom of Information Act (FOIA), 5 U.S.C. section 552, would apply so that they could designate information in Part III of the Preliminary Justification appropriately. They also requested more guidance on CMS's review and appeal process for FOIA requests and disclosures.

Response: The final rule essentially adopts the confidentiality approach taken in the proposed rule; that is, information contained in Part III of a Preliminary Justification will be posted on our Web site unless the FOIA exemption for trade secrets and confidential commercial or financial information applies. As a Federal agency, we generally are required to utilize the FOIA standard in determining confidentiality. As discussed in more detail in the preamble to the proposed rule, CMS's FOIA rule, 45 CFR Part 5, establishes the process and standards that generally apply to determining whether information designated as confidential is subject to disclosure. Issuers will be able to designate the information that they believe is protected by the exemption and we will determine whether the exemption applies.

We reviewed the approaches currently taken by States concerning the public disclosure of rate filings. Some States make all parts of a rate filing public; some States provide standards for which parts of a rate filing will be made public; and other States follow a freedom of information process and standard under State law that is similar to FOIA. Based on a review of State filing guidelines and State Web sites, it appears at least 12 states do not redact any information when making rate filings available to the public. Given that Part III is based on State rate filing requirements, this means that many States do not regard the types of information found in Part III to be confidential or protected from disclosure. Based on the fact that the information contained in Part III appears to be widely available across the country and that many States already are making this information available, it may be difficult for an issuer to assert that the information in Part III is confidential or protected from disclosure under Federal law.

Comment: Industry commenters recommended that issuers be provided additional time beyond five business days to respond to an inquiry from CMS regarding an incomplete Part III of the Preliminary Justification. Commenters noted that, for example, a more complex request might require an issuer to gather and organize information from different internal departments, which could take longer than five business days.

Response: We have modified the final rule so that, after receiving a request from CMS, an issuer will have 10 business days to respond to provide additional Part III information.

Comment: Several State regulator, consumer, and industry commenters expressed concerns that the proposed rule's disclaimer language would be misleading to consumers and that a clearer description of both the purpose of the Preliminary Justification and the rate review process was needed. State regulator and industry commenters requested an explicit statement that rates subject to review had not yet been determined to be unreasonable by a State or CMS. Commenters also recommended including statements regarding: (1) The availability of additional information if a rate was determined to be unreasonable; (2) the actuarial factors that impact the reasonableness of rates; (3) the possibility that a proposed increase might change prior to implementation; and (4) whether a product was available for purchase notwithstanding review of its proposed rates.

Response: We have modified the final rule to state more generally that a disclaimer will accompany the Preliminary Justifications posted on our Web site. Guidance concerning this disclaimer will be provided at a later date and the commenters' concerns will be considered when that guidance is developed.

5. Timing of Preliminary Justification (§ 154.220)

The proposed rule provides that if a State requires a proposed rate increase to be filed with the State prior to implementation of the increase, the health insurance issuer must send CMS and the applicable State the Preliminary Justification on the date the issuer submits the proposed increase to the State. For all other States, the health insurance issuer must send CMS and the applicable State the Preliminary Justification prior to the implementation of the rate increase.

Comment: A few State regulator commenters suggested that Preliminary Justifications should not be posted unless a rate was found to be unreasonable. These commenters expressed concern that posting Preliminary Justifications prior to the proposed increases' evaluation would cause consumer confusion, lead to unsuitable replacements of coverage, and provide opportunities for misuse of information. In addition, commenters noted that some States did not allow disclosures concerning rate filing information until rates are approved. In contrast, other State regulator commenters supported the requirement that the Preliminary Justification be posted immediately upon receipt. Several consumer commenters recommended that policyholders and the public be given adequate notice of proposed rate increases prior to increases going into effect. These commenters generally suggested that issuers file proposed rates with the States and give consumers notice of the proposed increases 60 or 90 days before they go into effect. One commenter suggested that patient advocacy groups be given specific notice concerning proposed increases that were higher than medical inflation.

Response: Section 2794 of the Act requires that issuers submit to the Secretary and the relevant State a justification for an unreasonable rate increase before the rate is implemented. We considered two alternatives to implement that provision. The first would be to establish a federal regulatory requirement that a rate cannot go into effect until it has been reviewed and determined to be reasonable or unreasonable. At that point, justifications could be submitted only for those rates that were determined to be unreasonable, prior to their being implemented. Such a federal requirement would be inconsistent with the "file and use" laws in many States, which provide that a rate may go into effect as soon as it is filed. We concluded that overriding State law in this respect was not the best approach.

Alternatively, the approach taken in the proposed rule, which requires a Preliminary Justification to be submitted at the time a rate increase subject to review is filed, assures that there will be a justification for increases for all rate increases that ultimately are determined to be unreasonable, without requiring any change in current State law or practice for reviewing rates. We believe that requiring the posting of the Preliminary Justification before a final determination is made both satisfies the requirements of the Affordable Care Act and assures that consumers will better understand why their issuers are proposing rate increases that meet or exceed the subject to review threshold.

In addition, the disclaimer language on our Web site will be modified to better inform consumers of the purpose of the Preliminary Justification and to make clear that its posting is not a determination that the proposed rate increase is unreasonable.

6. Determination by CMS or a State of an Unreasonable Rate Increase (§ 154.225)

When CMS reviews a rate increase subject to review, it will post on its Web site a final determination and a brief explanation of its analysis within five business days following the determination. If the rate increase is determined to be unreasonable, CMS will also provide this information to the health insurance issuer.

When a State reviews an increase subject to review, CMS will adopt the State's final determination and post it on the CMS Web site. If a State determines that the rate increase is unreasonable, but the health insurance issuer is legally permitted to implement the increase under State law, CMS will provide the State's final determination and explanation to the issuer within five business days of CMS receiving the information from the State.

Comment: One State commenter suggested that States with Effective Rate Review Programs not be required to post brief explanations and analyses that were more in-depth than those posted by CMS in cases where it reviews rates.

Response: We have modified the final rule to clarify that the brief explanations and analyses posted by CMS and States are intended to be consistent in format and content.

Comment: Numerous industry commenters suggested that CMS establish safe harbors or expedited rate review procedures. For example, some commenters suggested that if a health insurance issuer's proposed rate increases were expected to satisfy the Federal medical loss ratio standard, the increases should be exempt from review. Another commenter suggested that proposed rates in insurance markets that were determined to be competitive should either be exempt from review or subject to an expedited process. One commenter stated generally that the review process applied should vary based on the circumstances of the proposed increase.

Response: We have not modified the final rule to provide safe harbors or expedited rate review procedures given that many factors are relevant in determining whether a particular proposed rate increase is unreasonable, thus supporting the need for a more detailed review process.

7. Submission and Posting of Final Justifications for Unreasonable Rate Increases (§ 154.230)

If a health insurance issuer declines to implement a rate increase that has been determined to be unreasonable, or

chooses to implement a lower increase, under the proposed rule, the issuer would be required to provide CMS timely notice of its decision. A lower increase that meets or exceeds the applicable thresholds for review would require a new Preliminary Justification. However, if an issuer chooses to lower its request for a proposed increase while the increase is under review and before a determination or unreasonableness has been made, the issuer can do so by filing a modification to the filing under review. If the revised rate falls below the review threshold, the review will cease and the revised rate will be displayed on the posting.

If a health insurance issuer implements an unreasonable rate increase, it must, within 10 days of the later of implementing the increase or receiving the final determination, provide CMS with a "Final Justification" responding to CMS's or the State's determination, using information consistent with that provided by the issuer in the Preliminary Justification. The health insurance issuer must prominently post on its Web site: (1) the portions of the Preliminary Justification posted on the CMS Web site; (2) CMS's or the State's final determination; and (3) the issuer's Final Justification. This information must be made available on the issuer's Web site for at least three years. In addition, CMS will make an issuer's Final Justification available through the healthcare.gov Web site for three years.

Note: We did not receive any major comments on this section.

C. Subpart C—Effective Rate Review Programs

CMS's Determination of Effective Rate Review Programs (§ 154.301)

Under the proposed rule, CMS would apply the following criteria in evaluating whether a State has an Effective Rate Review Program for the individual market and small group market, including different types of products within those markets. CMS will examine information publicly available concerning each States' authority to receive the data needed in order to review a proposed rate increase. This includes State statutes, regulations, bulletins, filing guidance, and so forth. CMS will also review available information that describes each State's practices in conducting rate reviews. This information primarily consists of State applications for rate review grants, quarterly reports of activity undertaken with grant funds, and conversations between CMS staff and state regulators relating to grant activities.

CMS will then conduct a phone call with each State insurance regulator to confirm the information CMS has gathered and to ask for any additional information the State believes is relevant to the determination of whether it has an Effective Rate Review Program.

CMS will notify States of its determinations by July 1, 2011, two months in advance of the date filings are first due pursuant to this regulation. States will have the right to bring any new information bearing on this decision to CMS at any time, and CMS will consider whether based on this new information the State should be determined to have an Effective Rate Review Program. CMS will also monitor States that have determined to be effective in order to ascertain that their processes continue to satisfy the requirements of the regulation.

CMS would consider whether the State receives data and documentation from issuers concerning rate increases sufficient to conduct an examination of the reasonableness of the assumptions used to develop proposed rate increases, the validity of the historical data underlying the assumptions, and the issuers' data related to past projections and actual experience. CMS also would consider whether the State conducts effective and timely reviews of the information submitted by issuers in support of proposed rate increases. The examination would need to include an analysis of: (1) Medical trend changes by major service categories; (2) utilization changes by major service categories; (3) cost-sharing changes by major service categories; (4) benefit changes; (5) changes in enrollee risk profile; (6) impact of over- or under-estimate of medical trend in previous years on the current rate; (7) reserve needs; (8) administrative costs related to programs that improve health care quality; (9) other administrative costs; (10) applicable taxes and licensing or regulatory fees; (11) medical loss ratio; and (12) the health insurance issuer's risk-based capital status relative to national standards. Finally, the State's determination whether a rate increase is unreasonable would need to be made under a standard set forth in State statute or regulation.

CMS would determine whether a State has an Effective Rate Review Program for each market based on documentation and information received by CMS from the State or any other information otherwise available to CMS indicating that its rate review program meets these criteria. CMS would reserve the right to determine that a State no longer had an Effective Rate Review Program if it no longer met these criteria. The NAIC individual rate filing guidelines—the basis of many states current rate review practices—require the collection and review of a larger, more detailed set of data than the review criteria provided in the rule. Thus, the review criteria provided in the rule incorporates practices that are already in place in many states.

Comment: The NAIC recommended that the final rule allow flexibility for States to conduct rate reviews within their statutory frameworks. One State regulator commenter recommended that the final rule defer to State law on what constitutes an Effective Rate Review Program and not require States to conform to any Federal definition of an Effective Rate Review Program. In the alternative, the commenter suggested that the NAIC establish rate review standards that could be required for State accreditation. In addition, some commenters including State regulators and an organization representing the actuarial profession generally recommended that reviews conducted by CMS and the States should be subject to the same standards under the final rule. For example, the commenter believed that the lists of informational elements required under § 154.215(g)(1) and § 154.301(a)(3) should be the same. Industry commenters argued that review standards in the proposed rule did not reflect the variation that currently exists among the States and the rule could drive States towards a national standard. Industry commenters also expressed concern that the criteria were overly prescriptive and that their application could be unduly subjective. Consumer and provider commenters expressed concern that the proposed rule's standards overall were too low and that States with limited review capabilities could be designated as having effective programs. Commenters also noted that the effectiveness of State review processes in practice, in addition to a State's statutory authority, was relevant to determining if an Effective Rate Review Program existed in a State.

Response: We believe it is necessary for the rule to set forth minimum review standards so that CMS can determine which States meet those standards and subsequently defer to their determinations concerning whether proposed rate increases are unreasonable. We agree with commenters that the minimum standards for reviews for CMS and the States should be consistent. Therefore, we have modified the proposed rule in this final rule so that the information that CMS will review in Part III of the Preliminary Justification will be the same information that will be reviewed

as part of a State Effective Rate Review Program under § 154.301(a)(3) and (4). In addition, we have modified § 154.301(a)(4) to clarify that CMS and States with Effective Rate Review Programs will have to take into consideration the various factors listed in paragraph (4) to the extent applicable to the filing under review. This change is meant to reflect that reviewers for CMS or the State will have flexibility to use their expert judgment in evaluating the relevance of the different factors in the context of a particular rate filing.

Comment: Many consumer commenters urged that public hearings and comment periods be required as part of an Effective Rate Review Program. One commenter recommended that excessive or frequent increases give rise to public hearings. Another commenter suggested that the public hearings be held at the health insurance issuer's expense if the proposed increase exceeded medical inflation. Lastly, one commenter suggested that issuers be required to mail information to consumers concerning proposed rate increases and their opportunities to participate in the rate review process.

Response: We did not include public hearings as a required element for Effective Rate Review Programs in deference to the fact that most States today do not hold public hearings as part of the rate review process. However, in response to the comments urging a greater opportunity for input from the public, we modified the final rule to require that in order to be deemed to have an Effective Rate Review Program, a State must: (1) Provide access on a State Web site to Parts I and II of the Preliminary Justifications for those proposed rate increases that meet or exceed the threshold, and (2) have a mechanism for receiving public comments on those proposed rate increases. For example, a State could provide Web site access either by directly posting the relevant Parts I and II on its own Web site or by posting a regularly-updated list of the relevant Parts I and II with a link to the CMS Web site where they can be found. States could choose to accept public comments through the mail, their Web sites, public hearings, or other means. We believe that posting the Parts I and II of the Preliminary Justifications and allowing public input will encourage public participation in the rate review process, but be less burdensome than requiring all States with Effective Rate Review Programs to hold public hearings. In addition, we added a parallel requirement in § 154.215 that we accept public comments on the proposed rate increases we review. We note that CMS has encouraged States to undertake efforts to increase the transparency of their rate review programs under the grants authorized by PHS Act section 2794 and that many States are responding with innovative programs to increase public input. We also note that this is a criteria for States with Effective Rate Review Programs and not a requirement for a health insurance issuer filing for a rate increase.

Comment: Several consumer commenters stated that States should be required to have prior approval authority over proposed rate increases in order to qualify as having Effective Rate Review Programs.

Response: Prior approval authority over proposed rate increases can be an important part of a State's rate review program. States that have or propose this authority qualify for a supplemental performance grant under the grants provided under section 2794(b) of the PHS Act. Section 2794 of the PHS Act requires CMS to establish a process for reviewing unreasonable rates; it does not provide CMS with prior approval authority. We therefore did not think it would be appropriate for CMS to mandate that States have prior approval authority in order to qualify as having Effective Rate Review Programs.

Comment: Several State regulator and industry commenters asked for clarification concerning the role of medical loss ratios in the rate review process.

Response: Both Federal and State medical loss ratios are relevant to the rate review process. We recognize that aggregation standards and relevant time periods differ between this rule and the Federal medical loss ratio interim final rule, 45 CFR part 158. For purposes of this rule, when CMS is reviewing rates, we will consider whether a product, along with the other products in the same market with which it will be aggregated for purposes of the Federal medical loss ratio, will be reasonably likely to satisfy the Federal medical loss ratio standards on a projected basis. We note that an issuer's explanation with regard to its projected medical loss ratio in a Part III submission has no bearing on its obligations under section 2718 of the PHS Act (for example, medical loss ratio rebates). In addition, CMS will consider whether a product satisfies the applicable State medical loss ratio standards in those States in which it reviews rates. In the absence of a State standard for the individual market, CMS will apply NAIC Model 134–1, "Guidelines for Filing of Rates for Individual Health Insurance Forms." In the absence of a State standard for the small group market, CMS will apply NAIC Model 134–1 until it releases its own guidelines for the small group market. The CMS guidelines will be released in future guidance and will be developed following a review of current State requirements and practices, medical loss ratio data, and other relevant information concerning the small group market.

Comment: Some State regulator and industry commenters recommended that CMS not mandate that risk-based capital information be reviewed as part of the rate review process, stating that use of such information is not part of most State rate review processes. Consumer commenters emphasized that the overall financial condition of an issuer is relevant and should be taken into account.

Response: We understand that few States specifically consider risk-based capital information as part of the rate review process, although many States do consider more general information concerning issuers' capital and surplus. Therefore, we deleted risk-based capital as a factor in the final rule and have replaced it with capital and surplus. We believe that information concerning an issuer's capital and surplus may be useful in certain instances (for example, where an issuer has low surplus levels and needs to build reserves, or conversely where an issuer might be able to moderate a rate increase without causing solvency concerns). In addition, we note that capital and surplus information is only one of several items that would be taken into account as part of the rate review process, many of which will be of greater importance than capital and surplus information in making a determination of whether a proposed rate is unreasonable.

Comment: Several commenters suggested different ways to use the Rate Review Grant Program to support State efforts to conduct effective rate reviews. Some consumer groups urged that the grant program be used to award funds, either directly or through States, to voluntary health agencies and other groups to educate the public about the rate review process and to assist them in selecting coverage appropriate to their individual circumstances. One consumer group commenter suggested that grant funds be used to develop rate review models that include financial incentives for issuers that meet predetermined goals and that implement cost containment, quality improvement, and clinical effectiveness measures. Another consumer group commenter recommended that the grant program should be used to encourage states to enact legislation necessary to

secure rate review and prior approval authority.

Response: Grants awarded during Cycle I of the Rate Review Grant Program are being used to improve State rate review programs in a number of ways. Grant funds are being used to hire actuaries, improve information technology systems, and expand State rate review authority. Transparency is another goal of the rate review grant program and many States submitted work plans to improve public engagement in the rate review process. Cycle II grants, to be awarded in the Fall of 2011, will be awarded to States that have developed, or are in the process of developing, Effective Rate Review Programs. In Cycle II, CMS also will offer supplemental awards to States that have or obtain prior approval authority during the three-year grant period. Improving quality, implementing cost containment, and clinical effectiveness measures, while laudable goals, are outside the scope of the rate review rule.

III. Provisions of the Final Rule

For the most part, this final rule incorporates the provisions of the proposed rule. Those provisions of this final rule that differ from the proposed rule are as follows:

- *Applicability (§ 154.103).* We deleted extraneous language.
- *Rate increases subject to review (§ 154.200).* We streamlined language concerning when the 10 percent or State-specific threshold will be applicable, provided additional information on State-specific thresholds, and clarified the rate increase calculation formula. In addition, we changed the program's effective date from July 1, 2011 to September 1, 2011. We also changed the date of the publication of state specific threshold to no later than June 1 of each year for the 12 month period that begins on September 1.
- *Review of rate increases subject to review by CMS or by a State (§ 154.210).* We clarified that CMS and the States will provide similar explanations on final determinations concerning unreasonable rates.
- *Submission of disclosure to CMS for rate increases subject to review (§ 154.215).* We replaced or deleted certain elements required for Parts I and II of the Preliminary Justification. In addition, we conformed the information requirements for Part III of the Preliminary Justification submitted to CMS to be the same as the information requirements for an Effective Rate Review Program maintained by a State; clarified that further instructions for Part III will be provided in guidance; and provided issuers with 10 business days (instead of 5 business days) to respond to a request for more information from CMS concerning a Part III submission. We shortened the language describing how CMS will treat confidential information in Part III under FOIA. We stated that the disclaimer that will accompany the Preliminary Justifications will be provided in guidance. Lastly, we added a requirement that CMS accept public comments on the proposed rate increases it reviews.
- *Timing of Providing the Preliminary Justification (§ 154.220).* We clarified the section's title and changed the program's effective date from July 1, 2011 to September 1, 2011.
- *Determination by CMS or a State of an unreasonable rate increase (§ 154.225).* We clarified that CMS will make timely determinations whether proposed rate increases are unreasonable and that CMS and the States will provide similar explanations on final determinations concerning unreasonable rates. In addition, we made a technical correction to clarify that CMS will provide a State's final determination to an issuer within five business days (rather than five days) of receipt.
- *Submission and posting of Final Justifications for unreasonable rate increases (§ 154.230).* We made a technical correction to clarify that issuers have 10 business days (rather than 10 days) to submit a Final Justification.
- *CMS's determinations of Effective Rate Review Programs (§ 154.301).* We clarified that States will need to take into account the listed factors in conducting their rate reviews. We replaced the risk-based capital factor with a capital and surplus factor. We required that States provide access to Parts I and II of the Preliminary Justifications through their Web sites and accept public comments on them. Lastly, we clarified that CMS will determine whether a State had an Effective Rate Review Program based on the information available to CMS and that CMS will revisit these determinations in light of changed circumstances.

IV. 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.

We requested comments on these requirements in the proposed rule. In addition, on March 1, 2011, CMS published a draft version of the Preliminary Justification in the **Federal Register** and requested public comments as required under the Paperwork Reduction Act (PRA). The public comment period closed on May 2, 2011, and 9 comments were submitted from consumer advocacy organizations, health insurance issuers, a state regulatory organization, and an actuarial professional association.

CMS has reviewed all of the comments and will release as soon as possible but no later than 7–10 days after publication of this final rule an updated version of the preliminary justification that incorporates the feedback received through the PRA comment process. The description of the preliminary justification in the final rule outlines the overall structure of the updated preliminary justification that is still pending release.

A description of the information collection requests is given in the following paragraphs with an estimate of the annual burden, and summarized in table A. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information. Because we have not yet made a determination on the comments received pertaining to the draft forms published on March 1, 2011, these estimates are not final and are subject to change. Further, the information collection requirements associated with this final rule will not become effective until approved by OMB. HHS will issue a notice in the Federal Register announcing OMB approval once it is obtained.

A. Background

Section 2794 requires the Secretary to develop, in conjunction with the States, a process for the annual review of unreasonable rate increases. The

regulation establishes a rate review program to ensure that all rate increases that meet or exceed an established threshold are reviewed by a State or CMS to determine whether the rate increases are unreasonable. Under the regulation, if CMS determines that a State has an Effective Rate Review Program in a given market, using the criteria set forth in the rule, CMS will adopt that State's determinations regarding whether rate increases in that market are unreasonable, provided that the State reports its final determinations to CMS, and explains the bases of its determinations. For all other States or markets, CMS will conduct its own review of rates that meet or exceed the applicable threshold to determine whether they are unreasonable.

Section 2794 directs the Secretary to ensure the public disclosure of information on unreasonable rate increases and justification for those increases. The regulation therefore develops a process to ensure the public disclosure of information on unreasonable rate increases and justifications for those increases. Section 2794 also requires that health insurance issuers submit a justification for an unreasonable rate increase to CMS and the relevant State prior to its implementation. The regulation therefore establishes various reporting requirements for health insurance issuers, including a Preliminary Justification for a proposed rate increase, a Final Justification for any rate increase determined by a State or CMS to be unreasonable, and a notification requirement for unreasonable rate increases which the issuer will not implement.

B. Information Collection Requirements (ICRs) Regarding the Rate Review Preliminary Justification Form (§§ 154.215 and 154.220)

This final rule describes the Preliminary Justification that each health insurance issuer would be required to submit to both CMS and States, if it is seeking to implement a rate increase that meets or exceeds the threshold described in § 154.200. The Preliminary Justification includes data supporting the potential rate increase as well as a written explanation of the rate increase. For those rates CMS will be reviewing, issuers' submissions must also include supplemental data and information that CMS will need to make a valid actuarial determination regarding whether a rate increase is unreasonable.

Each health insurance issuer seeking to implement a rate increase that meets or exceeds the established threshold would be required to complete a Preliminary Justification. The Preliminary Justification consists of three Parts. Part I consists of a document (Excel spreadsheet) to be completed by issuers for all proposed rate increases that meet or exceed the threshold. Part II of the Preliminary Justification is a brief written narrative explaining the methodology used to derive the rate increase. Issuers would be required to submit to both CMS and the applicable State Parts I and II prior to implementation of a rate increase, regardless of whether CMS is reviewing the rate increase or adopting the State's review. Issuers typically calculate these figures in order to develop their rates and submit a rate filing to State regulators. The data elements and methodologies are commonly calculated by issuers and are often required by States that review rates.

Issuers will be required to complete Part III of the Preliminary Justification only when CMS rather than the State is reviewing a rate increase to determine whether it is unreasonable or not, and submit Part III to CMS only (and not to the applicable State). Part III of the Preliminary Justification defines an additional set of information that issuers must submit only when CMS is reviewing a rate increase. The information provided under Part III will allow CMS to make a valid actuarial determination as to whether the rate increase is unreasonable or not. If an issuer completes and submits Part III of the Preliminary Justification, but does not provide sufficient information for CMS to conduct its review, CMS will request the additional information necessary to make its determination. Issuers have 10 business days to respond to any request for outstanding information from CMS.

Using 2010 data, CMS estimates the number of rate filings in 2010 that would have been subject to the rule had it been in force to be between 4,580 and 5,059 in the individual and small group markets nationwide. CMS estimates that the total number of rate filings is expected to increase slightly in 2011, due in part to an increased number of issuers required to file based on those factors discussed in the impact analysis section.

Therefore, CMS estimates that, in 2011, there would be 6,733 rate filings subject to the rule. As discussed in the impact analysis section, CMS estimates that approximately 974 of these rate filings will require review under the rule because they meet or exceed the established threshold. CMS estimates the total number of burden hours to be 10,714.

C. ICRs Regarding State Determinations (§ 154.210 and § 154.225)

Under the final rule, if CMS determines that a State has satisfied specific criteria for an Effective Rate Review Program under § 154.301, CMS would adopt the State's determinations regarding whether a rate increase that meets or exceeds the established threshold is unreasonable, providing the State reports its final determinations to CMS and explains the basis of its determination as required under § 154.210(b)(2). As discussed in the impact analysis section, since many States are already performing these functions, the cost burden to States would be small and would largely be offset by rate review grants provided by CMS to help States improve their rate review processes. In those cases where a State does not have an Effective Rate Review Program, CMS will make its own determinations regarding whether a rate increase that meets or exceeds the established threshold is unreasonable.

CMS and the States would post on their Web sites the information contained in each Preliminary Justification for each rate increase subject to review under § 154.200. For consumer clarity, CMS will also post on its Web site the final disposition of each rate increase reviewed by either CMS or a State. Therefore, either a State or CMS would make a final disposition for all rate increases reviewed under the rule, similar to current rate filing practices under the NAIC System for Electronic Rate and Form Filing ("SERFF") or similar State-based filing systems.

As explained in the impact analysis section, CMS estimates that 974 rates would be reviewed under the rule because they meet or exceed the established threshold and that 25 to 35 States, in whole or in part based on market segment, would be reporting to CMS and posting dispositions on approximately two-thirds of these rates (or 649 filings) for at least one market. The RIA also estimates that reporting information from the State to CMS will require approximately 20 minutes per filing. Thus the annual burden for this requirement is approximately 214 hours. CMS believes that posting the final disposition would not pose any additional burden on States.

D. ICRs Regarding the Final Justification and Final Notification (§ 154.230)

The final rule requires health insurance issuers to submit to CMS and the relevant State a Final Justification for any unreasonable rate increase that would be implemented and to display this information on their Web sites. If an

issuer is legally permitted to implement an unreasonable rate increase and declines to implement the increase, the issuer will provide notice to CMS that it will not implement the increase. As discussed in the impact analysis section, CMS estimates that 417 issuers will submit an estimated 468 to 1,723 rates for review and that it will take between 6 to 16 hours to complete the entire justification process. CMS estimates that 974 rates will meet or exceed the threshold and for the purposes of providing an upper bound of the potential number of final notifications further assumes issuers will implement 100 percent of rates found unreasonable.

E. ICRs Regarding CMS' Determinations of Effective Rate Review Programs (§ 154.301)

As discussed earlier in the preamble, CMS will determine whether a State's rate review program meets the requirements of an Effective Rate Review Program set forth in § 154.301(a) based on information received from the State through the grant process, through review of applicable State law, and through any other information otherwise available to CMS. The information collection for the "Grants to States for Health Insurance Premium Review" is approved under OMB Control number 0938–1121. Since CMS does not believe additional data from States are necessary to make these determinations, we assume the additional burden from this provision is zero.

TABLE A—ESTIMATED ANNUAL BURDEN

Regulation section(s)	OMB control No.	Number of respondents	Number of responses	Burden per response (hours)	Total annual burden (hours)	Hourly labor cost of reporting ($)	Total labor cost of reporting ($)	Total capital/ maintenance costs ($)	Total cost ($)
§ 154.210 ICRs Regarding State Determinations.	0938–New ..	35	649	.33	214	200	42,800	0	42,800
§§ 154.215, and 154.220, ICRs Regarding the Rate Review Preliminary Justification Form.	0938–New ..	417	974	11	10,714	200	2,142,800	0	2,142,800
§ 154.230, ICRs Regarding the Final Justification.	0938–New ..	417	974	.5	487	200	97,400	0	97,400
§ 154.230, ICRs Regarding the Final Notification.	0938–New ..	417	974	.5	487	200	97,400	0	97,400
Total	.....	452	3,571	.....	11,902	.....	2,380,400	.....	2,380,400

We initiated an information collection request under a separate notice and comment period from that associated with the proposed rule that was published on December 23, 2010 (75 FR 81004). Specifically, the 60-day **Federal Register** notice soliciting public comment on the aforementioned information collection requirements was published on March 1, 2011 (76 FR 11248) and the comment period closed on May 2, 2011. We plan to publish the requisite 30-day **Federal Register** notice to announce the formal submission of the information collection request to OMB and to announce another opportunity for the public to submit comments in the near future.

V. Response to Comments

Because of the large number of public comments we receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. A discussion of the comments we received is included in the preamble of this document.

VI. Regulatory Impact Analysis

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

A. Summary

As stated earlier in the preamble, this final rule implements section 2794 of the PHS Act (as added by Section 1003 of the Affordable Care Act), which requires the Secretary, in conjunction with the States, to establish a process for the annual review of unreasonable increases in health insurance premiums (referred to in the rule as "rates"). This final rule outlines the methodology by which CMS would review proposed rate increases. This regulation implements statutory provisions designed to help make private health insurance more affordable, and to increase the transparency of the process by which health insurance issuers calculate premiums. CMS has quantified costs where possible and provided a qualitative discussion of the benefits and of the transfers and costs that may stem from this regulation.

In the preamble to this regulation, we solicit comments on whether we should amend the final rule to include individual and small employer coverage sold through associations in the rate review process. This final regulation does not specifically include such coverage in the rate review process unless the State reviews it as either individual coverage or small employer coverage. Many States currently consider coverage sold through associations as large group coverage, in which case it would not be subject to the rate review process of this regulation. Since we did not specifically require in this regulation that coverage sold through associations be included in the rate review process, we did not include in this RIA an estimate of the additional burden of including association coverage in the rate review process. We do, however, include below a separate estimate of the burden associated with including association coverage in the rate review process for the purpose of soliciting comments on the burden estimate.

In the proposed rule we requested comments on the burden and cost estimates in the RIA but did not receive any such comments.

B. Executive Order 13563 and 12866

Executive Orders 13563 and 12866 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 a "significant regulatory action" although not economically significant, under section 3(f) of Executive Order 12866.

Accordingly, the rule has been reviewed by the Office of Management and Budget.

A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any one year); and a "significant" regulatory action is subject to review by the Office of Management and Budget (OMB). As discussed below, CMS has concluded that this final rule would likely not have economic impacts of $100 million or more in any one year, nor would it adversely or materially affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities. This assessment is based primarily on the administrative costs to issuers of completing the Preliminary Justification form they are required to submit when proposing rate increases of 10 percent or greater, and on the costs to States and the Federal government of reviewing these justifications. As discussed below, CMS is not able to quantify the effect of this final rule on rates charged by issuers, and it is possible that the effect on rates will be large enough to cause the final rule to be considered a major rule. CMS solicited comments on this issue in the proposed rule but did not receive any response.

Nevertheless, CMS opted to provide an assessment of the potential costs, benefits, and transfers associated with this final rule.

1. Need for Regulatory Action

Consistent with the provisions in section 2794 of the PHS Act, this final rule requires health insurance issuers offering non-grandfathered coverage in the individual and small group markets to report information concerning rate increases to CMS and the applicable State if the proposed increase is 10 percent or higher. Section 2794(a) of the PHS Act requires the Secretary to "establish a process for the annual review of unreasonable increases in premiums for health insurance coverage." The section further provides that issuers "submit to the Secretary and the relevant State a justification for an unreasonable premium increase prior to the implementation of the increase."

Many States currently review rate filings in all or some portion of the insurance market, therefore, the burden of implementing this final rule on States will be small. In the States that do not currently conduct effective rate review, CMS will initially review those rate filings that meet or exceed the 10 percent threshold. CMS anticipates that those States will use the rate review grants described in the preamble to enhance their capacity for review. Moreover, CMS anticipates gradually transitioning rate review responsibilities to these States as they build their capacity and as a result, reducing Federal costs over time.

In addition, this final rule requires issuers proposing rate increases 10 percent and above to provide a Preliminary Justification for the proposed increase. That Preliminary Justification will use data typically assembled by the issuers in computing their rate request. Because the Preliminary Justification requires the restating of existing data rather than the generation of new information, CMS expects the burden on issuers in filing the justification will be relatively small.

2. Summary of Impacts

In accordance with OMB Circular A–4, Table 1 below depicts an accounting statement summarizing CMS' assessment of the benefits, costs, and transfers associated with this regulatory action. CMS limited the period covered by the regulatory impact analysis (RIA) to 2011 through 2013. Estimates are not provided for subsequent years because there will be significant changes in the marketplace in 2014 related to the offering of new individual and small group plans through the health insurance Exchanges, and the wide ranging scope of these changes makes it difficult to project results for 2014 and beyond.

As described in this RIA, CMS estimates that this regulatory action will result in better information for consumers about their health insurance premiums and is likely to lower premiums. The final rule also imposes costs on insurers associated with preparing and filing proposed rate increases, and imposes costs on State and Federal governments associated with reviewing proposed rate increases. In accordance with Executive Order 12866, CMS believes that the benefits of this regulatory action justify the costs.

TABLE 1—ACCOUNTING TABLE

Benefits:						
Qualitative: * Increased transparency in health insurance markets, promoting competition * To the extent that unreasonable rate increases are prevented as a result of this rule, reduction in the deadweight loss to the economy from the exercise of monopolistic power by issuers						
Costs:	Low estimate	Mid-range estimate	High estimate	Year dollar	Discount rate percent	Period covered
Annualized Monetized ($millions/year)	11	15	20	2010	.....	2011–2013
	10	14	19	2010	.....	2011–2013
One-time costs to create systems to report data, and annual costs related to reporting data to the Secretary, providing rate increase justifications, and costs to the States and Federal government of reviewing the justifications						
Transfers:						
Qualitative:						
* To the extent that rate increases are reduced as a result of this rule, money will be transferred from issuers/shareholders to consumers.						

3. Qualitative Discussion of Anticipated Benefits, Costs and Transfers

a. Benefits

Reliable information on prices is a prerequisite for well-functioning competitive markets. Consumers in the individual and small-group health insurance markets, which are highly concentrated, may have difficulty knowing whether an increase in their premium is actuarially justifiable—for example, because it is due to a change in the scope of covered services—or whether it is the result of insurers exercising market power to set rates above the level that is actuarially justifiable.

The final rule subjects proposed rate increases of 10 percent or more to additional scrutiny in order to safeguard against this exercise of market power by insurers. The final rule's reporting requirements should result in better information for consumers about prices, promoting competition and potentially increasing the volume of trade, thereby yielding a net benefit to society.

b. Costs

CMS has identified the primary sources of costs that will be associated with this final rule as the costs to issuers associated with reporting, recordkeeping, notifications, and the costs to State and Federal governments of conducting reviews of the justifications filed by issuers.

CMS estimates that issuers will incur approximately $10 million to $15 million in one-time administrative costs, and $0.6 million to $5.5 million in annual ongoing administrative costs related to complying with the requirements of this final rule from 2011 through 2013. In addition, States will incur very small additional costs for reporting the results of their reviews to the Federal government, and the Federal government will incur approximately $0.7 million to $5.9 million in annual costs to conduct reviews of justifications filed by issuers in States that do not perform effective reviews. Additional details relating to these costs are discussed later in this regulatory impact analysis.

C. Estimated Number of Affected Entities and Number of Rate Filings Meeting or Exceeding the Threshold and Subject to Review

Section 2794 of the PHS Act specifies that the rate review provisions apply to health insurance issuers offering individual or group health insurance coverage, not including grandfathered health plans. As discussed earlier in the preamble, in this context, the term "issuer" has the same meaning provided in 45 CFR 144.103, which states that an issuer is "an insurance company, insurance service, or insurance organization (including an HMO) that is required to be licensed to engage in the business of insurance in a State and that is subject to State law that regulates insurance (within the meaning of section 514(b)(2) of ERISA)." As discussed in the preamble, the rate review provisions in this final rule apply to issuers that offer individual and small group coverage, and these issuers will be required to submit a Preliminary Justification for rate increases meeting or exceeding the rate review threshold of 10 percent, to file with the Secretary and the applicable State a Final Justification for those rate increases found unreasonable, and disclose information about the proposed increase, if implemented, on their Web sites. The following sections summarize CMS' estimates of the number of entities and rate filings that would be affected by the requirements being implemented in this final rule.

D. Estimated Number of Affected Entities

The rate review provisions will apply to all health insurance issuers offering coverage in the individual and small group markets except for grandfathered plans. The number of issuers is 311 in the individual market and 342 in the small group market, for a total of 417 (unduplicated) issuers, as determined for the interim final rule for implementing the medical loss ratio requirements under the Affordable Care Act (**Federal Register**, December 1, 2010).

Table 2 shows the estimated distribution of the 417 issuers offering coverage in the individual and small group markets for the analytic sample used in this RIA.[1] Approximately 75 percent (311) of these issuers offer coverage in the individual market and 82 percent (342) offer coverage in the small group market. Additionally, CMS estimates that there are 34.8 million enrollees in coverage that will be subject to the requirements being proposed in this final rule, including approximately 10.6 million enrollees in individual market coverage and 24.2 million enrollees in small group coverage (estimated based on "life years" for 2009 NAIC Health and Life Blank filers, which excludes data for companies that are not required to file annual statements with NAIC).[2]

TABLE 2—ESTIMATED NUMBER OF ISSUERS SUBJECT TO THE RATE REVIEW REQUIREMENTS BY MARKET

Description	Issuers (companies) offering coverage [1 3]	% of total	Enrollees [2]	% of total
	Number		Number (in thousands)	
Total (Unduplicated)	417	100.0	34,792	100.0
Number Offering Coverage In:				
Individual Market	311	74.6	10,603	30.5
Small Group Market [4]	342	82.0	24,189	69.5

[1] Issuers represents companies (for example, NAIC company codes).
[2] Enrollment represents "life years" (total member months divided by 12).
[3] Total issuers represents 2009 NAIC Health and Life Blank filers with valid data, which excludes approximately 8 percent of comprehensive major medical premium among NAIC filers. Also excludes data for companies that are regulated by the California Department of Managed Health Care.
[4] Small group is defined based on the current definition (for example, 2 to 50 employees).

[1] The analytic sample excludes companies that are regulated by the Department of Managed Health Care in California, as well as small, single-State insurers that are not required by State regulators to submit NAIC annual financial statements. The excluded companies are estimated to account for approximately 9 percent of the comprehensive major medical fully insured market. In addition, among the 579 companies that filed with the NAIC, 137 were excluded because of data anomalies. These 137 excluded companies are estimated to account for approximately 5 percent of the individual market and less than one percent of the group market.

[2] As noted above, issuers that are regulated by the Department of Managed Health Care in California are not required to file annual statements with the NAIC, and are not included in the estimates provided here.

E. Estimated Number of Rate Filings

This section of the regulatory impact assessment provides estimates of the number of filings that would be subject to review under this final rule.

1. Estimation Methods and Sources of Uncertainty

In the proposed rule, CMS estimated the total number of rate filings using data on the number of filings in 2010 made through the NAIC System for Electronic Rate and Form Filing ("SERFF"). However, not all issuers are required to file through SERFF, and CMS is required to make assumptions about the total number of filings in 2010, as well as the expected change in the number of filings between 2010 and 2011.

For the proposed rule, CMS conducted research to compile information regarding the regulatory structure in place by State and market. CMS analyzed information provided by States in their applications for rate review grants, analyzed State Department of Insurance Web sites, and surveyed State Insurance Department staff via telephone to obtain information regarding the number of licensed issuers and filings in the individual and small group markets. In its original estimate for the number of filings, CMS used ten representative States with relatively complete data to estimate the average number of filings that could be expected per State and by market. Those average values were used for all States to estimate the total number of filings in the individual and small group markets.

CMS also gathered information from State Insurance Departments to obtain data for 2008 through 2010 on the estimated number of filings processed, by market, and approval/rejection rate, stratified by the magnitude of the increase. Separately CMS received from the NAIC an extract showing the final disposition for all comprehensive major medical filings in SERFF for the first three quarters of calendar year 2010, by market type. This information was used to estimate the total number of filings in 2010 received and processed by the 49 States and the District of Columbia which use SERFF.

Another SERFF extract provided the number of comprehensive major medical filings filed for 2009 by 31 States. All 19 States that did not use the field "market type" were excluded from the extract. Using the data pertaining to the 31 States included in the 2009 data, CMS estimated the proportion of filings submitted by quarter, and used that distribution, along with the 2010 data, to project the number of filings for all States using SERFF for the 4th quarter of 2010. The increase in the number of number of filings from 2009 to 2010, by State and market, was added to the 2010 estimates to trend the number of filings forward to 2011. CMS has determined that there is insufficient data to estimate the number of rate filings beyond 2011.

For this final rule, in addition to reviewing the 2010 SERFF data, CMS reviewed data on the number of rate filings included in the grant reports submitted by the States to CMS for the 4th quarter of 2010. Since this is data directly reported by the States to CMS, we believe that this is more reliable than what is reported in SERFF, which contains data from the health insurance issuers. There were 26 States for which both SERFF and the grant reports contained the number of rate filings for the fourth quarter of 2010. In comparing the numbers, the numbers of rate filings in the grant reports were higher than the SERFF numbers by 26 percent. Although we did not have the numbers for all the States, the data for the 26 States is a sufficient representative sample because it is statistically significant and it reflects a representative cross-section of the set of different types of State filing authority. Accordingly, based on the grant reports data, we increased the rate filing estimates of the proposed rule by 26 percent for this final rule.

Although there is some uncertainty concerning the number of filings in 2011, a much larger source of uncertainty is uncertainty about the number of filings that will have proposed rate increases greater than or equal to 10 percent. Data on rate requests made by issuers are available from a handful of States, and CMS has used these data to estimate the proportion of rate filings with requested rate increases of 10 percent or greater. However, given the small number of States for which data is available, there is substantial uncertainty about the number of filings in 2010 with proposed rate increases that are greater than or equal to 10 percent. Further, even if CMS had precise data on the distribution of rate increase requests in 2010, it is unclear to what extent that distribution might change in 2011 as a result of this final rule. Given the combination of data imperfections and limitations and behavioral uncertainties, CMS has chosen to provide a range of estimates, based on a range of assumptions.

2. Estimated Number of Rate Filings Meeting or Exceeding the Threshold and Subject to Review

Twenty-five States require issuers to use the NAIC System for Electronic Rate and Form Filing (SERFF) and many issuers also use SERFF for filings in States that have no SERFF requirement. Based on the number of SERFF filings from 31 States for the first three quarters of 2010 and the 2010 4th quarter number of rate filings in both SERFF and the grant reports, CMS estimates a range of rate filings from 4,580 to 5,059 in the individual and small group markets for all States for all of 2010.

The total number of filings in 2011 is expected to be larger than the number of filings in 2010 in part due to an increased number of issuers required to file and additional filings to meet the justification requirements.[3] Based on actuarial estimates using data from 2009 and 2010, CMS estimates that the number of 2011 rate filings will be in the range of 6,121 to 7,343 (see Table 3).

Issuers are not required to submit Preliminary Justifications for their grandfathered enrollees. The percentage of individuals covered under policies that will lose grandfathered status in the individual market is estimated to be 40 to 67 percent, according to Grandfathered Health Plan Regulation (**Federal Register**, June 17, 2010). The percentage of small group plans relinquishing their grandfathered status in the small group market is estimated to be 20 to 42 percent in 2011. CMS uses 40 percent, 54 percent, and 67 percent for the low, mid, and high estimates of the percentage of non-grandfathered rate filings in the individual market and 20 percent, 30 percent and 42 percent in the small group market.

An issuer will be required to submit a Preliminary Justification report to the Secretary and the applicable State if the rate increase is 10 percent or higher. The estimates in this regulatory impact analysis are based on this provision of the final rule.

Data from a small group of States for their individual market show the percentage of rate requests at or above 10 percent ranged from 50 percent to 72 percent during the time period 2008 to

[3] According to the Kaiser Family Foundation, a number of States have already enhanced their rate review and filing process under their current authority and several other States will seek additional authority to review rates from their legislature. See *Rate Review: Spotlight on State Efforts to Make Health Insurance More Affordable,* Kaiser Family Foundation, December 2010.

2010.[4] The fraction of enrollees in plans requesting an increase of 10 percent or greater ranged from 34 percent to 77 percent. CMS uses 50 percent, 60 percent, and 70 percent as the low, mid, and high estimates for the percentage of rate requests at or above the rate review threshold of 10 percent in the individual market, and 35 percent, 50 percent, and 75 percent for the percentage of enrollees affected.

Data on rate requests in the small group market are available from three States (Colorado and Oregon, data for 2009 and 2010, and Minnesota, 2007 through 2010).[5] On average, approximately 35 percent of rate requests were for 10 percent or greater, and with one exception, in each State and year combination, between 20 percent and 40 percent of rate requests were above that threshold. CMS uses 20 percent, 30 percent, and 40 percent for the low, medium, and high-range estimates of the percentage of rate requests at or above the rate review threshold of 10 percent in the small group market. For the percentage of enrollees affected in the small group market, CMS estimates 15 percent, 30 percent, and 50 percent.[6]

The following table (Table 3) shows the low, mid and high range estimates (468, 974, and 1,723) of the number of filings that will be subject to review and require the submission of a justification report because the proposed rate increase is 10 percent or greater.

TABLE 3—ESTIMATED NUMBER OF FILINGS SUBJECT TO REVIEW

	Individual	Small group	Total
Estimated number of filings for 2011:			
Low Range	1,395	4,726	6,121
Mid Range	1,571	5,162	6,733
High Range	1,746	5,597	7,343
Percent of filings subject to review (non-grandfathered):			
Low Range	40%	20%	.....
Mid Range	54%	30%	.....
High Range	67%	42%	.....
Number of filings subject to review:			
Low Range	558	945	1,503
Mid Range	848	1,549	2,397
High Range	1,170	2,351	3,521
Estimated percentage of filings meeting or exceeding threshold:			
Low Range	50%	20%	.....
Mid Range	60%	30%	.....
High Range	70%	40%	.....
Estimated number of filings meeting or exceeding threshold:			
Low Range	279	189	468
Mid Range	509	465	974
High Range	819	940	1,759

3. Estimated Number of Additional Filings Subject to Review if Coverage Sold Through Associations Are Subject to the Rate Review Process

In this preamble, we discuss a proposal to amend the definitions of individual and small group markets in order for individual and small group coverage sold through associations to be subject to the rate review process. While we did not make this change in the final rule, we solicit comments in the preamble on this issue and indicate that we may amend the final rule after the comment period to include individual and small group coverage sold through associations in the rate review process. Although we did not estimate the burden of including coverage sold through associations for the PRA package or for this RIA, an estimate is provided below for purposes of soliciting comments on the potential burden of including individual and small group coverage sold through associations in the rate review process.

In reviewing data submitted by health insurance issuers to the NAIC, it is estimated that there would be 986 filings annually that would have to be submitted for individual or small group coverage sold through associations.[7] In applying the factors for non-grandfathered coverage (.42) and filings above the 10% threshold (.45), both of which are discussed above, this results in a total of 186 additional filings that would be subject to rate review. We further estimate that 34 percent of these filings would occur in States that require prior approval before a rate increase can be implemented, in which case the rate filings are already subject to review by a State. Accordingly, 123 additional filings above the 10% threshold would occur if coverage sold through associations were subject to the rate review process, all of which would be reviewed by CMS.

[4] The sources for the rate increases in the individual market are: Iowa list of proposed rate increases as of October 25, 2010, *http://www.iid.state.ia.us/docs/0_Multi-year%20A&H%20Rate%20Increase_PPACA%20Types.pdf;* Illinois list of proposed rate increases as of September 2010, *http://www.insurance.illinois.gov/Reports/special_reports/IMMHPRFR.pdf*; North Carolina rate filings, *http://infoportal.ncdoi.net/filelookup.jsp?divtype=3;* Oregon list of proposed rate increases as of November 30, 2010, *http://www.oregoninsurance.org/insurer/rates_forms/health_rate_filings/health-rate-filing-search.html;* Pennsylvania announcement of each proposed rate increases, *http://www.pabulletin.com/secure/search.html;* and Washington list of proposed rate increases from the State.

[5] The sources for the rate increases in the small group market are: Colorado list of rate increases, *http://www.dora.state.co.us/pls/real/Ins_RAF_Report.main;* Minnesota list of final rate increases from the State; and Oregon list of proposed rate increases, *http://www.oregoninsurance.org/insurer/rates_forms/health_rate_filings/health-rate-filing-search.html.*

[6] Rate filings in which each of the products covered in the filing are grandfathered plans will not be subject to the provisions of this final rule. However, in the small group market, CMS believes that most filings are made for products which are still being actively marketed. To the extent that there are filings in the individual market that include no products which are being actively marketed, the estimates provided here of the number of filings that will be subject to review are overestimates of the true burden that will be imposed by this final rule.

[7] The data on which this estimate is based may exclude some issuers selling association coverage in States that do not require issuers to include data on this coverage in their annual financial reports submitted to the NAIC. In addition, this estimate did not take into account data for companies that are regulated by the California Department of Managed Health Care.

We welcome comments on any aspect of this burden estimate. We also welcome any additional data on the additional number of rate filings that would occur if individual and small group coverage sold through associations is subject to the rate review process.

F. Estimated Administrative Costs Related to Rate Review Provisions

As stated earlier in this preamble, this final rule will implement the reporting requirements of section 2794, describing the type of information that will be included in the Preliminary Justification to the Secretary and the applicable State and the disclosure that will be made available to consumers on the issuer's Web site if the rate increase is found to be unreasonable. CMS has quantified the primary sources of start-up costs that issuers in the individual and small group market will incur to bring themselves into compliance with this final rule, as well as the ongoing annual costs that they will incur related to these requirements. These costs and the methodology used to estimate them are discussed below.

In order to assess the potential administrative effect of the requirements in this final rule, CMS consulted with the NAIC and industry experts to gain insight into the tasks and level of effort required. Based on these discussions, CMS estimates that issuers will incur one-time start-up costs associated with developing teams to review the requirements in this final rule, and developing processes for capturing the necessary data (for example, automating systems). CMS estimates that issuers will also incur ongoing annual costs relating to data collection, completing the justification reports, conducting a final internal review, submitting the reports to the Secretary and applicable State, record retention, and Web site notifications.

1. One-Time Start-Up Costs

Based on discussions with NAIC and industry experts, start-up costs are estimated at $25,000 to $35,000 per issuer, calculated from assumptions of 125 to 175 hours at $200 per hour (senior actuary fee) to review the requirements for this final rule and developing processes for data collection.

2. Ongoing Costs Related to Rate Review Reporting

For each rate review reporting year, issuers offering coverage in the individual and small group markets will be required to submit a Preliminary Justification to the Secretary and applicable State prior to the implementation of a rate increase for each proposed rate increase of 10 percent or greater.

Ongoing annual costs are estimated at 6 to 16 hours per justification report at $200 per hour or $1,200 to $3,200 per report. Most of the hours are for populating the justification reports with an additional hour for record retention and Web site notification.

CMS estimates that the one-time costs relating to the rate review reporting requirements in this final rule will range from $10 million to $15 million, and that annual costs will be between $0.6 million and $5.5 million per year (Table 4).

TABLE 4—ESTIMATED COSTS FOR REPORTING, RECORD RETENTION, AND WEBSITE NOTIFICATION

[Actual dollars]

Description	Total number of issuers	Total number of reports	Estimated total hours (1)	Estimated average cost per hour (2)	Estimated total cost	Estimated average cost per issuer	Estimated average cost per report
LOW RANGE ASSUMPTIONS:							
One-Time Costs	417	468	52,125	$200	$10,425,000	$25,000	$22,276
Ongoing Costs	417	468	2,808	200	561,600	1,347	1,200
Total Year One Costs	417	468	54,933	200	10,986,600	26,347	23,476
MID RANGE ASSUMPTIONS							
One-Time Costs	417	974	62,550	200	12,510,000	30,000	12,844
Ongoing Costs	417	974	10,714	200	2,142,800	5,139	2,200
Total Year One Costs	417	974	73,264	200	14,652,800	35,139	15,044
HIGH RANGE ASSUMPTIONS							
One-Time Costs	417	1,759	72,975	200	14,595,000	35,000	8,471
Ongoing Costs	417	1,759	27,568	200	5,513,600	13,222	3,200
Total Year One Costs	417	1,759	100,543	200	20,108,600	48,222	11,671

Notes: Estimated costs are stated in 2010 dollars.
(1) Estimated number of one-time start up hours and annual ongoing hours.
(2) Actuary salary/fee.

3. Estimated Costs to the States and Federal Government Related to Rate Review Provisions

Section 2794 directs the Secretary, in conjunction with the States, to establish a process for the annual review of unreasonable increases in premiums for health insurance coverage. In doing so, both the Federal Government and States will incur certain administrative costs. However, CMS estimates that the additional costs to the States will be negligible given that the majority already conducts some level of rate review, and the costs to the Federal Government and States will be extremely small.

4. Estimated Costs to the Federal Government

States currently have primary responsibility for the review of rate increases and will continue to under this final rule. If a State does not have an Effective Rate Review Program in place for all or some markets within the State, CMS will review rate increases that meet or exceed the 10 percent threshold and make its own determinations of whether the rate increases were excessive, unjustified, or unfairly discriminatory, or otherwise unreasonable, within those markets. This activity could be conducted with in-house resources and/or with the use of contracted services. Given the fact that, as noted above, some States do not have review authority in either the

small group or individual markets, and assuming filings are evenly distributed across markets, CMS estimates a range between 28 percent and 36 percent of the rate filings requiring review in 2011 will fall under CMS's review responsibility. Based on these filing estimates and the necessary actuarial expertise, this rate review process would range in cost from $0.7 million to $5.9 million.

Table 5 describes the assumptions used in the estimates for the administrative costs to the Federal Government associated with its rate review activities.

TABLE 5—ESTIMATED ACTUARIAL RATES

Estimated actuarial rates	Low	Mid	High
Principal Actuaries	$340.00	$350.00	$360.00
Support Actuaries	200.00	234.00	275.00
Actuarial Analyst	120.00	150.00	180.00
Administrative Support	80.00	100.00	120.00
Estimated time to complete average review	Average time required		
Principal Actuaries	4.25	5.50	6.75
Support Actuaries	8.50	9.50	11.00
Actuarial Analyst	12.00	14.00	15.00
Administrative Support	9.00	9.50	12.00
Actuarial Staff Hours	24.75	29.00	32.75
Total Staff Hours	33.75	38.5	44.75
	Low	Mid	High
Estimated Cost per Review	$5,305	$7,198	$9,595
Number of Rate Reviews	131	321	620
Total Expected Contracting Cost	$695,167	$2,313,581	$5,948,900

In addition to the costs to the Federal government of conducting rate reviews in States that do not conduct effective reviews, there will be a small, largely one-time cost to the Federal government to determine whether States are conducting effective reviews.

5. Estimated Costs to States

CMS recognizes that States have significant experience reviewing rate increases. As discussed earlier in this preamble, most States have existing Effective Rate Review Programs that will meet the requirements of this regulation in substituting for CMS' review of rate filings that meet or exceed the threshold. Rate review grants provided by CMS are expected to increase the effectiveness of State rate review processes, but are not a direct measure of the cost of this regulation.

CMS estimates that the cost burden on States will be small because most States currently conduct rate review. For these States the incremental costs and requirements of this regulation will be minimal. Some States do not already have a rate review process or have a process that applies to only a portion of the individual and small group markets that this regulation addresses. In these States, the implementation costs to develop effective rate review processes at the State level will be offset by the rate review grants provided by CMS. However, from a Federal budget perspective, these Federal costs from grants will be largely balanced by a decrease in the Federal cost of performing reviews directly. For States not currently conducting effective rate review, there are likely a variety of factors affecting the decision to institute an effective rate review process, including the need for resources, as well as potential legislative hurdles. The rate review grants are expected to help States overcome some of these hurdles.

States with Effective Rate Review Programs will be required to report on their rate review activities to the Secretary. CMS believes that this reporting requirement will involve minimal cost. CMS estimates that reporting information from the State to CMS will require approximately 20 minutes per filing. Based on an actuary's fee of $200 per hour, CMS estimates an average cost per filing of $66.60. The estimated cost of reporting the two-thirds of filings meeting or exceeding the 10 percent threshold, which are reviewed by States, is $42,800.

G. Transfers

The final rule will likely result in lower premiums, although the magnitude of this effect is difficult to predict. To the extent that premiums are lower as a result of the final rule, this represents a transfer from insurers/shareholders to consumers. The experience of States that engage in rate review, summarized in Table 6, suggests that the review process may result in premium increases that are lower than they would otherwise be.[8]

[8] Data provided by States on recent rate review actions from informal discussions between CMS and State Department of Insurance actuaries.

TABLE 6—STATE RATE REVIEW ACTIONS

[State filings from 2005 to 2010]

State	Market	Number of filings	Range of rate requests	Range of actual increases	Number of rate reductions
A	Individual	96	7%–40%	0%–21%	15
	Small Group	21	14%–26%	9%–22%	5
B	Individual	31	4%–30%	1%–25%	14
	Small Group	37	1%–17%	1%–17%	5
C	Combined	34	1%–32%	1%–32%	8

It is difficult, however, to draw strong conclusions from this information about the effects of additional rate review on rates because we are uncertain about insurers' behavioral response. Further, a substantial number of States currently operate effective rate review processes, and it is likely that any potential effect in these States will be less than in States that have not previously had a strong rate review process.

Although CMS did not estimate the impact of this proposed regulation on the reduction in premium rate increases, CMS estimates that comprehensive major medical premiums are $28 billion in the individual market and $95 billion in the small group market, for a total of $123 billion in 2011 (Medical Loss Ratio Regulation Technical Appendix, December 1, 2010 and National Health Expenditure projection factors). The percentage of individuals covered under policies that will lose grandfathered status in the individual market is estimated to be 40 to 67 percent (Grandfathered Health Plan Regulation, June 17, 2010). The percentage of small group plans relinquishing their grandfathered status in the small group market is estimated to be 20 to 42 percent in 2011 (Grandfathered Health Plan Regulation, June 17, 2010). Thus, CMS estimates that approximately $30 to $59 billion of premiums will be written by issuers in the individual and small group markets to non-grandfathered subscribers. Given the magnitude of the premiums that may be affected, CMS invited comments in the proposed rule on how to calculate premium savings so as to determine whether the $100 million threshold is met but did not receive any responses.

H. Regulatory Alternatives

Under the Executive Order, CMS is required to consider alternatives to issuing regulations and alternative regulatory approaches. CMS considers a variety of regulatory alternatives described below.

1. Establish a Lower or Higher Threshold for Rate Increase Review

Section 2794(a) requires the Secretary, in conjunction with the States to conduct an annual review of unreasonable increases in premiums. In establishing a threshold for rate increases that would be subject to review, CMS: (1) Examined national trends in rate increases and health care costs; and (2) weighed the administrative burden on issuers and States against the level of protection for consumers.

In the proposed rule, CMS proposed a threshold of 10 percent. Comments received from issuers indicated that this was too low and that a 10 percent threshold would virtually capture all proposed rate increases thereby imposing a large burden on issuers and state regulators. Consumer advocates, on the other hand, felt that the threshold was too high since there would be rate increases below 10 percent that will be unreasonable. Consumer advocates also feared that issuers could game the process by keeping their rate increases at no higher than 9.9 percent.

If CMS established a threshold lower than 10 percent, this would impose a larger burden on issuers, States, and CMS, and CMS judged that it would not yield a substantial benefit for consumers. In addition, CMS has also taken into consideration the fact that many States, as discussed below, conduct a rate review process for all rate increases without regard to the magnitude of the increase, and we expect the number of States conducting the reviews to increase. Therefore, as a practical matter, in a growing number of States, the prospect that an unreasonable increase that is also below the 10 percent threshold would be implemented without review is mitigated by the State review processes.

CMS recognizes that there may be rate increases that fall below the 10 percent threshold that are unjustified. However, given the practice of many States to review all increases, CMS considered the costs and benefits of the additional Federal resources to potentially catch unjustified or unreasonable rates versus fairness to consumers and the additional administrative burden for insurers. CMS decided against spending additional resources to potentially catch only a small number of unreasonable rates below the threshold.

CMS also examined establishing a threshold higher than 10 percent for rate increases that would be subject to review. However, in attempting to strike the balance discussed above, CMS decided on the 10 percentage point threshold. Specifically, with a threshold higher than 10 percent, consumers would face greater exposure to rate increases that were either unjustified or excessive with no assurance that those rates were given a careful review.

2. Establish a Threshold Based on the Market Share of the Insurer

An alternative approach would have established a lower threshold for insurers with larger market share, with the justification that such insurers were more likely to be able to exert market power. However, analysis of data from a limited number of States suggested showed no evidence that larger insurers proposed higher rates of increase. Further, to the extent that market power exists in the individual market because subscribers with health problems are unable to switch to a competing insurer, this power exists equally for small companies as for large ones. As a result, CMS decided to utilize a uniform threshold for all insurers, regardless of their size.

3. Apply Rate Review Standards to the Large Group Market

As discussed in the Preamble, CMS discussed applying this final rule to the large group market as well as the individual and small group markets. Comments were received in response to the proposed rule that supported including the large group market in the rate review process. However, because of the current rate-setting practices of the large group market and States' limited authority over this segment of the market, CMS concluded that this regulation should only apply to the individual and small group markets.

4. Including Individual and Small Group Coverage Sold Through Associations in the Rate Review Process

We generally deferred in the proposed rule to the State definitions of individual and small group markets. In response to the proposed rule, we received comments indicating that, in some States, association coverage is considered to be large group coverage, resulting in individual and small group coverage sold through associations not being subject to the rate review process. We considered amending the definitions of individual market and small group market for the final rule in order to include all individual and small group coverage in the rate review process. However, since including all individual and small group coverage sold through associations in the rate review process could have a large impact on the markets in some States, we are incorporating the proposed definitions of individual market and small group market into the final rule and solicit additional comments on this issue, with the possibility of amending the final rule after receiving comments in order to include coverage sold through associations in the rate review process.

I. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires agencies that issue a regulation to analyze options for regulatory relief of small businesses if a final rule has a significant impact on a substantial number of small entities. The RFA generally defines a "small entity" as: (1) A proprietary firm meeting the size standards of the Small Business Administration (SBA), (2) a nonprofit organization that is not dominant in its field, or (3) a small government jurisdiction with a population of less than 50,000 (States and individuals are not included in the definition of "small entity"). CMS uses as its measure of significant economic impact on a substantial number of small entities a change in revenues of more than 3 to 5 percent.

The RFA requires agencies to analyze options for regulatory relief of small businesses, if a final 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 government jurisdictions. Small businesses are those with sizes below thresholds established by the Small Business Administration (SBA). We examined the health insurance industry in depth in the Regulatory Impact Analysis we prepared for the proposed rule on establishment of the Medicare Advantage program (69 FR 46866, August 3, 2004). In that analysis we determined that there were few if any insurance firms underwriting comprehensive health insurance policies (in contrast, for example, to travel insurance policies or dental discount policies) that fell below the size thresholds for "small" business established by the SBA.

Further, the one-time costs of this final rule are approximately $25,000 per covered entity (regardless of size or non-profit status) and approximately $4,000 annually in ongoing costs. Numbers of this magnitude do not remotely approach the amounts necessary to be considered a "significant economic impact" on firms with revenues of tens of millions of dollars (usually hundreds of millions or billions of dollars annually). Accordingly, we have determined, and certify, that this final rule will not have a significant economic impact on a substantial number of small entities and that a regulatory flexibility analysis is not required.

In addition, section 1102(b) of the Social Security Act requires us to prepare a regulatory impact analysis if a final rule may have a significant economic impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. This final rule will not affect small rural hospitals. Therefore, the Secretary has determined that this final rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

J. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits before issuing any final rule that includes a Federal mandate that could result in expenditure in any one year by State, local or tribal governments, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. In 2011, that threshold level is approximately $136 million.

UMRA does not address the total cost of a final rule. Rather, it focuses on certain categories of cost, mainly those "Federal mandate" costs resulting from: (1) Imposing enforceable duties on State, local, or tribal governments, or on the private sector; or (2) increasing the stringency of conditions in, or decreasing the funding of, State, local, or tribal governments under entitlement programs.

This final rule includes no mandates on State, local, or tribal governments. Under the final rule, issuers would be required to submit rate justification reports for rate increases of 10 percent or greater directly to CMS. A State may voluntarily choose to use its existing rate review process, if deemed an Effective Rate Review Program, to make a determination as to whether a rate increase is unreasonable. If a State chooses to review the rate increase, the State would be required to submit to CMS the final determination and an explanation of its analysis. However, if a State chooses not to do so, CMS would review a rate increase subject to review to determine whether it is unreasonable. Thus, the law and this regulation do not impose an unfunded mandate on States. However, consistent with policy embodied in UMRA, this final rule has been designed to be the least burdensome alternative for State, local and tribal governments, and the private sector while achieving the objectives of the Affordable Care Act.

K. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. In CMS' view, while the requirements proposed in this final rule would not impose substantial direct costs on State and local governments, this final rule has federalism implications due to direct effects on the distribution of power and responsibilities among the State and Federal governments relating to determining the reasonableness of rate increases for coverage that State-licensed health insurance issuers offer in the individual and small group markets.

CMS recognizes that there are federalism implications with regard to CMS' evaluation of Effective Rate Review Programs and its subsequent review of rate increases. Under Subpart C of this final rule, CMS outlines those criteria that States would have to meet in order to be deemed to have an Effective Rate Review Program. If CMS determines that a State does not meet those criteria, then CMS would review a rate increase subject to review to determine whether it is unreasonable. If a State does meet the criteria, then CMS would adopt that State's determination of whether a rate increase is unreasonable.

States would continue to apply State law requirements regarding rate and policy filings. State rate review processes that are more stringent than

the Federal requirements likely would be deemed effective and satisfy the requirements under this final rule. Accordingly, States have significant latitude to impose requirements with respect to health insurance issuers that are more restrictive than the Federal law.

In compliance with the requirement of Executive Order 13132 that agencies examine closely any policies that may have federalism implications or limit the policy making discretion of the States, CMS has engaged in efforts to consult with and work cooperatively with affected States, including participating in conference calls with and attending conferences of the National Association of Insurance Commissioners (NAIC), participating in a NAIC workgroup on rate reviews and consulting with State insurance officials on an individual basis.

Throughout the process of developing this final rule, CMS has attempted to balance the States' interests in regulating health insurance issuers, and Congress' intent to provide uniform protections to consumers in every State. By doing so, it is CMS' view that it has complied with the requirements of Executive Order 13132. Under the requirements set forth in section 8(a) of Executive Order 13132, and by the signatures affixed to this regulation, CMS certifies that the Center for Consumer Information and Insurance Oversight has complied with the requirements of Executive Order 13132 for the attached final rule in a meaningful and timely manner.

List of Subjects in 45 CFR Part 154

Administrative practice and procedure, Claims, Health care, Health insurance, Health plans, Penalties, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Department of Health and Human Services amends 45 CFR Subtitle A, Subchapter B, by adding part 154 to read as follows:

PART 154—HEALTH INSURANCE ISSUER RATE INCREASES: DISCLOSURE AND REVIEW REQUIREMENTS

Subpart A—General Provisions

Sec.
154.101 Basis and scope.
154.102 Definitions.
154.103 Applicability.

Subpart B—Disclosure and Review Provisions

154.200 Rate increases subject to review.
154.205 Unreasonable rate increases.
154.210 Review of rate increases subject to review by CMS or by a State.
154.215 Submission of disclosure to CMS for rate increases subject to review.
154.220 Timing of providing the Preliminary Justification.
154.225 Determination by CMS or a State of an unreasonable rate increase.
154.230 Submission and posting of Final Justifications for unreasonable rate increases.

Subpart C—Effective Rate Review Programs

154.301 CMS's determinations of Effective Rate Review Programs.

Authority: Section 2794 of the Public Health Service Act (42 USC 300gg–94).

Subpart A—General Provisions

§ 154.101 Basis and scope.

(a) *Basis.* This part implements section 2794 of the Public Health Service (PHS) Act.

(b) *Scope.* This part establishes the requirements for health insurance issuers offering health insurance coverage in the small group or individual markets to report information concerning unreasonable rate increases to the Centers for Medicare & Medicaid Services (CMS). This part further establishes the process by which it will be determined whether the rate increases are unreasonable rate increases as defined in this part.

§ 154.102 Definitions.

As used in this part:

CMS means the Centers for Medicare & Medicaid Services.

Effective Rate Review Program means a State program that CMS has determined meets the requirements set forth in § 154.301(a) and (b) for the relevant market segment in the State.

Federal medical loss ratio standard means the applicable medical loss ratio standard for the State and market segment involved, determined under subpart B of 45 CFR part 158.

Health insurance coverage has the meaning given the term in section 2791(b)(1) of the PHS Act.

Health insurance issuer has the meaning given the term in section 2791(b)(2) of the PHS Act.

Individual market has the meaning given the term under the applicable State's rate filing laws, except that where State law does not define the term, it has the meaning given in section 2791(e)(1)(A) of the PHS Act.

Product means a package of health insurance coverage benefits with a discrete set of rating and pricing methodologies that a health insurance issuer offers in a State.

Rate increase means any increase of the rates for a specific product offered in the individual or small group market.

Rate increase subject to review means a rate increase that meets the criteria set forth in § 154.200.

Secretary means the Secretary of the Department of Health and Human Services.

Small group market has the meaning given under the applicable State's rate filing laws, except that where State law does not define the term, it has the meaning given in section 2791(e)(5) of the PHS Act; provided, however, that for the purpose of this definition, "50" employees is substituted for "100" employees in the definition of "small employer" under section 2791(e)(4).

State has the meaning given the term in section 2791(d)(14) of the PHS Act.

Unreasonable rate increase means:

(1) When CMS is conducting the review required by this part, a rate increase that CMS determines under § 154.205 is:

(i) An excessive rate increase;

(ii) An unjustified rate increase; or

(iii) An unfairly discriminatory rate increase.

(2) When CMS adopts the determination of a State that has an Effective Rate Review Program, a rate increase that the State determines is excessive, unjustified, unfairly discriminatory, or otherwise unreasonable as provided under applicable State law.

§ 154.103 Applicability.

(a) *In general.* The requirements of this part apply to health insurance issuers offering health insurance coverage in the individual market and small group market.

(b) *Exceptions.* The requirements of this part do not apply to grandfathered health plan coverage as defined in 45 CFR § 147.140, or to excepted benefits as described in section 2791(c) of the PHS Act.

Subpart B—Disclosure and Review Provisions

§ 154.200 Rate increases subject to review.

(a) A rate increase filed in a State on or after September 1, 2011, or effective on or after September 1, 2011, in a State that does not require a rate increase to be filed, is subject to review if:

(1) The rate increase is 10 percent or more, applicable to a 12-month period that begins on September 1, as calculated under paragraph (c) of this section; or

(2) The rate increase meets or exceeds a State-specific threshold applicable to

a 12-month period that begins on September 1, as calculated under paragraph (c) of this section, determined by the Secretary. In establishing a State-specific threshold, the Secretary shall consult with the State and may consider relevant information provided by other interested parties. A State-specific threshold shall be based on factors impacting rate increases in a State to the extent that data relating to such State-specific factors is available.

(b) The Secretary will publish a notice no later than June 1 of each year concerning whether a threshold under paragraph (a)(1) or (2) of this section applies to a State; except that, with respect to the 12-month period that begins on September 1, 2011, the threshold under paragraph (a)(1) of this section applies.

(c) A rate increase meets or exceeds the applicable threshold set forth in paragraph (a) of this section if the average increase for all enrollees weighted by premium volume meets or exceeds the applicable threshold.

(d) If a rate increase that does not otherwise meet or exceed the threshold under paragraph (c) of this section meets or exceeds the threshold when combined with a previous increase or increases during the 12-month period preceding the date on which the rate increase would become effective, then the rate increase must be considered to meet or exceed the threshold and is subject to review under § 154.210, and such review shall include a review of the aggregate rate increases during the applicable 12-month period.

§ 154.205 Unreasonable rate increases.

(a) When CMS reviews a rate increase subject to review under § 154.210(a), CMS will determine that the rate increase is an unreasonable rate increase if the increase is an excessive rate increase, an unjustified rate increase, or an unfairly discriminatory rate increase.

(b) The rate increase is an excessive rate increase if the increase causes the premium charged for the health insurance coverage to be unreasonably high in relation to the benefits provided under the coverage. In determining whether the rate increase causes the premium charged to be unreasonably high in relationship to the benefits provided, CMS will consider:

(1) Whether the rate increase results in a projected medical loss ratio below the Federal medical loss ratio standard in the applicable market to which the rate increase applies, after accounting for any adjustments allowable under Federal law;

(2) Whether one or more of the assumptions on which the rate increase is based is not supported by substantial evidence; and

(3) Whether the choice of assumptions or combination of assumptions on which the rate increase is based is unreasonable.

(c) The rate increase is an unjustified rate increase if the health insurance issuer provides data or documentation to CMS in connection with the increase that is incomplete, inadequate or otherwise does not provide a basis upon which the reasonableness of an increase may be determined.

(d) The rate increase is an unfairly discriminatory rate increase if the increase results in premium differences between insureds within similar risk categories that:

(1) Are not permissible under applicable State law; or

(2) In the absence of an applicable State law, do not reasonably correspond to differences in expected costs.

§ 154.210 Review of rate increases subject to review by CMS or by a State.

(a) Except as provided in paragraph (b) of this section, CMS will review a rate increase subject to review to determine whether it is unreasonable, as required by this part.

(b) CMS will adopt a State's determination of whether a rate increase is an unreasonable rate increase, if the State:

(1) Has an Effective Rate Review Program as described in § 154.301; and

(2) The State provides to CMS, on a form and in a manner prescribed by the Secretary, its final determination of whether a rate increase is unreasonable, which must include a brief explanation of how its analysis of the relevant factors set forth in § 154.301(a)(3) caused it to arrive at that determination, within five business days following the State's final determination.

(c) CMS will post and maintain on its Web site a list of the States with market segments that meet the requirements of paragraph (b) of this section.

§ 154.215 Submission of disclosure to CMS for rate increases subject to review.

(a) For each rate increase subject to review, a health insurance issuer must submit a Preliminary Justification for each product affected by the increase on a form and in the manner prescribed by the Secretary.

(b) The Preliminary Justification must consist of the following Parts:

(1) Rate increase summary (Part I), as described by paragraph (e) of this section;

(2) Written description justifying the rate increase (Part II), as described by paragraph (f) of this section; and

(3) When CMS is reviewing the rate increase under § 154.210(a), rate filing documentation (Part III), as described by paragraph (g) of this section.

(c) A health insurance issuer must complete and submit Parts I and II of the Preliminary Justification described in paragraphs (b)(1) and (2) of this section to CMS and, as long as the applicable State accepts such submissions, to the applicable State for any rate increase subject to review. If a rate increase subject to review is for a product offered in the individual market or small group market and CMS is reviewing the rate increase under § 154.210(a), then the health insurance issuer must also complete and submit Part III of the Preliminary Justification described in paragraph (b)(3) of this section to CMS only.

(d) The health insurance issuer may submit a single, combined Preliminary Justification for rate increases subject to review affecting multiple products, if the claims experience of all products has been aggregated to calculate the rate increases and the rate increases are the same across all products.

(e) Content of rate increase summary (Part I): The rate increase summary must include the following as determined appropriate by the Secretary:

(1) Historical and projected claims experience;

(2) Trend projections related to utilization, and service or unit cost:

(3) Any claims assumptions related to benefit changes;

(4) Allocation of the overall rate increase to claims and non-claims costs;

(5) Per enrollee per month allocation of current and projected premium; and

(6) Three year history of rate increases for the product associated with the rate increase.

(f) Content of written description justifying the rate increase (Part II): The written description of the rate increase must include a simple and brief narrative describing the data and assumptions that were used to develop the rate increase and include the following:

(1) Explanation of the most significant factors causing the rate increase, including a brief description of the relevant claims and non-claims expense increases reported in the rate increase summary; and

(2) Brief description of the overall experience of the policy, including historical and projected expenses, and loss ratios.

(g) Content of rate filing documentation (Part III): (1) The rate filing documentation must be sufficient for CMS to conduct an examination satisfying the requirements of

§ 154.301(a)(3) and (4) and determine whether the rate increase is an unreasonable increase. Instructions concerning the requirements for the rate filing documentation will be provided in guidance issued by CMS.

(2) If the health insurance issuer is also required to submit a rate filing to a State in connection with the rate increase under State law, CMS will accept a copy of the filing provided that the filing includes all of the information described in paragraph (g)(1) of this section.

(h) If the level of detail provided by the issuer for the information under paragraph (g) of this section does not provide sufficient basis for CMS to determine whether the rate increase is an unreasonable rate increase, CMS will request the additional information necessary to make its determination. The health insurance issuer must provide the requested information to CMS within 10 business days following its receipt of the request.

(i) Posting of the disclosure on the CMS Web site: (1) CMS promptly will make available to the public on its Web site the information contained in Parts I and II of each Preliminary Justification.

(2) CMS will make available to the public on its Web site the information contained in Part III of each Preliminary Justification that is not a trade secret or confidential commercial or financial information as defined in CMS's Freedom of Information Act regulations, 45 CFR 5.65.

(3) CMS will include a disclaimer on its Web site with the information made available to the public that explains the purpose and role of the Preliminary Justification.

(j) CMS will include information on its Web site concerning how the public can submit comments on the proposed rate increases that CMS reviews.

§ 154.220 Timing of providing the Preliminary Justification.

A health insurance issuer must submit a Preliminary Justification for all rate increases subject to review that are filed in a State on or after September 1, 2011, or effective on or after September 1, 2011 in a State that does not require the rate increase subject to review to be filed, as follows:

(a) If a State requires that a proposed rate increase be filed with the State prior to the implementation of the rate, the health insurance issuer must submit to CMS and the applicable State the Preliminary Justification on the date on which the health insurance issuer submits the proposed rate increase to the State.

(b) For all other States, the health insurance issuer must submit to CMS and the State the Preliminary Justification prior to the implementation of the rate increase.

§ 154.225 Determination by CMS or a State of an unreasonable rate increase.

(a) When CMS receives a Preliminary Justification for a rate increase subject to review and CMS reviews the rate increase under § 154.210(a), CMS will make a timely determination whether the rate increase is an unreasonable rate increase.

(1) CMS will post on its Web site its final determination and a brief explanation of its analysis, consistent with the form and manner prescribed by the Secretary under § 154.210(b)(2), within five business days following its final determination.

(2) If CMS determines that the rate increase is an unreasonable rate increase, CMS will also provide its final determination and brief explanation to the health insurance issuer within five business days following its final determination.

(b) If a State conducts a review under § 154.210(b), CMS will adopt the State's determination of whether a rate increase is unreasonable and post on the CMS Web site the State's final determination described in § 154.210(b)(2).

(c) If a State determines that the rate increase is an unreasonable rate increase and the health insurance issuer is legally permitted to implement the unreasonable rate increase under applicable State law, CMS will provide the State's final determination and brief explanation to the health insurance issuer within five business days following CMS's receipt thereof.

§ 154.230 Submission and posting of Final Justifications for unreasonable rate increases.

(a) If a health insurance issuer receives from CMS a final determination by CMS or a State that a rate increase is an unreasonable rate increase, and the health insurance issuer declines to implement the rate increase or chooses to implement a lower increase, the health insurance issuer must submit to CMS timely notice that it will not implement the rate increase or that it will implement a lower increase on a form and in the manner prescribed by the Secretary.

(b) If a health insurance issuer implements a lower increase as described in paragraph (a) of this section and the lower increase does not meet or exceed the applicable threshold under § 154.200, such lower increase is not subject to this part. If the lower increase meets or exceeds the applicable threshold, the health insurance issuer must submit a new Preliminary Justification under this part.

(c) If a health insurance issuer implements a rate increase determined by CMS or a State to be unreasonable, within the later of 10 business days after the implementation of such increase or the health insurance issuer's receipt of CMS's final determination that a rate increase is an unreasonable rate increase, the health insurance issuer must:

(1) Submit to CMS a Final Justification in response to CMS's or the State's final determination, as applicable. The information in the Final Justification must be consistent with the information submitted in the Preliminary Justification supporting the rate increase; and

(2) Prominently post on its Web site the following information on a form and in the manner prescribed by the Secretary:

(i) The information made available to the public by CMS and described in § 154.215(i);

(ii) CMS's or the State's final determination and brief explanation described in § 154.225(a) and § 154.210(b)(2), as applicable; and

(iii) The health insurance issuer's Final Justification for implementing an increase that has been determined to be unreasonable by CMS or the State, as applicable.

(3) The health insurance issuer must continue to make this information available to the public on its Web site for at least three years.

(d) CMS will post all Final Justifications on the CMS Web site. This information will remain available to the public on the CMS Web site for three years.

Subpart C—Effective Rate Review Programs

§ 154.301 CMS's determinations of Effective Rate Review Programs.

(a) *Effective Rate Review Program.* In evaluating whether a State has an Effective Rate Review Program, CMS will apply the following criteria for the review of rates for the small group market and the individual market, and also, as applicable depending on State law, the review of rates for different types of products within those markets:

(1) The State receives from issuers data and documentation in connection with rate increases that are sufficient to conduct the examination described in paragraph (a)(3) of this section.

(2) The State conducts an effective and timely review of the data and

documentation submitted by a health insurance issuer in support of a proposed rate increase.

(3) The State's rate review process includes an examination of:

(i) The reasonableness of the assumptions used by the health insurance issuer to develop the proposed rate increase and the validity of the historical data underlying the assumptions; and

(ii) The health insurance issuer's data related to past projections and actual experience.

(4) The examination must take into consideration the following factors to the extent applicable to the filing under review:

(i) The impact of medical trend changes by major service categories;

(ii) The impact of utilization changes by major service categories;

(iii) The impact of cost-sharing changes by major service categories;

(iv) The impact of benefit changes;

(v) The impact of changes in enrollee risk profile;

(vi) The impact of any overestimate or underestimate of medical trend for prior year periods related to the rate increase;

(vii) The impact of changes in reserve needs;

(viii) The impact of changes in administrative costs related to programs that improve health care quality;

(ix) The impact of changes in other administrative costs;

(x) The impact of changes in applicable taxes, licensing or regulatory fees;

(xi) Medical loss ratio; and

(xii) The health insurance issuer's capital and surplus.

(5) The State's determination of whether a rate increase is unreasonable is made under a standard that is set forth in State statute or regulation.

(b) *Public disclosure and input.* In addition to satisfying the provisions in paragraph (a) of this section, a State with an Effective Rate Review Program must provide access from its Web site to the Parts I and II of the Preliminary Justifications of the proposed rate increases that it reviews and have a mechanism for receiving public comments on those proposed rate increases.

(c) CMS will determine whether a State has an Effective Rate Review Program for each market based on information available to CMS that a rate review program meets the criteria described in paragraphs (a) and (b) of this section.

(d) CMS reserves the right to evaluate from time to time whether, and to what extent, a State's circumstances have changed such that it has begun to or has ceased to satisfy the criteria set forth in paragraphs (a) and (b) of this section.

Dated: May 3, 2011.

Donald M. Berwick,

Administrator, Centers for Medicare & Medicaid Services.

Approved: May 18, 2011.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

[FR Doc. 2011–12631 Filed 5–19–11; 11:15 am]

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Federal Register

Vol. 76, No. 99

Monday, May 23, 2011

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The United States Government Manual	**741–6000**
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Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6064**
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FEDERAL REGISTER PAGES AND DATE, MAY

24339–24786 2
24787–25210 3
25211–25514 4
25515–26176 5
26177–26578 6
26579–26926 9
26927–27216 10
27217–27602 11
27603–27842 12
27843–28164 13
28165–28302 16
28303–28622 17
28623–28884 18
28885–29142 19
29143–29632 20
29633–29988 23

CFR PARTS AFFECTED DURING MAY

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

2 CFR

Proposed Rules:
Ch. VI 26651

3 CFR

Proclamations:
8658 24785
8659 25515
8660 25517
8661 25519
8662 25521
8663 25523
8664 25525
8665 25527
8666 25529
8667 25531
8668 26925
8669 27217
8670 27599
8671 27601
8672 27843
8673 28623
8674 29133
8675 29135
8676 29137
8677 29139

Executive Orders:
13571 24339
13572 24787
13573 29143

Administrative Orders:
Notices:
Notice of April 29, 2011 24791
Notice of May 16, 2011 28883
Notice of May 17, 2011 29141
Presidential Determinations:
No. 2011-9 of April 26, 2011 27845

5 CFR

Proposed Rules:
550 24406
2640 24816

6 CFR

5 27847

7 CFR

28 25533
205 ..... 26177, 26927
271 27603
272 ..... 27603, 28165
301 27219
927 27848
946 27850
985 27852
1150 26930
1221 28625
4288 24343

Proposed Rules:
54 26222
62 26222
205 25612
271 ..... 24820, 25414
272 ..... 24820, 25414
273 25414
275 24820
301 26654
319 26654
789 29084
955 27919
989 27921
1206 26946
1208 25618
1210 25619
1724 28333
1726 28333
3201 28188

8 CFR

204 28303

9 CFR

78 28885
93 24793
94 24793
95 ..... 24793, 28886
321 24714
332 24714
381 24714

Proposed Rules:
71 28910
77 28910
78 28910
90 28910
93 28910
94 28910
98 28910
300 26655
441 26655
530 26655
531 26655
532 26655
533 26655
534 26655
537 26655
539 26655
540 26655
541 26655
544 26655
548 26655
550 26655
552 26655
555 26655
557 26655
559 26655
560 26655
561 26655

10 CFR

429 24762

430 ..... 24762, 25211
600 26579
603 26579
609 26579
611 26579
Proposed Rules:
2 ..... 27924, 27925
26 ..... 24831, 28191, 28192
35 29171
40 28336
50 26223
52 ..... 27924, 27925
61 24831
72 28193
74 28193
150 ..... 28193, 28336
430 26656
431 25622
1703 28194

12 CFR

335 28168
956 29147
1202 29633
1267 29147
Proposed Rules:
45 27564
205 29902
226 27390
237 27564
324 27564
349 28358
624 27564
1221 27564

13 CFR

124 27859
Proposed Rules:
121 ..... 26948, 27935, 27952
124 26948
125 26948
126 26948
127 26948

14 CFR

25 25229
39 ..... 24343, 24345, 24349, 24351, 24354, 24356, 24358, 24360, 24793, 24796, 24798, 25534, 25535, 27220, 27227, 27232, 27237, 27239, 27240, 27242, 27244, 27246, 27861, 27863, 27865, 27872, 27875, 27880, 28169, 28626, 28632, 28635, 28637, 28639
71 ..... 25537, 28305, 28306, 28308, 28641, 28887, 28888
97 ..... 25231, 25232, 28171, 28173
Proposed Rules:
25 ..... 25648, 26949, 26957
39 ..... 24407, 24832, 25259, 25264, 26959, 26962, 27281, 27282, 27615, 27617, 27952, 27954, 27956, 27958, 28373, 28376, 28683, 28914, 29176, 29673
65 29336
71 ..... 24409, 26658, 27619, 28379, 28382, 28684, 28685, 28686, 28687, 28915, 29176
119 29336
121 29336
135 29336
142 29336
460 24836

15 CFR

714 26583
734 29610
740 29610
742 29610
743 29610
772 29610
774 29610

16 CFR

1217 27882
1512 27882

17 CFR

4 28641
202 28888
Proposed Rules:
Ch. I 25274
1 ..... 27802, 29818
23 ..... 27621, 27802
140 27802
229 25273
240 ..... 25273, 26550, 29818
242 26550
249 26550
275 27959

19 CFR

4 27606
210 24363

20 CFR

404 24802
405 24802
416 24802
422 24802

21 CFR

1 ..... 25531, 25542
73 25234
522 27888
800 28308
878 29153
Proposed Rules:
866 ..... 28688, 28689
1316 26660

22 CFR

120 28174
124 28174
126 28174
Proposed Rules:
Ch. I 26651

24 CFR

200 24363
207 24363

25 CFR

Proposed Rules:
Ch. III 26967

26 CFR

1 ..... 26178, 27609, 28890
31 26583
301 24813
Proposed Rules:
31 26678

28 CFR

Proposed Rules:
8 26660
9 26660
50 29675
Ch. XI 26651

29 CFR

1910 24576
1915 24576
4022 27889
Proposed Rules:
1904 28383

30 CFR

285 28178
Proposed Rules:
70 25277
71 25277
72 25277
75 25277
90 25277
104 25277

31 CFR

Proposed Rules:
1069 24410

32 CFR

706 28180

33 CFR

3 26603
100 ..... 26603, 27890, 27892, 29640, 29642
117 ..... 24372, 26181, 26182, 26606, 27250, 28309, 28311, 28645
165 ..... 24813, 25545, 25548, 26183, 26603, 26607, 26931, 27251, 27253, 27895, 27897, 28312, 28315, 28895, 29645, 29647
Proposed Rules:
100 27284
165 ..... 24837, 24840, 24843, 25278, 27967, 27970, 28386
167 ..... 27287, 27288

34 CFR

Proposed Rules:
Ch. VI 25650

36 CFR

Proposed Rules:
7 28388

37 CFR

202 27898
203 27898
211 27898

38 CFR

17 26148
71 26148
Proposed Rules:
17 28917
39 28925

39 CFR

Proposed Rules:
3050 28696

40 CFR

9 26186
52 ..... 24372, 25178, 26192, 26609, 26615, 26933, 27610, 27613, 27898, 27904, 27908, 28181, 28646, 28661, 29153, 29649, 29652
55 29158
60 ..... 28318, 28662
63 ..... 28318, 28662, 28664
180 ..... 25236, 25240, 26194, 27256, 27261, 27268, 28675
272 26616
710 27271
721 ..... 26186, 27910
1042 ..... 25246, 26620
Proposed Rules:
52 ..... 24421, 24846, 25652, 26224, 26679, 27290, 27622, 27973, 28195, 28393, 28696, 28707, 28934, 28942, 28944, 29180, 29182, 29680, 29686, 29688, 29695
60 24976
63 ..... 24976, 29032, 29528
81 29695
180 25281
272 26681
721 ..... 26225, 27294

42 CFR

412 26432
422 26490
480 26490
482 25550
485 25550
Proposed Rules:
10 29183
Ch. IV 28196
412 25788
413 ..... 25788, 26364
418 ..... 26806, 28195
424 26364
447 26342
455 26364
476 25788
482 25460
485 25460
491 25460
494 25460

44 CFR

64 26938
65 ..... 26941, 26943
67 29656
Proposed Rules:
67 ..... 26968, 26976, 26978, 26980, 26981, 26982

45 CFR

154 29964

47 CFR

0 ..... 24376, 24383, 26199
1 ..... 24376, 24383, 26620, 29158
20 26199
64 ..... 24393, 26641
73 27914
Proposed Rules:
Ch. I 28397
0 24434
1 ..... 24434, 26983
2 26983
22 26983
24 26983
27 26983
64 ..... 24437, 24442
73 ..... 24846, 28946
90 ..... 26983, 27296
95 26983

48 CFR

19 26220

Ch. 2 27274
209 27274
211 25565
215 28856
216 25566
223 25569
225 27274
234 28856
237 25565
242 28856
244 28856
245 28856
252 ....25566, 25569, 28856

Proposed Rules:

4 24443
8 24443
17 24443
37 24443
52 24443
Ch. 6 26651
1511 26232
1552 26235
1809 25656
1812 25657
1828 25657
1852 25657

49 CFR

191 28326
192 28326
193 28326
195 ....25576, 28326
383 26854
384 26854
385 26854
390 29169
395 25588
451 24402
571 28132

Proposed Rules:

172 27300
177 27300
Ch. II 26682
385 ....26681, 28207
386 ....26681, 28207
390 ....26681, 28207, 28403
391 28403
395 ....26681, 28207
531 26996
533 26996
665 28947

50 CFR

17 ....25590, 25593, 29108
21 29665
218 ....25480, 27915
648 ....28328, 29670
660 ....25246, 27508, 28897
679 ....24403, 24404, 29671

Proposed Rules:

17 ....25150, 26086, 27184, 27629, 27756, 28405
223 28715
226 25660
424 28405
600 29707
648 ....24444, 29717
665 29718
679 25295

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws*.

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H.R. 1308/P.L. 112–13
To amend the Ronald Reagan Centennial Commission Act to extend the termination date for the Commission, and for other purposes. (May 12, 2011; 125 Stat. 215)
Last List April 28, 2011

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